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Processo Coletivo no Brasil: Sucesso ou Decepção?

Collective Redress in Brazil: Success or Disappointment?

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Resumo: O texto está dividido em três linhas: apresentar a evolução histórica e consolidação da doutrina e jurisprudência em relação aos processos coletivos; demonstrar, apesar da necessidade do aprofundamento dos dados, a eficiência estratégica quantitativa e qualitativa do processo coletivo na defesa dos direitos coletivos *lato sensu*; informar possíveis tendências de desenvolvimento a partir da inter-relação entre ações coletivas, casos repetitivos e precedentes e o direito processual estruturante, com especial destaque para o direito processual dos desastres. A preocupação principal do texto é traçar um panorama do processo coletivo no Brasil, indicando algumas das tendências de desenvolvimento.

Palavras-chave: Tutela coletiva. Análise empírica. Ações coletivas. Casos repetitivos. Processo estruturante.

Abstract: The text has three major goals: to present the historical evolution and consolidation of the legal writing and jurisprudence in relation to the collective redress in Brazil; to demonstrate, despite the need for better data and further research, the quantitative and qualitative strategic efficiency of the collective judicial redress in the defense of group rights; to inform possible development trends based on the interrelation between class actions, aggregate litigation and precedents, and structural injunctions in procedural law, with special emphasis on the procedural law of disasters. The main concern of the text is to outline the collective process in Brazil by indicating some of the development trends.

Keywords: Collective redress. Empirical analysis. Class actions. Aggregate litigation. Structural injunctions.

1. INTRODUÇÃO

No Brasil corremos o risco de pela porta dos fundos transformar ações individuais em ações coletivas, vinculando todos a uma decisão para a qual não se garantiu o justo processo coletivo.

A única maneira de enfrentarmos seriamente este risco é compreender o processo coletivo como um gênero, composto por diversas técnicas e procedimentos, voltado para as necessidades de tutela das situações jurídicas ativas e passivas coletivas de que são titulares grupos de pessoas.

1.1. Modelos de Processo Coletivo e Tutela Coletiva: Modelo Brasileiro

É errado pensar que apenas as *class actions opt out* servem aos objetivos da tutela coletiva. Não há um só modelo, junto com as soluções judiciais existem também soluções extrajudiciais muito eficazes, mas a melhor solução tem sido aquela que permite a combinação de técnicas *opt out* e *opt in*, litígios agregados

(que por razões que iremos explicar a seguir consideramos espécie de tutela *opt in*) e estímulo à autocomposição, antes e durante o processo judicial[1] e um reforço na tutela administrativa através de agências reguladoras e da função mais ampla de *ombudsman*.

A solução que combina todas as hipóteses de tutela coletiva buscando o *design* mais efetivo é a que melhor atende as exigências da nova ciência econômica, que sugere que é possível um desenho institucional mais inteligente (*market design*) e uma arquitetura das escolhas (*choice architecture*) que nos permita estabelecer uma tutela padrão (default) mais eficiente para cada grupo de casos.[2]

Neste sentido, a doutrina delineou as técnicas mais utilizadas na Europa[3], evidenciando o predomínio do *ombudsman*, das agências reguladoras e da ADR coletiva. A combinação de tais técnicas com o processo coletivo judicial, como veremos, é uma característica da tutela coletiva brasileira, muito embora se possam fazer críticas, é a interrelação do Ministério Público na função de *ombdusman* dos direitos fundamentais, que trabalha para permitir uma maior integração entre estes mecanismos de tutela.

Este texto pretende divulgar como o processo coletivo brasileiro atualmente está configurado, sua história de sucesso quantitativo e qualitativo e o futuro que lhe espera a partir da ampliação do tradicional modelo de ações coletivas pensadas a partir das *class actions* norte-americanas para um modelo combinado em que se agregam as técnicas de processo coletivo *opt in* (litígios agregados, , principalmente, mas também, ações por representação mediante autorização, centralização de processos para

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1. "The bottom line is to connect the different dots. To put it simply, the approach should be 'and …and' and not 'or … or'. It is not choosing between white or brown bread, it is looking at how it is baked. The ultimate goal should be an integrated and holistic framework, or, as was mentioned above, a 'multilayered framework of regulation, lawmaking and law application (…) The focus should be on exploring and optimizing all options for mass harm situations. Even more important, is to connect these options so they can form an integrated (dispute resolution) framework. Only a broad and integrated instrumentarium, as a 'dispute resolution continuum', which can avoid empty enforcement gaps, can tackle mass harm situations effectively and efficiently", VOET, Stefaan. 'Where the wild things are': reflections on state and future of European collective redress. In: KEIRSE, Anne L. M.; LOOS, Marco B. M. (eds.). Waves in contract and liability law in three decades of Ius Commune. Cambridge: Intersentia, 2017, p. 138/139; HODGES, Christopher; VOET, Stefaan. *Delivering Collective Redress. New Technologies.* Oxford: Hart, 2018; HODGES, Christopher. *The reform of class and representative actions in European legal systems.* Oxford: Hart, 2008; DODSON, Scott. An opt-in option for class actions. *Michigan Law Review*, v. 115, n. 2, 2016.
2. ROTH, Alvin. *Who Gets What – And Why. The New Economics of Matchmaking and Market Design*. New York: Mariner Books, 2016; THALER, Richard H.; SUNSTEIN, Cass R. *Nudge*. *Improving Decisions about Health, Walth, and Happiness.* New York: Penguin Books, 2008; ROTH, Alvin. *Who Gets What – And Why. The New Economics of Matchmaking and Market Design*. New York: Mariner Books, 2016.
3. HODGES, Christopher; VOET, Stefaan. *Delivering Collective Redress. New Technologies.* Oxford: Hart, 2018.

produção de provas, entre outras) e uma ampla utilização de negócios processuais e meios autocompositivos controlados pelo juízo.

O Código de Processo Civil de 2015 aplica-se diretamente aos processos coletivos, em especial ao desenhar normas fundamentais e institutos que permitem repensar o desenho institucional da justiça brasileira e sustentar o processo justo coletivo: casos repetitivos, precedentes vinculantes, renovação da oralidade e estímulo à autocomposição.[4]

Ao final, a partir de um recente caso polêmico, o Caso do Rio Doce, o maior desastre ambiental da história da América Latina, iremos abordar a *next generation* da nossa tutela coletiva.

1.2. Nosso passado

O Brasil é devedor da Itália no processo coletivo. Basta olhar para alguns dos textos fundadores da nossa doutrina para perceber a influência da inteligência processual italiana. Foi através dos estudos de Vittorio Denti, Andrea Proto Pisani, Vincenzo Vigoritti, Mauro Cappelletti, Giorgio Costantino, Sergio Chiarloni e Michele Taruffo, ícones da processualística italiana, que importamos o modelo americano das *class actions*, nossa ação coletiva é uma *class action* à italiana.[5]

4. ZANETI JR., Hermes. El Nuevo Código de Proceso Civil brasileño de 2015 y los conflictos jurídicos: el Derecho Procesal como un camino para la paz social. *Revista de Derecho Procesal.* Buenos Aires: Rubinzal-Culzoni, p. 583/614, 2017-2.

5. Isto é verdade para a doutrina desenvolvida na década de 1970 na Itália, que influenciou a doutrina e a legislação brasileira, mas infelizmente não corresponde à atual situação da Itália atualmente. Para a doutrina italiana mais citada no Brasil na fase de formação do nosso processo coletivo: DENTI, Vittorio. Relazione introduttiva. In: Le azione a tutela di interessi collettivi: atti del convegno di studio di Pavia, 11-12 giugno 1974. Padova: Cedam, 1976; PISANI, Andrea Proto. Apuntti preliminari per uno studio sulla tutela giurisdizionale degli interessi colletivi (o piu esattamente: superindividuali) innanzi al giudice civili ordinario. In: Le azione a tutela di interessi collettivi: atti del convegno di studio di Pavia, 11-12 giugno 1974. Padova: Cedam, 1976; VIGORITTI, Vicenzo. Interesse collettivi e processo: la legitimazione ad agire. Milano: Giuffrè, 1979; CAPPELLETTI, Mauro. Appunti sulla tutela giurisdizionale di interessi coletivi o diffusi. In: Le azione a tutela di interessi collettivi: atti del convegno di studio di Pavia, 11-12 giugno 1974. Padova: CEDAM, 1976; CAPPELLETTI, Mauro. Acesso a la justicia – programa de accion reformadora y nuevo método de pensamiento. Trad. Silvia Virgínia Leo Vidaña. Boletin mexicano de derecho comparado: Instituto de Investigaciones Jurídicas. Universidad Nacional Autônoma de México. Nueva Serie, Año XVI, n. 48, 1983. Em português, cf. CAPPELLETTI, Mauro. Formações sociais e interesses coletivos diante da justiça civil. *Revista de Processo*, v. 2, n. 5, São Paulo, jan.-mar./1977, entre outros; COSTANTINO, Giorgio. Brevi note sulla tutela giurisdizionale degli interessi collettivi davanti al giudice civile. Diritto e Giurisprudenza, p. 817, 1974; COSTANTINO, Giorgio. L'azione di classe ai sensi dell'art. 140 bis del codice del consumo. La sentenza di accoglimento. Il giudizio preventivo di ammissibilità. Diritto ed Economia dell'Assicurazione, p. 1130, 2010; CHIARLONI, Sergio. Per la chiarezza di idee in tema di tutele collettive dei consumatori. Riv. Dir. Proc., 2007; CHIARLONI, Sergio. Il nuovo articolo 140 bis del codice del consumo: azione di classe o azione collettiva? In: Analisi Giuridica dell'Economia, vol. 1, 2008. (Class Action (?)); TARUFFO, Michele. Interventi. In.: Le azione a tutela di interessi collettivi: Atti del

O processo coletivo é um exemplo de como o direito processual evoluiu por fases privatistas e publicistas, ligadas à ação, sua autonomia e ao papel da jurisdição na afirmação da vontade concreta da lei, para a centralidade do próprio processo na solução do conflito.

O processo coletivo brasileiro atua exatamente na perspectiva de garantir acesso à justiça e a solução dos conflitos para as situações merecedoras de tutela. Como afirmam a melhor doutrina, inclusive italiana,[6] e as decisões da Corte Europeia de Direitos Humanos (CEDH), é necessário, para a tutela adequada, um modelo combinado de direitos e remédios, um processo que dê acesso às situações merecedoras de tutela: *ubi remedium ibi ius*[7] ou *remedies precede rights.*

Para contar essa história do processo coletivo brasileiro e do nosso novo Código de Processo Civil, iremos iniciar, na primeira parte, com os resultados e o atual estágio das ações coletivas na doutrina e nos precedentes judiciais, descrevendo também como o CPC/2015 aplica-se diretamente ao processo coletivo e o surgimento dos litígios agregados como forma de tutela coletiva combinada com as ações coletivas. Na segunda parte deste texto, com o objetivo de mostrar as revoluções que estão ocorrendo indutivamente, iremos tratar dos processos estruturantes e do grande conflito socioambiental e socioeconômico resultante do Desastre do Rio Doce.

2. HISTÓRIA DE SUCESSO? EFETIVIDADE QUANTITATIVA E QUALITATIVA DAS AÇÕES COLETIVAS NO BRASIL E O NOVO PROCESSO CIVIL (CPC/2015)

O processo coletivo no Brasil tem uma longa história de sucesso. Evidentemente não há somente flores nesta jornada, mas, comparando a outros ordenamentos jurídicos autoproclamados de *civil law* que tentaram implantar o sistema de tutela judicial coletiva, o processo civil brasileiro representa um dos modelos mais avançados,

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convegno di studio di Pavia, 11-12 giugno 1974. Padova: Cedam, 1976; TARUFFO, Michele. Modelli di tutela giurisdizionale degli interessi collettivi. La tutela giurisdizionale degli interessi collettivi e diffusi. Lucio Lanfranchi (org.). Torino: Giappichelli, 2003. Mais recentemente, na doutrina italiana cf. SANTIS, Angelo Danilo de. La tutela giurisdizionale collettiva. Napoli: Jovene, 2013; DONZELLI, Romolo. L'azione di classe a tutela dei consumatori. Napoli: Jovene, 2011; GIUSSANI, Andrea. Azioni collettive risarcitorie nel processo civile. Bologna: Il Mulino, 2008.

6. TARUFFO, Michele. Sui Confini. Scritti Sulla Giustizia Civile. Bologna: Il Mulino, 2002, p. 67/97; TROCKER, Nicolò. *La Formazione del Diritto Processuale Europeo.* Torino: Giappichelli, 2011, p. 302/303; MAZZAMUTTO, Salvatore; PLAIA, Armando. *I Rimedi nel Diritto Privato Europeo.* Torino: Giappichelli, 2012; PINO, Giorgio. Il Diritto All'Identità Personale: Interpretazione Costituzionale e Creatività Giurisprudenziale. Bologna: Il Mulino, 2003; DI MAJO, Adolfo. *La Tutela Civile dei Diritti.* 4ª ed. Milano: Giuffrè, 2003, p. 72; VARRANO, Vincenzo; BARSOTTI, Vittoria. *La Tradizione Giuridica Occidentale.* 4ª ed. Torino: Giappichelli, 2010; ZANETI JR., Hermes. A Legalidade na Era da Proteção das Necessidades de Tutela: Princípio da Constitucionalidade e Legalidade Ampla. In.: DIDIER JR., Fredie; NUNES, Dierle; FREIRE, Alexandre. *Normas Fundamentais.* Salvador: JusPodivm, 2016, p. 175/196 (Coleção Grandes Temas do Novo CPC, vol. 8, Coord. Geral: Fredie Didier Jr.).

7. DI MAJO, Adolfo. *La Tutela Civile dei Diritti.* 4ª ed. Milano: Giuffrè, 2003, p. 72.

talvez aquele que mais produziu ações coletivas e mudanças relevantes na sociedade a partir de litígios coletivos.

Iremos simplificar os dados, na falta de pesquisas empíricas e comparadas mais aprofundadas, a constatação das afirmações acima pode ser realizada a partir de dois critérios muito básicos: o *número de ações ajuizadas* e *admitidas em juízo* e a *efetividade do sistema processual para assegurar os direitos materiais definidos por sentença*, ou seja, as decisões efetivadas, que tiveram a capacidade de alterar a realidade das pessoas - o *Lebenswelt (o mundo da vida)*.

2.1. Número Expressivo de Ações Coletivas Ajuizadas e Admitidas para Julgamento

Temos um número expressivo de ações coletivas ajuizadas sobre as mais diversas matérias. Uma pesquisa em nossos sistemas de acompanhamento de processos judiciais pelos termos ação civil pública, processo coletivo e ação de improbidade administrativa revela números muito elevados. Somente no Superior Tribunal de Justiça, o equivalente a Corte de Cassação Italiana, são 18.881 decisões para o termo "ação civil pública", e são 1.929 decisões para o termo "processo coletivo".[8] Exemplo de que este meio não é somente possível, ou seja, que a regulação normativa está madura para se *admitirem ações coletivas*, mas também que *as ações coletivas são um veículo muito utilizado na prática*. O número de ações admitidas e julgadas nos tribunais superiores é, portanto, um indicador de resultado positivo.

Temos ainda outras pesquisas que apresentam resultados conflitantes, mas que precisam ser mencionadas. A exemplo da comparação que pode ser feita entre o *Relatório Ações Coletivas*, do CNJ (RAC)[9] e o relatório "Ministério Público: Um Retrato",[10] a partir das informações resultantes dos diversos ramos do Ministério Público no ano de 2017.

Ambos necessitam ser lidos criticamente. O RAC pode ser criticado por ser uma pesquisa aleatória realizadas por robôs (*crawlers*) e cruzada com entrevistas à juízes

8. Os dados podem ser imprecisos, uma vez que incluem a presença de expressões utilizadas na pesquisa, podendo registrar mais de uma vez o mesmo processo conforme a existência de mais de um recurso na mesma demanda, todavia é relevante observar que nem todas as ações coletivas terminam com sentença ou mesmo chegam ao Superior Tribunal de Justiça. Portanto, mesmo que impreciso os dados comprovam o volume das ações coletivas no Brasil. Problemas de metodologia semelhantes já foram apontados em outras pesquisas, como MENDES, Conrado Hubner *et all*. *Ações coletivas no Brasil: temas, atores e desafios da tutela coletiva.* Brasília: CNJ, 2018. A pesquisa na União Europeia resultou em números infinitamente menores de ações ajuizadas, HODGES; VOET, *Delivering Collective Redress. New Technologies*, p. 284/285.
9. MENDES, Conrado Hubner *et al*. *Ações coletivas no Brasil: temas, atores e desafios da tutela coletiva.* Brasília: CNJ, 2018.
10. CONSELHO NACIONAL DO MINISTÉRIO PÚBLICO. Ministério Público: um retrato – 2018. Brasília: CNMP, 2018.

(*survey*), como veremos adiante essa metodologia deixou a desejar.[11] O relatório do CNMP pode ser criticado em razão da alimentação dos dados ser realizada pelas diversas promotorias e procuradorias de justiça espalhadas pelo país, sendo uma experiência recente e baseada na taxonomia unificada do CNMP/CNJ, ainda não plenamente conhecida, além da possibilidade de que ocorra uma sobreposição de informações. Visto que alguns procedimentos podem ter sido cadastrados em mais de um assunto.

O Relatório do Conselho Nacional de Justiça foi elaborado por acadêmicos, não especialistas na matéria processual e sem experiência prática. A iniciativa é louvável, vejamos as conclusões alcançadas. Em um breve resumo, as críticas do Relatório Ações Coletivas aos processos coletivos brasileiros apontam uma discrepância no número de ações civis públicas, afirmando que as ações na área de saúde muitas vezes são individuais e não coletivas e que haveria um desvirtuamento dessas ações pelo próprio Ministério Público que ao invés de buscar soluções estruturais com alcance social estaria privilegiando as ações individuais, inclusive pelos juízes pensarem ser essas ações as mais efetivas. A mesma pesquisa afirma, sem comprovar, que algumas ações coletivas seriam mal-sucedidas por dificuldades estruturais, por exemplo, as ações ambientais não teriam resultados positivos por ocorrerem deficiências na produção da prova pericial necessária aos julgamentos, muito custosa e de difícil produção, bem como, nas ações de combate a corrupção, as dificuldades de se provar o dolo nas condutas dos agentes públicos ímprobos.

Os dados podem ser contestados do ponto de vista da metodologia utilizada. Podemos apontar que a pesquisa utilizou robôs ineficientes para as buscas, incapazes de acessar, por exemplo, as diversas e conhecidas decisões em ações coletivas do Superior Tribunal de Justiça em matéria ambiental. O número de decisões do STJ é muito grande, tanto em questões processuais, como em questões de direito material, e várias delas resultaram em decisões *pro ambiente.* Outro aspecto é que a pesquisa também não foi eficiente para coletar o perfil dos magistrados, quer pela redação tendenciosa das perguntas na *survey*, quer pelos problemas de amostra, por exemplo, apenas 1 dos 11 ministros do Supremo Tribunal Federal respondeu ao questionário, o que é insuficiente para afirmar como pensa o Tribunal. Os resultados, justamente em razão destes problemas na coleta de dados, não são concludentes e aparecem claramente enviesados.[12]

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11. Para uma crítica ampla a metodologia utilizada na pesquisa consultar VITORELLI, Edilson; ZANETI JR., Hermes. *O futuro do processo coletivo: considerações sobre o relatório analítico propositivo do Conselho Nacional de Justiça*, no prelo.
12. As pesquisas recentes em psicologia comportamental identificaram uma série de posturas enviesadas como a heurística da disponibilidade (*availability heuristic*), que podem ser aqui implicadas na pesquisa em análise. Tendemos a avaliar com atalhos mentais e prever a frequência de um evento a partir de exemplos que mais facilmente são acessíveis a nossa mente. Essa forma de heurística pode resultar no viés de confirmação (*confirmation bias)* que trata exatamente do fenômeno de validar resultados em conformidade com aquilo que já se pensava desde o início. Assim facilmente superestimamos a probabilidade de um evento e damos peso excessivo a achados em uma pesquisa

Por outro lado, os dados do CNMP no relatório “Ministério Público: Um Retrato”, obtidos a partir das tabelas taxonômicas, informam que somente no ano de 2017 foram ajuizadas 39.496 petições iniciais e firmados 12.627 compromissos de ajustamento de conduta com o Ministério Público. Mais, informam que foram instaurados 256.678 procedimentos preparatórios e inquéritos civis em matérias relativas aos direitos coletivos.

O total de investigações mostra a dimensão da tutela coletiva no Brasil e da atuação do Ministério Público brasileiro na área dos processos coletivos. Matérias como combate a corrupção, meio ambiente, proteção do patrimônio público, infância e juventude, saúde e educação, são prioridades da sociedade e do Ministério Público. Note-se que ao final da investigação ministerial existem três hipóteses: poderá arquivar o procedimento se entender que as questões estão resolvidas ou que não ocorreu lesão, realizar compromisso de ajustamento de conduta para o adimplemento (pelos particulares e pelo Poder Público) das obrigações determinadas em lei ou ajuizar a ação civil pública.

Conforme a tabela abaixo, o Ministério Público Federal e os Ministérios Públicos dos Estados e do Distrito Federal no ano de 2017 atuaram prioritariamente nas seguintes áreas:

Tema	Quantidade de Procedimentos Preparatórios e Inquéritos Civis em 2017
Improbidade Administrativa	31.476 (MPE e MPDFT) e 15.475 (MPF)
Meio Ambiente	27.238 (MPE e MPDFT) e 3.594 (MPF)
Patrimônio Público	19.746 (MPE e MPDFT) e 4.934 (MPF)
Direito da Criança e do Adolescente	18.405 (MPE e MPDFT) e Outros Assuntos (MPF)[13]
Saúde	18.130 (MPE e MPDFT) e 4.448 (MPF)
Direito do Consumidor	9.362 (MPE e MPDFT) e 2.100 (MPF)
Ordem Urbanística	8.139 (MPE e MPDFT) e Outros Assuntos (MPF)
Educação	6.458 (MPE e MPDFT) e 3.670 (MPF)
Pessoa Idosa	5.292 (MPE e MPDFT) e Outros Assuntos (MPF)

em razão da nossa atenção estar concentrada em determinado resultado, esperarmos a confirmação de nossas pré-compreensões ou, simplesmente, por conforto cognitivo. KAHNEMAN, Daniel. *Rápido e devagar, duas formas de pensar.* p. 130/131. Resultado das pesquisas com Amos Tversky, TVERSKY, Amos; KAHNEMAN, Daniel. Availability: a heuristic for judging frequency and probility. *Cognitive Psychology* 5 (1973): 207-32.

13. As tabelas do MPE e MPDFT e do MPF não correspondem em todas as matérias, adota-se como padrão a tabela do MPE e MPDFT por serem mais representativas da quantidade de procedimentos preparatórios e inquéritos civis. Na hipótese de não correspondência anotaremos “*outros assuntos*”, como no caso. Os assuntos e quantidades de procedimentos referentes a domínio público (2.236), servidor público civil (2.207) e responsabilidade civil (1.995), existentes na tabela do MPF, foram somados ao computo geral. Ressalvamos que a própria pesquisa informa a *possibilidade de cadastramento de mais de um assunto por procedimento*.

Civil Procedure Review. v.10, n.2: mai.-ago., 2019.
ISSN 2191-1339 – www.civilprocedurereview.com

Tema	Quantidade de Procedimentos Preparatórios e Inquéritos Civis em 2017
Outros Assuntos	46.989 (MPE e MPDFT) e 24.784 (MPF)
Subtotal MPE e MPDFT	191.235
Subtotal MPF	65.443
Total	256.678

Os dados comprovam que há uma forte atuação dos Ministérios Públicos na tutela coletiva, o que, em um país de dimensões continentais, tem números realmente impressionantes do ponto de vista quantitativo.

2.2. Encerramento de Processos por Autocomposição ou Autocomposição Extrajudicial como um Elemento Decorrente da Existência da Tutela Judicial

Quanto ao aspecto efetividade, há de se acrescentar uma consideração de ordem prática: o Brasil aderiu ao movimento mundial de justiça multiportas, prevendo o CPC o dever de estímulo à autocomposição (art. 3, § 3º, CPC). No processo coletivo, é possível realizar o compromisso de ajustamento de conduta com as exigências legais e muitos dos casos são resolvidos extrajudicialmente.[14]

As ações coletivas no Brasil têm permitido a evolução da autocomposição.

Há nestes casos um reforço da BATNA (*Best Alternative to a Negotiated Agreement*).[15] O Ministério Público e as partes que enfrentam uma negociação em processo coletivo sabem que, se não houver a busca pela identificação de interesses comuns e o atendimento às exigências legais, a questão será encaminhada para o litígio, muitas vezes com obtenção de tutela de urgência.

Qualquer um que tem alguma experiência em litigância civil sabe que só existem acordos e somente se pode falar de autocomposição quando a via judicial representa uma ameaça concreta de decisão contrária aos interesses do réu. A experiência mostra que, quando concedida a tutela provisória em uma ação coletiva, facilita-se muito a

14. O compromisso de ajustamento de conduta pode ser realizado por órgão público e é regulado pelo art. 5º, § 5º, da Lei nº 7.347/1985 (LACP) e, atualmente, pela Resolução CNMP nº 179/2017. A tendência é mundial. SILVESTRI, Elisabetta. Class Actions in Italy. In: HARSÀGI, Viktória; VAN RHEE, C. H. (eds.). *Multi-party redress mechanisms in Europe: Squeaking Mice?*. Cambridge: Intersentia, 2014, p. 200.
15. A judicialização tem sido mencionada como uma alternativa para a inocorrência de acordos em questões complexas. A judicialização, por outro lado, também acarreta uma objetivação do conflito e um delineamento do conflito de maneira mais precisa, com a impossibilidade de alternativa após o ajuizamento da ação de retirada das negociações, ou seja, elimina o BATNA referente à saída da mesa de negociações. Caso não seja possível a negociação, após o ajuizamento da ação, a alternativa passa a ser a decisão adjudicada. PIGMAN, Geoffrey Allen. Judicialization: The Third Transformation. In.: *Trade Diplomacy Trasformed*. London: Palgrave Macmillam, 2016, p. 187/215.

composição. Isso ocorre por estarem presentes elementos não só psicológicos, mas também jurídicos, pois já existe a indicação de que o juízo está propenso a reconhecer o direito de forma definitiva (*fumus boni iuris*).

Assim, a autocomposição tem crescido muito, mesmo os processos judiciais se encerram, muitas vezes, por autocomposição, facilitando a efetividade pela tendencial ausência de impugnações e execuções e reduzindo o prazo de tramitação dos processos cíveis.

É ainda muito maior o número de termos de ajustamento de conduta efetivados mesmo antes do ajuizamento da ação.[16]

2.3. Resultados das Ações Coletivas no Brasil

Os resultados das ações coletivas mencionadas acima são o pagamento de indenizações a consumidores lesados, como devolução de valores pagos a maior, obrigações de fazer e não-fazer ligadas ao meio ambiente, incluindo destruição de propriedades consolidadas, instalação de equipamentos antipoluentes e proibição de instalar determinados empreendimentos, assim como, recuperação da área degradada e políticas públicas para retorno da natureza ao *status quo ante*, determinação de reformas em presídios, hospitais e escolas, fornecimento de leitos hospitalares e vagas para crianças em creches pré-escolares, entre outras milhares de ações que julgadas no mérito asseguraram a tutela efetiva dos direitos e são exemplos que chegaram aos tribunais superiores e foram amplamente divulgados na imprensa nacional e internacional.

É bom registrar que não se tratam de experiências isoladas, membros do Ministério Público podem narrar casos e experiências bem-sucedidas de reformas de presídios, escolas, hospitais, anulação de cláusulas abusivas em contratos do consumidor, mudança de práticas abusivas do mercado que afetam o consumidor, proteção do meio ambiente em casos de poluição com a determinação de instalação de equipamentos, encerramento de atividade poluidora por parte de empresas, proibição de práticas locais de maltrato a animais, regularização fundiária, determinação de obras em loteamentos públicos, assim como o combate aos atos de improbidade administrativa, com a perda de cargo de políticos corruptos, proibição de contratar por parte das empresas envolvidas, devolução de recursos aos cofres públicos etc.

16. Na pesquisa "Ministério Público: Um Retrato", citada acima, foram registrados mais de 12 mil compromissos de ajustamento de conduta firmados antes do ajuizamento da ação no ano de 2017, nas mais diversas materias. O site consumidor vencedor, ligado ao Ministério Público, existente nas diversas unidades da federação e na esfera federal, notícia mais de 4.000 ocorrências de termos de ajustamento de conduta em matéria do consumidor, muitas com alcance nacional. Para as mais de 2.000 decisões e termos de ajustamento de conduta nacionais em benefício dos consumidores brasileiros, cf. http://rj.consumidorvencedor.mp.br/pesquisa-nacional.

Evidentemente também existem experiências negativas. O ajuizamento de ações por membros isolados do Ministério Público contra a política de cotas de acesso à universidade, contrariando a política nacional de inclusão do Ministério Público Federal, e ações que não foram admitidas em juízo, como a ação que buscava impedir a adoção de tomadas elétricas de três pinos, exclusiva do Brasil, infelizmente.

O impacto das ações positivas é também cultural. Apenas para exemplificar com mais um caso recente e mundialmente conhecido. Na área da corrupção, no Brasil, os números da Operação Lava-Jato são impressionantes e falam por si mesmo. Há mais de 14,5 bilhões de reais em pedidos de condenação civil nas ações coletivas ajuizadas.[17] Perceba-se que somente a combinação das tutelas penal e cível permitiu essa amplitude de resultados.

2.4. Não-Taxatividade (*Transubstantive Rights*) e Atipicidade da Ação Coletiva Brasileira (*Atypical Class Action*)

A demonstração desses resultados serve para comprovar uma das questões que defende a doutrina em relação ao processo coletivo brasileiro. O processo coletivo brasileiro é *atípico* (quaisquer espécies de ações) e *não-taxativo* (quaisquer direitos coletivos). Admite, portanto, diversas espécies de ações, como refere o Código de Defesa do Consumidor (art. 83, Lei Federal nº 8.078/1990); e *a tutela de amplas situações jurídicas coletivas*, como se lê na Constituição Federal brasileira, ao afirmar que o Ministério Público promoverá a ação civil pública para a proteção do patrimônio público e social, do meio ambiente e *outros interesses difusos e coletivos* (art. 129, III, CF/1988).[18]

2.5. Legitimação por Substituição Processual do Grupo: Órgãos Públicos e Privados

Por outro lado, essas experiências não se limitam ao Ministério Público. Associações civis, pessoas jurídicas de direito público como União, Estados e Municípios e suas autarquias e fundações, Defensoria Pública e, no caso da ação popular, também o cidadão (Lei nº 4.717/1965), todas eles podem propor ações coletivas. Em todos os casos, o Ministério Público, quando não for autor, será órgão interveniente para a tutela do interesse público (*custos juris*, art. 178, CPC). A não intervenção do Ministério Público irá resultar na anulação do processo nos casos em que ele entenda que haja prejuízo (art. 279, § 1º e § 2º, CPC).

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17. *http://www.mpf.mp.br/para-o-cidadao/caso-lava-jato/atuacao-na-1a-instancia/atuacao-na-1a-instancia/parana/resultado.*
18. DIDIER JR., Fredie; ZANETI JR., Hermes, *Curso de Direito Processual Civil. Processo Coletivo*, p. 86. Na Itália o A.C 791, de julho de 2018, composto por seis artigos, propõem modificações na tutela coletiva através da alteração do Código de Processo Civil, com a ampliação das situações jurídicas tuteladas, modificações na disciplina de adesão à ação de classe, entre outras modificações.

A característica da legitimação coletiva ampla, com um número grande de colegitimados, é, portanto, outra peculiaridade do processo coletivo brasileiro. Esta legitimação é autônoma, exclusiva, concorrente e disjuntiva ou simples e, muito embora alguma divergência conceitual na doutrina, trata-se de espécie de substituição processual na qual o grupo (titular do direito) é substituído pelo legitimado coletivo previsto em lei (*ope legis*) e a sua legitimidade pode ser controlada judicialmente em concreto (*ope judicis*).

A evolução do modelo brasileiro caminha ainda no sentido de reconhecer ações coletivas passivas, nas quais o grupo está no polo passivo.[19]

2.6. Coisa julgada *Secundum Eventum Litis*

Outro elemento característico das ações coletivas brasileiras é a coisa julgada *erga omnes secundum eventum litis*. Mas é preciso compreender bem essa questão, nem sempre muito clara. O que é efetivamente *secundum eventum litis* é a extensão subjetiva da coisa julgada, e não a formação da coisa julga em si. Forma-se a coisa julgada *pro et contra*, não se pode repropor ação coletiva (não importa o nome dado à ação) com a mesma causa de pedir e o mesmo pedido. Porém, a ação coletiva julgada improcedente não prejudica os titulares dos direitos individuais, que poderão ajuizar suas ações ou continuar até o julgamento das ações já ajuizadas (art. 103, CDC). Pelas mesmas razões, afirma-se que não há litispendência entre ação individual e ação coletiva (art. 104, CDC), ou seja, por não haver identidade entre a causa de pedir coletiva e a causa de pedir individual não ocorre litispendência, nem coisa julgada.

Essa formulação original representou sempre um dos aspectos mais críticos na doutrina brasileira e na crítica internacional sobre o nosso processo coletivo.[20] Isto porque a *class action opt out* se caracteriza pelo *binding effect*, pela vinculação *pro et contra* inclusive dos titulares de direitos individuais. Hoje estas críticas perdem um pouco de sua força em razão do fato de algumas *estabilidades* novas no direito brasileiro permitirem que as questões que afetam à tutela coletiva e aos litígios de massa sejam fixadas com "força vinculante" para todos os demais casos tramitando ou ações futuras, como veremos em um tópico adiante.

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19. DIDIER JR., Fredie; ZANETI JR., Hermes. *Curso de Direito Processual Civil. Processo Coletivo.* 12ª ed. Vol. 4. Salvador: JusPodivm, 2018 (Cap. 13. Processo Coletivo Passivo).
20. GIDI, Antonio. *Rumo a um Código de Processo Civil coletivo: A codificação das ações coletivas no Brasil.* Rio de Janeiro: Forense, 2008; GIDI, Antonio. *A class action como instrumento de tutela coletiva dos direitos.* São Paulo: RT, 2007; ARENHART, Sérgio Cruz. *A tutela coletiva de interesses individuais: para além da proteção dos interesses individuais homogêneos*. São Paulo: Revista dos Tribunais, 2013, p. 374-380.

2.7. Interesse Público Primário e Maior Amplitude da Cognição: Microssistema do Processo Coletivo

Além da legitimação, atipicidade e não-taxatividade, extensão subjetiva da coisa julgada *secundum eventum litis*, o processo coletivo brasileiro é caracterizado pela forte presença de interesse público primário e pela maior amplitude da cognição. Estes elementos devem ser compreendidos de maneira combinada.

O interesse público primário é o resultado das preocupações do legislador com a defesa dos interesses de toda a sociedade nos processos coletivos (evidentemente plúrimos e não uniformes em uma democracia de direitos, como a brasileira) e desequilibra a relação processual em benefício da tutela coletiva.[21]

A herança italiana ajuda a compreender um fenômeno normativo do processo coletivo brasileiro, a formação de um microssistema processual coletivo com diversas leis que se interpenetram e subsidiam, aplicando-se reciprocamente, graças à influência da doutrina de Natalino Irti[22] e por força da total ignorância do CPC/1973 em relação ao processo coletivo.

Existem uma série de exemplos da aplicação do microssistema do processo coletivo reconhecidos pela doutrina.

Basta lembrar aqui que: a) a pessoa jurídica ré nas ações coletivas poderá contestar ou optar pelo polo ativo ou não-contestar a ação (despolarização da demanda ou intervenção móvel); b) a execução das sentenças coletivas em relação ao réu que receber do poder público poderá ser mediante desconto em folha (com exclusão da conhecida impenhorabilidade dos salários); a remessa necessária para o tribunal de apelação nas sentenças de improcedência do mérito e nas sentenças de extinção do processo sem resolução do mérito, até mesmo nas ações de improbidade administrativa;[23] d) a competência do local do dano;[24] e) o princípio da primazia do mérito no processo coletivo, que entre outras coisas determina, por exemplo,

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21. O conceito de interesse público primário resulta da influência italiana de ALESSI, Renato. *Sistema istituzionale del diritto amministrativo italiano*. Milano: Giuffrè, 1953, p. 148-155, citado no Brasil por MELLO, Celso Antônio Bandeira de. *Curso de direito administrativo*. 15ª ed. São Paulo: Malheiros, 2003; MAZZILLI, Hugo Nigro. *A defesa dos interesses difusos em juízo*. 15ª ed. São Paulo: Saraiva, 2003; DIDIER JR.; ZANETI JR., *Curso de Direito Processual Civil. Processo Coletivo*, vol. 4, p. 42, e pelos tribunais superiores (STF RE 393175/RS).
22. IRTI, *L'Età della Decodificazione Vent'Anni Dopo*, In.: IRTI, Natalino. L'Età della Decodificazione. 4ª ed. Milano: Giuffrè, 1999.
23. REsp 1447774/SP, Rel. Ministro FRANCISCO FALCÃO, SEGUNDA TURMA, julgado em 21/08/2018, DJe 27/08/2018; REsp 1.108.542/SC, Rel. Ministro Castro Meira, Segunda Turma, DJe 29/5/2009.
24. CC 97.351/SP, Rel. Ministro CASTRO MEIRA, PRIMEIRA SEÇÃO, julgado em 27/05/2009, DJe 10/06/2009.

a sucessão processual, com chamamento de colegitimado ao invés da extinção do processo por ilegitimidade ativa.[25]

Nos processos coletivos também resulta da primazia do julgamento de mérito uma preocupação com o julgamento com esgotamento das questões referentes à prova. Assim, as ações julgadas por insuficiência de provas poderão ser repropostas, desde que apresentada prova nova capaz de, por si só, alterar o resultado do julgamento. Este instituto é chamado de coisa julgada *secundum eventum probationis* para afirmar que não é oponível a exceção de coisa julgada, quando possível a produção de prova que resulte em novo julgamento de mérito.[26]

A maior amplitude da cognição é caraterizada pela existência de transporte *in utilibus*, ou seja, a sentença de procedência coletiva, na tutela de direitos difusos e de direitos coletivos em sentido estrito poderá ser executada pelos titulares de direitos individuais.

O microssistema serviu de escudo a um CPC individualista até 2015, que apenas se aplicava residualmente ao processo coletivo. O CPC/2015 mudou essa relação entre o processo coletivo brasileiro e o processo individual, a relação entre CPC e microssistema *deixou de ser residual e passou a ser direta*, como veremos a seguir.

3. PROCESSO COLETIVO NO BRASIL: DA AÇÃO CIVIL PÚBLICA AOS CASOS REPETITIVOS

O que caracteriza, do ponto de vista dogmático, o sucesso do processo coletivo brasileiro é a flexibilidade e a adaptação.

O novo CPC previu expressamente a existência do processo coletivo, muito embora não tenha trazido um tópico próprio sobre o tema.

Assim, a partir do novo Código, todo o processo brasileiro será iluminado pelas normas fundamentais do processo, previstas já na novíssima Parte Geral do Código de Processo Civil de 2015 (doze primeiros artigos), mas espalhadas igualmente ao longo de todo o texto. Todas as normas fundamentais ali descritas aplicam-se integralmente aos processos coletivos, bem como aplica-se ao processo coletivo uma série de outras normas espalhadas pelo CPC. Como consequência, pode ser dito que, atualmente, o Código de Processo Civil de 2015 incide *diretamente* no microssistema do processo coletivo.

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25. REsp 1177453/RS, Rel. Ministro MAURO CAMPBELL MARQUES, SEGUNDA TURMA, julgado em 24/08/2010, DJe 30/09/2010.

26. É preciso destacar que muito embora a lei seja clara em relação aos direitos difusos e coletivos em sentido estrito, não há a mesma clareza em relação aos direitos individuais homogêneos. Para estes não há previsão expressa de coisa julgada *secundum eventum probationis*. A jurisprudência do STJ é no sentido de que a regra não se aplica nestes casos (REsp 1.302.596-SP, Rel. Min. Paulo de Tarso Sanseverino, Rel. para acórdão Min. Ricardo Villas Bôas Cueva, julgado em 9/12/2015, DJe 1°/2/2016).

Existem vários exemplos dessa aplicação, mas chamam atenção a referência às ações coletivas no art. 139, X, que trata dever de comunicação aos colegitimados da existência de ações individuais com potencial para coletivização, e nos artigos que tratam da suspensão ou sobrestamento ou da aplicação da tese firmada nos casos repetitivos às ações coletivas.

Portanto, o processo coletivo brasileiro atual é gênero de duas espécies, pelo menos: a) as ações coletivas, que descrevemos no tópico anterior, das quais o principal exemplo é a chamada ação civil pública; e, b) os casos repetitivos, de que são exemplos o chamado incidente de resolução de demandas repetitivas e os recursos especial e extraordinário repetitivos.

Estes *casos repetitivos* são uma espécie de agregação de litígios, na qual ações são suspensas para tramitação de um incidente de resolução de demandas repetitivas no tribunal de apelação, ou para julgamento de um recurso especial ou extraordinário repetitivo em questões de direito material ou processual (art. 928, CPC). A inspiração dessa nova espécie pode ser buscada no *Musterverfahren* (KapMuG, *Kapitalanleger-Musterverfahrensgesetz*), como expressamente mencionada na exposição de motivo pelos relatores do anteprojeto do CPC/2015, no *Pilotverfahren*, na *Group Litigation Order* (GLO) e na *Multisdistrict Litigation* (MDL).

Ações coletivas e casos repetitivos convergem por trazerem uma situação jurídica coletiva ativa ou passiva que diz respeito a um grupo de pessoas.

A doutrina tem defendido que o grupo é formado *opt out* nas ações coletivas, incluindo todos que estão na mesma situação, sem exigir nenhum comportamento ativo; e que o grupo é formado *opt in* nos casos repetitivos, exigindo-se que efetivamente tenha ocorrido o ajuizamento de uma ação por parte dos indivíduos.[27]

Muito embora o uso dessa classificação tenha outra tradição, conhecida e utilizada pela doutrina internacional, é necessário alterá-la para melhor tratar a questão na dogmática brasileira.[28] A tradicional classificação internacional diz respeito à vinculatividade da coisa julgada. Parte da doutrina brasileira inverte a classificação para objetivar não o final (a estabilidade da decisão), mas sim o início (a formação do grupo), e, dessa formação, extrair algumas consequências, como veremos a seguir.

27. DIDIER JR., Fredie; ZANETI JR., Hermes. Las Acciones Colectivas y el Enjuiciamento de Casos Repetitivos: dos Tipos de Proceso Colectivo en el Derecho Brasileño, *International Journal of Procedural Law*, Cambridge: Intersentia, vol. 7, pp. 266/275, 2017/02.

28. Note-se, ademais, uma sensível tendência na doutrina para propor modelos mistos de classificação *opt in* e *opt out*. Entre eles VOET, Stefaan. 'Where the wild things are': reflections on state and future of European collective redress. In: KEIRSE, Anne L. M.; LOOS, Marco B. M. (eds.). Waves in contract and liability law in three decades of Ius Commune. Cambridge: Intersentia, 2017. Este parece ser o sentido que irão tomar as *model rules* pensadas para a Europa pelo ELI/ UNIDROIT.

A utilização das expressões *opt in* e *opt out* é comum na economia e na medicina, não existe uma forma natural ou correta, podendo ser a classificação feita por estipulação.[29]

Percebe-se, então, a necessidade de combinar os métodos de tutela coletiva para que não ocorra uma ultrapassagem dos fins do processo, assim entendidos, como a garantia da tutela das pessoas e dos direitos de maneira adequada, efetiva e tempestiva, mediante o processo justo que possa tratar o conflito.

Nos processos coletivos, em especial, não será justo o processo que, ao compor a litigância de massa, não apresente uma solução dos conflitos *para além das pretensões individuais*.[30]

A estrutura do processo justo coletivo deve permitir garantias processuais mínimas: a) representatividade das partes interessadas (*stakeholders* - na maior parte dos casos pessoas ou grupos ausentes do processo, na expressão em inglês: *absent members*); b) direito de influência dos representantes adequados do grupo e o dever de debates por parte do julgador em relação aos fundamentos de fato e de direito debatidos no caso, inclusive com a participação de grupos de interesse através de *amici curiae* ou audiências públicas para o reforço da representatividade argumentativa; c) que o resultado seja efetivo para compor/tratar o conflito coletivo para além das pretensões individuais.

Por essas razões, é preciso pensar o equilíbrio entre as diversas modalidades de tutela coletiva disponíveis.[31]

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29. Ver, por exemplo, os debates em THALER, Richard H.; SUNSTEIN, Cass R. *Nudge*. *Improving Decisions about Health, Walth, and Happiness.* New York: Penguin Books, 2008; ROTH, Alvin. *Who Gets What – And Why. The New Economics of Matchmaking and Market Design*. New York: Mariner Books, 2016.
30. A preocupação está clara, por exemplo, no contexto da litigância estratégica para a qual o fator de diferenciação entre processos individuais e litigância estratégica reside no impacto causado. Perceba-se que nos casos de litigância estratégica, como o foco é no conflito, o resultado pode ser medido de diversas maneiras, seja obtendo-se a procedência ou não da demanda, os resultados não se consideram bons ou ruins em abstrato e pode muitas vezes ser inclusive um resultado que apresente aspectos positivos e negativos ao mesmo tempo, DUFFY, Helen. *Strategic Human Rights Litigation. Understanding and Maximising Impact.* Oxford/New York: Hart, 2018.
31. Um exemplo dessa preocupação está refletido na lição da doutrina sobre a relação entre as ações coletivas e os casos repetitivos. "Além disso, no caso de serem distintos os objetos da ação coletiva e do incidente de julgamento de casos repetitivos – o que poderá ocorrer com frequência quando o julgamento de casos repetitivos tiver por objeto questão processual –, havendo entre as causas repetitivas uma ação coletiva, ela deve ser a escolhida como caso piloto (causa representativa da controvérsia, nos termos do § 6º do art. 1.036 do CPC)." No mesmo sentido o enunciado n. 615, FPPC: "Na escolha dos casos paradigmas, devem ser preferidas, como representativas da controvérsia, demandas coletivas às individuais, observados os requisitos do art. 1.036, especialmente do respectivo § 6º". Isso resulta da aplicação do devido processo legal coletivo, da noção de processo justo coletivo. Há, assim, uma *diretriz normativa no sentido de priorizar a tutela coletiva por ação coletiva*. Essa opção revela-se com alguma clareza do art. 139, X, CPC: diante de casos repetitivas,

Por isso, pode-se afirmar que é "possível, inclusive, criar uma diretriz para o incidente de resolução de demandas repetitivas (...) a existência de ação coletiva, pendente no Estado ou na Região, enquanto não estiver no Tribunal, seria fato impeditivo da instauração do incidente; a pendência da ação coletiva deveria levar à suspensão, até mesmo de ofício, dos processos individuais".[32]

No Superior Tribunal de Justiça, decidiu-se que "*ajuizada ação coletiva atinente à macrolide geradora de processos multitudinários, suspendem-se as ações individuais, no aguardo do julgamento da ação coletiva"*. Na ação, que discutia expurgos inflacionários e direito do consumidor diante da conduta dos bancos, foi reconhecida a "prejudicialidade" (art. 313, V, a), por analogia, para entender que a sentença de mérito nos processos individuais "dependeria" do julgamento da causa coletiva com o fim de evitar as decisões contraditórias e atingir o que se consideram os objetivos gerais da justiça civil contemporânea, a responsabilidade conjunta e compartilhada pela solução justa, eficiente, célere e proporcional das disputas cíveis.[33]

No próximo tópico, a partir das premissas firmadas até aqui e da experiência já demonstrada na prática e na doutrina brasileira, iremos tratar das possíveis inovações quanto à estabilidade das ações coletivas e no seguinte trataremos das novidades quanto ao processo estruturante do Caso Rio Doce (direito processual dos desastres) e da próxima geração do processo coletivo (*next gen collective redress*).

3.1. Inovações Quanto a Estabilidade a Partir dos Casos Repetitivos, Precedentes e do *Case Management* nos Processos Coletivos

Casos repetitivos, *case management* e precedentes ainda têm uma possível combinação para resolver um dos problemas levantados pela doutrina brasileira em relação ao modelo de coisa julgada *secundum eventum litis*.

Como vimos acima, a coisa julgada nos processos coletivos rigorosamente somente atinge os titulares de direitos individuais para beneficiá-los. Há, portanto, uma extensão subjetiva dos efeitos da coisa julgada apenas para beneficiar os titulares

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é dever do juiz comunicar o fato aos legitimados, para que verifiquem a viabilidade do ajuizamento de uma ação coletiva. Perceba: constatando a repetição, o órgão julgador tem o *dever* de informar para fim de instauração da ação coletiva." DIDIER JR.; ZANETI JR, *Curso de Direito Processual Civil. Processo Coletivo*, p. 101/105.

32. DIDIER JR.; ZANETI JR, Curso de Direito Processual Civil. Processo Coletivo, p. 101/105.

33. REsp. n. 1.110.549-RS, rel. Min. Sidnei Beneti, j. em 28.10.2009. A decisão é uma hipótese clara de *case management* por força de formação de precedente judicial, tendo sido reiteradamente aplicada pelos tribunais (REsp 1353801/RS, Rel. Ministro MAURO CAMPBELL MARQUES, PRIMEIRA SEÇÃO, julgado em 14/08/2013, DJe 23/08/2013), Impede decisões contraditórias, facilita a gestão dos processos e resulta em economia processual. No litígio originário do precedente as ações individuais foram julgadas procedentes e convertidas de ações de conhecimento em processos de liquidação e execução (REsp 1189679/RS, Rel. Ministra NANCY ANDRIGHI, SEGUNDA SEÇÃO, julgado em 24/11/2010, DJe 17/12/2010).

dos direitos individuais. A doutrina aponta que, em razão disto, há uma falta de seriedade na ação coletiva brasileira e a exposição dos réus a um duplo risco, apesar de terem vencido no processo individual ainda assim estarão submetidos a novas ações individuais. Milhares de ações individuais podem ser propostos gerando igualmente decisões contraditórias e insegurança jurídica. A opção do Código de Defesa do Consumidor é clara, embora existam estes riscos a ação coletiva e a ação individual não se confundem, não induzem litispendência e a coisa julgada coletiva não afeta, na improcedência, a ação individual.

Há, contudo, o surgimento de três novas estabilidades: a) a vinculação à tese no julgamento de casos repetitivos; b) os precedentes normativos formalmente vinculantes; c) a prejudicialidade das ações coletivas em relação às ações individuais nas "macrolides geradoras de litígios multitudinários".

As duas primeiras decorrem de uma análise da dogmática do CPC:

a) Primeiro, pelo advento dos *casos repetitivos*, técnica de julgamento e gestão de litígios agregados, que possibilita a *suspensão* de todas as ações individuais e coletivas para a aplicação da tese jurídica formada, seja ela favorável, seja ela contrária ao litigante individual (arts. 985, I e 1.040, III, CPC) uma vez julgada a tese ele se aplicará a todos os processos que estejam tramitando;

b) Segundo, por força dos *precedentes normativos formalmente vinculantes*.[34] Assim, mesmo quando não se tratar de um caso repetitivo, o caso julgado, na ação coletiva, poderá formar um precedente, vinculando a todos aqueles que tenham tese semelhante (arts. 926 e 927, CPC);

O último caso é uma construção judicial do Superior Tribunal de Justiça. O STJ por analogia estendeu os efeitos da regra da prejudicialidade para os processos coletivos em relação aos processos individuais gerados a partir do mesmo macrolitígio.

c) Terceiro, mas não menos importante, por força de uma *decisão em recurso especial repetitivo*, que garante a unidade do direito no Superior Tribunal de Justiça (STJ),[35] na qual se firmou entendimento que permite a suspensão de todas as ações individuais relacionadas por prejudicialidade com a ação coletiva (art. 313, V, *a*, questões de fato ou de direito), após o julgamento essas ações individuais, caso procedentes ou parcialmente procedentes, poderão ser convertidas em liquidação e

34. ZANETI JR., Hermes. *O Valor Vinculante dos Precedentes.* 3ª ed. Salvador: JusPodivm, 2017.

35. Nos termos do Tema 60: "Ajuizada ação coletiva atinente a macro-lide geradora de processos multitudinários, suspendem-se as ações individuais, no aguardo do julgamento da ação coletiva." REsp 1110549/RS, Rel. Ministro SIDNEI BENETI, SEGUNDA SEÇÃO, julgado em 28/10/2009, DJe 14/12/2009. O tema já foi aplicado em outras situações (REsp 1353801/RS, Rel. Ministro MAURO CAMPBELL MARQUES, PRIMEIRA SEÇÃO, julgado em 14/08/2013, DJe 23/08/2013) e o STJ já definiu que após a decisão coletiva os processos de conhecimento individuais que estiverem suspensos poderão ser convertidos de ofício em liquidação e cumprimento de sentença.

execução, caso improcedente a ação coletiva a prejudicialidade afetará igualmente a ação individual.

Evidentemente existem uma série de situações em que essas estabilidades não afetarão o julgamento do mérito da demanda individual, mas diferentemente do regime das ações coletivas as estabilidades aqui citadas poderão sim afetar o julgamento da ação individual negativamente.

Esses apontamentos sobre a coisa julgada são uma novidade da técnica processual recente que gostaria de ressaltar para mostrar como o Código de Processo Civil de 2015 está sendo aplicado diretamente ao processo coletivo.

4. PROCESSO COLETIVO NO BRASIL: *NEXT GENERATION*? DESIGN DE SOLUÇÃO DE DISPUTAS, PROCESSOS ESTRUTURANTES E O CASO RIO DOCE (DIREITO PROCESSUAL DOS DESASTRES)

O Caso Rio Doce[36] é um litígio complexo que pode ser considerado como prova de força para este novo modelo de processo civil coletivo, a confirmação de sua efetividade, de seu êxito, ou a prova de sua insuficiência ou decepção.

O Caso Rio Doce é um exemplo do "direito processual dos desastres": o direito que envolve litígios de alta complexidade causados pela ação humana ou natural e que impactem de forma irradiada um sem número de pessoas e grupos de atingidos em razão de um evento ou série de eventos com impactos humanos ou sociais, que possuam dimensão social para além da dimensão individual (art. 2º, II, Dec. 7.257/2010).[37]

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36. A expressão que entendemos mais correta para descrever todas as implicações jurídicas do caso é "Desastre do Rio Doce". Algumas razões de ordem técnica indicam neste sentido: 1) desastre não se limita a questões de origem natural, incluindo as consequências provocadas por ações antrópicas, ações humanas, neste sentido, cf. CARVALHO, Delton Winter de. *Desastres Ambientais e sua Regulação Jurídica. Deveres de Prevenção, Resposta e Compensação Ambiental.* São Paulo: RT, 2015, parte I; 2) o Rio Doce é um *rio nacional* que se estende por dois estados da federação brasileira, Minas Gerais e Espírito Santo, sendo que o desastre atingiu de forma intensa ambos os Estados-membros. Muito embora a localidade inicial do impacto tenha sido a cidade de Mariana e a comunidade de Bento Rodrigues hoje a extensão do dano já atingiu todos os integrantes da bacia hidrográfica e em alguns casos, como será relatado, pelas dimensões do impacto, pessoas e grupos de pessoas que estão inclusive fora da bacia hidrográfica do Rio Doce, visto que o dano atingiu o mar territorial brasileiro e ecossistemas que não obedecem limites geográficos fixos; 3) o termo desastre inclui as três esferas de responsabilidade jurídica consequentes aos fatos, ou seja, a responsabilidade civil, a responsabilidade administrativa e a responsabilidade criminal, bem como, os danos e ilícitos que atingem grupos ou indivíduos, individuais ou coletivo, ambientais, sociais, econômicos entre outros.
37. Na doutrina, falando sobre o direito dos desastres: "Uma definição normativa de desastres (*lato sensu*) pode ser encontrada na própria legislação brasileira, segundo a qual este consiste no 'resultado de eventos adversos, naturais ou provocados pelo homem sobre um ecossistema vulnerável, causando danos humanos, materiais ou ambientais e consequentes prejuízos econômicos e sociais' [art. 2º, II, Dec. 7.257/2010]." (CARVALHO, Delton Winter de. *Desastres Ambientais e sua Regulação Jurídica.*

A complexidade dos litígios coletivos exige que a cada geração antecipemos problemas e desenhemos soluções que possam se mostrar adequada para a solução de novos conflitos ou de situações que muito embora ocorrentes no passado, por falhas sistêmicas de um modelo processual rígido, tenham ficado sem uma solução adequada.

A necessidade de enfrentarmos conflitos complexos que envolvem temas como os desastres ambientais de Mariana (Caso Rio Doce) e Brumadinho, os acidentes aéreos da TAM e da Air France, no Brasil, e o desastre do Golfo do México, nos Estados Unidos, o *Apartheid* na África, a cura da violência, em Chicago, as comissões pela verdade e pela reconciliação, no Canadá, as resoluções online realizadas no caso dos poupadores,[38] judicialmente, ou, extrajudicialmente, pelo eBay e pelo consumidor.gov e tantos outros exemplos, nos impulsionam para uma nova forma de atuar no processo civil: o *design* de solução de disputas.[39]

Os objetivos do design de solução de disputas poderiam ser sumarizados nas seguintes potencialidades em relação aos processos tradicionais: a) auxiliam a identificar e absorver as oportunidades de ganhos mútuos; b) constroem e reforçam relacionamentos entre indivíduos, representantes, grupos de pessoas e comunidades; c) favorecem os objetivos da Justiça; d) promovem a paz e a reconciliação; e) garantem as reformas estruturais adequadas através do Estado de Direito, identificando os interesses e os direitos dos mais desfavorecidos e fracos nas relações de poder (*less powerfull stakeholders*), curando as deficiências ocorrentes nas práticas tradicionais de resolução de disputas prevalentes; e, f) são adaptáveis às modificações do tempo e das necessidades das vítimas e grupos interessados.[40]

A solução adequada de litígios muito complexos passa por atividades de planejamento e design que permitam a adequação dos procedimentos ao fim de solução do conflito e aplicação do direito ao caso com o menor custo e a maior satisfação e efetividade.

Deveres de Prevenção, Resposta e Compensação Ambiental. São Paulo: RT, 2015, parte I - o autor deixa claro que se tratam de eventos que atingem comunidades e possuem uma dimensão social, para além da dimensão individual).

38. O caso dos poupadores durou 30 anos e somente foi homologado o acordo quando as demandas estavam tramitando no Supremo Tribunal Federal. Pairam muitas dúvidas sobre a efetividade da solução acordada. A decisão homologatória pelo STF suspende ações individuais e coletivas para a adesão individual de cada consumidor ao acordo em uma plataforma online (https://www.pagamentodapoupanca.com.br/).
39. Estes e outros exemplos já estão sendo tratados na literatura especializada, cf. ROGERS, Nancy H.; BORDONE, Robert C.; SANDER, Frank E. A.; McEWEN, Craig A. *Designing Systems and Processes for Managing Disputes.* New York: Wolters Kluwer, 2013; FALECK, Diego. *Manual de Design de Sistemas de Disputas. Criação de Estratégias e Processos Eficazes para Tratar Conflitos.* Rio de Janeiro: Lumen Juris, 2018.
40. Adaptação livre de ROGERS, Nancy H.; BORDONE, Robert C.; SANDER, Frank E. A.; McEWEN, Craig A. *Designing Systems and Processes for Managing Disputes*. New York: Wolters Kluwer, 2013, p. xvii.

Muitas vezes são necessárias mudanças estruturais ou criação de novas estruturas, mediante processos estruturantes, para a efetivação de políticas públicas e de interesse público, quer sejam realizadas essas políticas pelo poder público, por atuação conjunta ou até mesmo por iniciativa dos responsáveis privados pelo conflito, pessoas naturais e jurídicas. A doutrina fala inclusive da criação de entidades com propósitos específicos para a resolução dos conflitos, as chamadas *claim resolution facilities*.[41]

Os processos estruturantes assim se caracterizam por reformas institucionais ou estruturais, nas burocracias públicas ou práticas privadas, relacionadas à efetivação de direitos fundamentais de um grupo de pessoas.[42]

Para atingir este objetivo os processos estruturantes alteraram o direito processual coletivo tradicional para permitir novas formas de discussão, autocomposição, delimitação dos objetos do processo, definição de competência para julgamento, decisão e efetivação das medidas judiciais.

A característica principal destes processos é a necessidade de adequação e flexibilidade dos procedimentos para atingir um fim determinado: a efetivação da modificação estrutural da realidade para o tratamento do conflito.

Existem inúmeros casos estudados na doutrina, na experiência comparada e no Brasil, os exemplos estão relacionados ao fim da política de separação racial (*Brown v. Board of Education of Topeka*);[43] à poluição ambiental (Caso Mendonça[44] e Caso da

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41. Para a ampla discussão desta questão, com farta bibliografia cf. CABRAL, Antonio do Passo; ZANETI JR., Hermes. Entidades de Infraestrutura Específica para a Resolução de Conflitos Coletivos: As Claim Resolution Facilities e a sua Aplicabilidade ao Brasil. *Revista de Processo.* Vol. 287, p. 445-483, jan/2019.
42. Nem todo processo coletivo será estrutural, nem todo processo estrutural será coletivo. A questão não é pacífica, na doutrina, entendendo que apenas as ações coletivas devem ser consideradas estruturantes GRINOVER, Ada Pellegrini. Seoul Conference 2014 – Constitution and proceedings – The Judiciary as an Organ of Political Control. *Revista de Processo*. São Paulo: RT, 2015, v. 249, pp. 26-27, no mesmo sentido o Projeto de Lei n. 8058/2014, prevê que o controle jurisdicional de políticas públicas deverá ocorrer "por intermédio de ação coletiva" (art. 3º). No sentido contrário, aceitando a possibilidade de ações individuais DIDIER JR.; ZANETI JR., *Curso de Direito Processual Civil. Processo Coletivo*, muito embora entendamos que o processo coletivo já ofereça melhores condições para as tutelas estruturantes isto não veda que a pretensão estruturante seja requerida em uma ação individual, a partir de uma situação individual merecedora de tutela que possa ser aplicável para além das partes envolvidas.
43. FISS, Owen M. *The Civil Rights Injunction.* Bloomington & London: Indiana University Press, 1978 (Addison Harris Lecture, 1976); FISS, Owen M.; RESNIK, Judith. *Adjudication and its Alternatives. An Introduction to Procedure.* New York: Foundation Press, 2003; JOBIM, Marco Félix. *Medidas estruturantes*: *da Suprema Corte Estadunidense ao Supremo Tribunal Federal*. Porto Alegre: Livraria do Advogado Editora, 2013, p. 93.
44. VERBIC, Francisco. El Remedio Estructural de la Causa 'Mendoza'. Antecedentes, Principales Características, y Algunas Cuestiones Planteadas Durante los Primeros Tres Años de su Implementación. *Revista ANALES nº 43*, Facultad de Ciencias Jurídicas y Sociales de la UNLP, p. 267/286, 2013; VERBIC, Francisco. Manual de Introdución a los Processos Colectivos y las Acciones de Clase. In.: GONZÁLEZ, Leonel: FANDIÑO, Marco. *Diálogo Multidisciplinario sobre la Nueva Justicia Civil de Latinoamérica.*

ACP do Carvão[45]); à reforma de presídios (Caso do FUNPEM); à garantia de educação pré-escolar (Caso das Creches em São Paulo).[46]

O Caso Rio Doce é mais um exemplo da crescente utilização de processos estruturantes e da importância dos processos coletivos no Brasil. Neste caso, um desastre ambiental documentado no Mundo todo, o maior da América Latina, foram ajuizadas mais de 30 ações coletivas, além de milhares de ações individuais e instauração de incidentes de resolução de demandas repetitivas no Estado de Minas Gerais, Espírito Santo e em Brasília, no Distrito Federal.

Um primeiro problema enfrentado foi a necessidade de conexão para evitar decisões conflitantes. As ações foram reunidas por uma decisão em conflito de competência julgado pelo Superior Tribunal de Justiça que fixou a competência da Justiça Federal da capital do Estado de Mina Gerais, Belo Horizonte. A decisão respeita a ideia de competência adequada por duas razões, desloca a competência para um dos Estados atingidos, evitando a via do Distrito Federal, e preserva as ações que tratem de impactos locais, ainda que coletivas, nas cidades atingidas. Assim, preserva a regra principal do processo coletivo ambiental brasileiro que é a competência do local do dano (art. 2º, LACP).

Duas eram as ações coletivas mais importantes e mais amplas. Uma ação coletiva movida pela União, Estados de Minas Gerais e do Espírito Santo, os Municípios atingidos e as autarquias ambientais responsáveis pela fiscalização, no valor de R$ 20 bilhões, na qual logo no início de 2016, pouco tempo depois do Desastre, na qual foi formulado um compromisso de ajustamento de conduta (TTAC), que criou uma entidade de infraestrutura específica (*claim resolution facility*) para tratar das questões referentes ao Desastre, a Fundação Renova.

A entidade é financiada por recursos privados, depositados pelas empresas causadoras do Desastre (Samarco S.A. e suas controladoras, Vale S.A. e BHP Billiton do Brasil) e conta com 42 programas nos eixos socioambientais e socioeconômicos para recuperação integral do dano.[47] Um dado importante do processo é que foi

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Santiago: Centro de Estudios de Justicia de las Américas, 2017. [https://classactionsargentina.files.wordpress.com/2018/01/3-dic3a1logo-multidisciplinario-sobre-la-nueva-justicia-civil-versic3b3n-definitiva.pdf]., esp. p. 275 e ss.

45. ARENHART, Sérgio Cruz. “Processos estruturais no direito brasileiro: reflexões a partir do caso da ACP do Carvão”. *Revista de Processo Comparado*, v. 2, jul./dez. 2015, versão digital, p. 7.

46. GRINOVER, Ada Pellegrini. Caminhos e descaminhos do controle jurisdicional de políticas públicas no Brasil. In: GRINOVER, Ada Pellegrini; WATANABE, Kazuo; COSTA, Suzana Henriques da. O Processo para solução de conflitos de interesse público. Salvador: Juspodivm, 2017; COSTA, Suzana Henriques da; FERNANDES, Débora Chaves, Processo Coletivo e Controle Judicial de Políticas Públicas – Relatório Brasil. In: GRINOVER, Ada Pellegrini; WATANABE, Kazuo; COSTA, Suzana Henriques da. O Processo para solução de conflitos de interesse público. Salvador: Juspodivm, 2017; MENDES, Conrado Hubner et all. Ações coletivas no Brasil: temas, atores e desafios da tutela coletiva. Brasília: CNJ, 2018, p. 203/209.

47. [https://www.fundacaorenova.org/conheca-os-programas/].

tentada a homologação deste acordo em juízo, tendo sido homologado pelo Tribunal Regional da 1ª Região e posteriormente cassada a homologação. Os argumentos para cassar a homologação foram justamente a falta de participação do Ministério Público na elaboração do acordo e a falta de participação dos atingidos, ou seja, a falta de representatividade argumentativa.

Na mesma época da tentativa de homologação, o Ministério Público ajuizou uma ação civil pública com amplos pedidos e o valor estimado de R$ 155 bilhões, visando a reparação integral. Como o acordo continuou válido mesmo sem a homologação, mas apenas para as partes, as ações coletivas da União e do MPF foram reunidas para tramitar conjuntamente no juízo da 12ª Vara Cível da Comarca de Belo Horizonte da Justiça Federal.

A partir desse quadro de concentração os interesses de todas as instituições de justiça convergiram para os mesmos autos principais. A novidade do ponto de vista institucional foi então a reunião dos Ministérios Públicos Federal, Ministério Público do Trabalho, Ministério Público do Estado de Minas Gerais e Ministério Público do Estado do Espírito Santo, bem como das Defensorias Públicas da União, dos Estados de Minas Gerais e do Espírito Santo para tratar conjuntamente desta questão.

A partir da tramitação da ACP de 155 bilhões foi possível ajustar a produção de prova independente e imparcial sobre os programas da Fundação Renova e reestruturar a governança da Fundação, com a criação de mais instâncias de deliberação para os atingidos e a maior participação dos atingidos, das Defensorias Públicas e dos Ministérios Públicos na gestão da Fundação e no Comitê Interfederativo, que atua como câmara técnica de supervisão. A repactuação da governança incluiu ainda o convite às instituições da sociedade civil para compor um Fórum de Observadores, com instituições universitárias isentas, externo e independente ao processo. A previsão da produção de auditórias técnicas independentes contratadas a pedido do Ministério Público e atuando para o juízo na conferência da eficiência e efetividade dos programas da Fundação.[48]

Para a realização dessa reengenharia foram utilizados novos conceitos do Código de Processo Civil, em especial, o processo cooperativo, o estímulo permanente a solução autocompositiva e os negócios processuais, bem como, abriu-se espaço para outras tantas iniciativas, como a possibilidade de cooperação jurisdicional interna, inclusive entre órgãos da Justiça Federal e da Justiça Estadual (art. 69, CPC). Os termos ainda determinaram o saneamento geral dos processos coletivos que estão tramitando, com a extinção da ação de 20 bilhões movida pela União e prazos para analisar pedidos e causa de pedir das demandas pendentes para eventual extinção ou reunião com a ação de 155 bilhões, que passa a ser convencionalmente considerada a ação principal.

48. Essa repactuação da governança e auditoria externa foram firmadas em dois termos de ajustamento de conduta denominados TAC GOV e TAP.

Outro tema polêmico era a possibilidade de prescrição das pretensões individuais para as pessoas que ainda não tivessem ajuizado suas ações. Como o Desastre ocorreu em 05.11.2015 e o Código Civil prevê a ocorrência de prescrição no prazo de 03 (três) anos para as ações que visam a reparação civil por responsabilidade (art. 206, § 3º, V, CC) ocorreu uma grande discussão na imprensa e um debate jurídico muito intenso, pressionando para novos ajuizamentos de milhares de ações individuais. A questão é que a doutrina e a jurisprudência brasileira têm entendido que ajuizada a ação coletiva interrompe-se a prescrição para as ações individuais, justamente para evitar a corrida ao judiciário uma vez que a sentença de procedência irá beneficiar os titulares dos direitos individuais.[49] Finalmente, por atuação conjunta dos Ministérios Públicos e das Defensorias Públicas, foi afastada convencionalmente a prescrição, com as Empresas e a Fundação Renova reconhecendo expressamente a sua inocorrência.[50]

Entendemos que este último exemplo mostra a importância do papel do juiz como juiz de garantias nestes casos, devendo resolver conflitos que surgem no curso da instrução e da implementação de suas decisões. Como o juiz determinou a suspensão da ação de 155 bilhões para o saneamento geral e a realização das auditorias sobre os programas da Fundação Renova, inclusive o programa de indenização mediada (PIM) que trata da indenização por falta de água e por danos gerais, espécie de design de solução de disputas (DSD) desenhado pela Fundação, não faz sentido falar em prescrição. Não faz sentido falar em prescrição, ainda e principalmente, pelo simples fato de que a propositura da ação coletiva com pedido de condenação genérica para a indenização de todas as vítimas do Desastre, o que foi pedido na ACP de 155 bilhões, interrompe a prescrição, como reconhece precedente do Superior Tribunal de Justiça seguido por mais de 50 (cinquenta) decisões daquele tribunal. O ideal seria que o próprio juiz do caso reunisse as partes e esclarece-se a questão.

Afinal, se o ambiente criado é para a autocomposição como melhor alternativa para a tutela integral dos direitos afetados, seria comportamento contraditório das empresas insistir na tese prescricional. A decisão consensual resolveu a questão, depois de longo debate e do ajuizamento de milhares de ações individuais em razão da dúvida.

A série de situações que surgem em litígios dessa complexidade exigem uma abertura da causa de pedir e do pedido para acatar as novas situações jurídicas

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49. Cf. ZANETI JR., Hermes; SOBRAL, Mariana Andrade; CAMPOS, Rafael Mello Portella; TRAZZI, Paulo; LINO, Daniela Bermudes. Ações Individuais no Caso Rio Doce: Interrupção da Prescrição, Suspensão da Prescrição e Comportamento Contraditório dos Litigantes no Processo de Autocomposição, *no prelo*.

50. No termo constou expressamente que "As EMPRESAS e a FUNDAÇÃO RENOVA reafirmam, conforme a legislação brasileira, o TTAC, o TAP e seu aditivo, e o TAC GOV, sua obrigação de reparar integralmente as pessoas atingidas pelo ROMPIMENTO DA BARRAGEM DE FUNDÃO (...) Não haverá perecimento de direitos e pretensões de pessoas atingidas, com fundamento em prescrição, na data de 05 de novembro de 2018". Cf. [http://laprocon.ufes.br/principais-termos-de-ajustamento-de-conduta], acesso em 14.11.2018.

relevantes para resolver o conflito.[51] Todas essas soluções são possíveis porque o novo Código permite flexibilidade da congruência objetiva supõe, por isso, que a interpretação do pedido (art. 322, § 2º, CPC) leve em consideração a complexidade do litígio estrutural.

Segundo essa perspectiva, também é possível falar de decisões em cascata e ampliação do *thema in decidendum* para levar em consideração os fatos que surgem no curso da instrução, desde que preservado o contraditório (art. 493, parágrafo único, CPC), torna-se uma ferramenta fundamental para que o juiz, na etapa de efetivação das decisões estruturais, corrija os rumos da tutela executiva de modo a contemplar as necessidades atuais dos interessados. Por outro lado, enquanto a efetivação das decisões proferidas em processos não estruturais se dá, normalmente, de forma impositiva, é comum que a efetivação da decisão estrutural se dê de *forma dialética*, "a partir de um debate amplo cuja única premissa consiste em tomar a lide como fruto de uma estrutura social a ser reformada".[52] Trata-se o conflito, não apenas a pretensão inicial.

No Direito processual brasileiro, a base normativa para a execução das decisões estruturais, necessariamente atípica, decorre da combinação do art. 139, IV,[53] com o art. 536, § 1º, ambos do CPC. Os dispositivos são cláusulas gerais executivas, das quais decorre para o órgão julgador o poder de promover a execução de suas decisões por medidas atípicas.

Mas para além disto, deve também ser observada uma *refundação do princípio da oralidade* para a solução de temas complexos, com a possibilidade de o juiz determinar o comparecimento das partes a qualquer momento (art. 139, VIII, CPC) e convocar audiência de saneamento compartilhado em causas complexas, convidando as partes a integrar ou esclarecer suas alegações (art. 357, § 3º, CPC). Refundar o princípio da oralidade exige dos juízes e das partes um novo comportamento no processo, o comparecimento nesta audiência deve ser realizado com conhecimento das questões

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51. Evidentemente isto não significa falta de clareza quanto ao objeto da demanda ou falta de clareza quanto ao direcionamento da atividade judicial pelos autores ao identificar este objeto. Existem um sem número de ressalvas a esta afirmação que dizem respeito ao processo ser um ambiente de discurso regrado, um ambiente do discurso prático do caso especial, não podendo ser compreendido como uma arena política ou moral simplesmente.
52. VIOLIN, Jordão. *Protagonismo judiciário e processo coletivo estrutural*, cit., p. 151. Sérgio Cruz Arenhart também destaca que, como a decisão estrutural almeja uma mudança substancial, para o futuro, em relação a uma determinada prática ou instituição, é importantíssimo garantir a participação não só da coletividade que será afetada, por meio de audiências públicas e amici curiae, mas também de especialistas que "possam contribuir tanto no dimensionamento adequado do problema a ser examinado, como em alternativas à solução da controvérsia" (ARENHART, Sérgio Cruz. "Processos estruturais no direito brasileiro: reflexões a partir do caso da ACP do Carvão", cit., p. 4).
53. JOBIM, Marco Felix. "A previsão das medidas estruturantes no artigo 139, IV, do novo Código de Processo Civil brasileiro". Repercussões do novo CPC – processo coletivo. Hermes Zaneti Jr. (coord.). Salvador: Editora JusPodivm, 2016, p. 230-232.

debatidas e de forma a permitir o compromisso entre os presentes com o objeto do processo, a solução ou a construção de um procedimento que permita uma discussão o mais clara possível sobre os fatos e o direito controvertido.

Por fim, em razão da complexidade das matérias debatidas nos processos estruturais e da potencialidade de que as decisões aí proferidas atinjam um número significativo de pessoas, é preciso pensar em *novas formas de participação* de sujeitos no processo, como a admissão de *amicus curiae* e a designação de audiências públicas.[54] As fórmulas tradicionais de intervenção pensadas para os processos individuais não são suficientes para garantir participação ampla nos processos estruturais que exigem uma representação argumentativa qualificada para atingir sua finalidade.

Este aspecto da representação argumentativa deve atingir todas as novas formas de tutela coletiva. É preciso estar ciente que o respeito ao contraditório deve ser reforçado principalmente nos casos em que grupo de pessoas que não participem do processo venha a ser atingidos pelas decisões judiciais, como ocorre nos processos coletivos das ações coletivas, nos casos repetitivos e, até mesmo, na formação de precedentes judiciais.[55]

5. CONCLUSÕES

A combinação de técnicas coletivas é a melhor solução para o avanço da proteção coletiva dos direitos.

No Brasil, existe o risco de que ações coletivas sejam substituídas por técnicas contenciosas agregadas, o que representaria um retrocesso. A combinação de ambas as formas de tutela judicial coletiva é possível e já prevista no CPC, mas deverá sempre privilegiar a ação coletiva quando a mesma questão disser respeito à distintas demandas individuais e, ao mesmo tempo, a proteção de direitos coletivos *lato sensu*.

Estudos empíricos em desenvolvimento e a contínua crítica aos resultados obtidos por meio desses estudos permitiram uma melhor gestão dos processos coletivos. As tabelas unificadas do CNMP e do CNJ são exemplos de potencial avanço na gestão e controle das ações coletivas, assim como outras iniciativas à exemplo do website consumidor vencedor que recolhe dados e informações da tutela do consumidor mediante ações coletivas e compromissos de ajustamento de conduta.

O cruzamento entre novas técnicas jurídicas previstas pelo Código de Processo Civil e estes estudos empíricos pode permitir avanços substanciais na tutela coletiva.

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54. No mesmo sentido: GRINOVER, Ada Pellegrini. “Seoul Conference 2014 – Constitution and proceedings – The Judiciary as an Organ of Political Control”. *Revista de Processo*. São Paulo: RT, 2015, v. 249, p. 26.
55. DIDIER JR., Fredie; ZANETI JR., Hermes, *Curso de Direito Processual Civil. Processo Coletivo,* p. 110.

A complexidade da gestão processual que envolve os conflitos coletivos e inovações como o direito dos desastres exigem uma revisitação da teoria dos litígios coletivos.

A próxima geração de processos coletivos requer maior atenção na resolução do conflito, com a participação mais intensa de órgãos públicos de controle (órgãos reguladores e *ombudsmen*), o estímulo à autocomposição, a descentralização do cumprimento de decisões judiciais (com a criação de *claims resolution facilities* – entidades de infraestrutura específica) e a ativação de Poder judiciário como instituição de garantia para a tutela dos direitos e efetiva resolução dos conflitos.

Estamos muito longe de uma tutela coletiva perfeita, mas já avançamos muito. Existe ainda um longo caminho a trilhar, mas os primeiros passos já foram dados. A exigência de tutela somente pode ser satisfeita quando há uma estrutura processual mínima que permita ser veiculada a demanda, os números do processo coletivo já provam que ultrapassamos essa fase. Agora é preciso continuar e, sem sair da trilha que permitiu o acesso à justiça, melhorar ainda mais os mecanismos de tutela coletiva.

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2

Small Claims and Procedural Simplification: Evidence from Selected EU Legal Systems

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Summary: 1. Introduction; 2. France: simplified procedures for the recovery of small credits; 3. Spain: *juicio verbal* and *monitorio notarial*; 4. Italy: the justices of the peace; 5. Concluding Remarks.

Abstract: *Most legal systems have a long-standing tradition of simplified procedures for the disposition of small claims. Obviously, the elements that qualify a claim as 'small' vary: the most significant one, meaning the amount of money at stake, reflects the economic situation of a given country. In any event, and regardless of the maximum sum that can be recovered, small claims are the claims that are most important to ordinary citizens. For if people had to turn to full-fledged litigation, probably many would relinquish their rights, being unable to bear the costs and the delays of a traditional judicial procedure. That is the reason why legal systems should provide inexpensive and expedited procedures for small claims if they really want to fulfill the promise of access to justice for all.*

This essay examines the solutions adopted in France and Spain, pointing out that the use of easily available forms can make a big difference, as can also the accessibility of IT platforms specifically designed for the recovery of small credits. The state of affairs in Italy for simplified procedures for small claims is also addressed through a description of the jurisdiction of the Italian justices of the peace.

Keywords: Small claims. Simplified procedure. Access to justice. Forms. IT platforms.

1. INTRODUCTION

The anonymous author of an essay published in an American law journal in 1924 wrote that, "A small claims court is doomed to failure unless it can speedily bring its cases to a *final* determination."[1] Further on in the essay, the reader can find a detailed list of the procedural features that are deemed to be essential for the swift disposition of small claims: an informal and untechnical procedure; a judge acting as "an impartial investigator into the truth", being "in affirmative control of the whole proceeding";[2] and the possibility for the parties to appear in court without the representation of lawyers, since "it is desirable that lawyers should not commonly appear because it is desirable that the expense of their appearance should be avoided".[3]

It is astonishing to discover that almost a century ago scholars were already debating over the need to provide for procedural models suitable for small claims, so that one may be inclined to think that nothing new is invented when contemporary lawmakers provide for simplified procedures aimed at granting small claims an expedited, inexpensive but also fair treatment in court. More or less, all European Union legal systems deal with small claims in specific ways, sometimes allocating them to special judicial bodies (for instance, small claims courts or courts operated by lay judges), other times relying on procedural rules that are different from the ones followed before the ordinary courts of first instance. Alongside national procedures, the European Small Claims Procedure (hereinafter ESCP)[4] exists for cross-border cases, so that two parallel procedures (the national one and the European one) are available for small claims that meet the requirements for the application of the European instrument at the choice of the plaintiff.

This essay will not deal with the ESCP even though it is a piece of European legislation specifically aimed at devising a uniform, simplified procedure for the recovery of small claims across Member States. A recent, comprehensive study has analyzed the ESCP in depth, clarifying the background of the Regulation, its purposes and shortcomings, and therefore this author does not consider it necessary to repeat concepts that have been masterfully expounded by someone else.[5] Furthermore,

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1. Anonymous, *Small Claims Procedure is Succeeding*, 8 J. Am. Jud. Soc. 247, 248 (1924).
2. *Id.* at 251.
3. *Id.* at 252.
4. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, *OJ L 199, 31.7.2007, pp. 1–22;* Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, *OJ L 341, 24.12.2015, pp. 1–13 (in force since 2017).*
5. Reference is made to E.A. Onţanu, Cross-Border Debt Recovery in the EU. A Comparative and Empirical Study on the Use of the European Uniform Procedures (2017).

the optional nature of the ESCP is such that its actual application, at least in some Member States, is negligible. This is the case, for instance, in Italy, where the practical relevance of the ESCP is inversely proportional to the theoretical commentaries on the Regulation produced by Italian scholars.[6]

In addition to Italy, the legal systems that this author has chosen for her analysis of simplified procedures for the disposition of small claims are those of France and Spain. This choice does not signify a value judgment, since a value judgment is not possible when looking at the two national procedures from a distance and without the benefit of empirical data. That said, the impression of a foreign 'bystander' is that both the French and the Spanish procedures are (at least, in theory) efficient, simple and with a touch of modernity that potentially will make them even more accessible to individuals. After all, the ability of a legal system to grant access to justice across the board is tested not with respect to cases where the amount at stake is large and the parties have all the resources (financial, social and cultural) necessary to navigate complex, costly and long court procedures, but with respect to cases where the amount at stake is small.

2. FRANCE: SIMPLIFIED PROCEDURES FOR THE RECOVERY OF SMALL CREDITS

As far as France is concerned, a detailed study of the procedures provided for the disposition of claims whose value is limited should entail an analysis of a variety of proceedings available before the *Tribunaux d'instance*, meaning the courts of first instance whose jurisdiction includes claims up to the value of €10,000.[7] As a matter of fact, the French Code of Civil Procedure contemplates four different proceedings that can be lodged with a *Tribunal d'instance*. Out of these proceedings one seems particularly interesting, since it concerns claims that, at least from the point of view of this author, can truly be deemed small. For claims not exceeding the value of €4,000, the plaintiff can choose to resort to a simplified procedure that entails a

6. *See* E. Silvestri, *Italy: Simplification of Debt Collection in Italy – National and EU Perspectives*, *in* Simplification of Debt Collection in the EU 347–61 (V. Rijavec, T. Ivanc & T. Keresteš eds., 2014).
7. Until 1 July 2017, claims up to €4,000 belonged to the jurisdiction of the *juges de proximité*, lay judges established in 2002 and considered, rightly or wrongly, the heirs of the traditional justices of the peace. They have been repealed from the French judicial geography, since their operation had never been satisfactory and their establishment has often been seen by stakeholders as a useless factor of complication in the identification of the appropriate court of first instance: *see* Commission sur la répartition des contentieux présidée par Serge Guinchard, Rapport au Garde des Sceaux: L' ambition raisonnée d'une justice apaisée 204 (La documentation Française 2008). On the 'philosophy' supporting the establishment of community justice in France, *see* M. Vericel et al., Juridictions et juges de proximité : leur rôle concret en matière d'accès à la justice des petits litiges civils [Rapport de recherche] (2008), available at [https://halshs.archives-ouvertes.fr/file/index/docid/946154/filename/Rapport_annexes_Juges_de_proximite.pdf].

simple *déclaration au greffe*, meaning a statement addressed to the court's clerk who provides for its registration.[8] The statement can be made orally or in written form. In any event, the statement must meet the general requirements specified by the Code for the introductory pleading before any civil jurisdictions and a summary explanation of the cause of action supporting the claim. The *déclaration au greffe* can be made also by filling in a form that can be downloaded from a number of websites managed by the French public administration.[9]

One peculiar feature of this procedure is that a preliminary attempt at conciliation is mandatory. Actually, the duty of the plaintiff to explore possible ways to reach a settlement with his adversary has a general character, since the introductory pleading of all cases lodged with any courts of first instance must mention "the diligences taken with a view to reaching an amicable resolution of the dispute" (my translation).[10] When this rule was adopted in 2015 in furtherance of the recourse to ADR methods, failure to comply with the duty to attempt conciliation or other forms of peaceful resolution of the dispute was not sanctioned, and probably one reason for that was the fuzziness of the concept of acceptable 'diligences' suitable to put an end to the controversy. But a statute passed in 2016 reinforced the duty,[11] providing for a harsh sanction in case of failure to comply with it: if a preliminary attempt at conciliation has not taken place, the *Tribunal d'instance*, even *ex officio*, can declare the case inadmissible, unless some special circumstances occur, for instance when the parties can give proof that they have carried out other 'diligences' with a view to reaching a mutually acceptable solution of their dispute.

If the attempt at conciliation is unsuccessful, the case can proceed according to the rules governing contentious procedure. A hearing is set for the parties to appear in person or, if they wish, by a representative (for instance, a family member), since the assistance of council is merely optional. The proceeding is oral, at least in principle. It is up to the judge to attempt again the conciliation of the parties or to delegate this task to a *conciliateur de justice*, who is a judicial officer whose specific task is to help the parties reach a settlement, under a duty of impartiality and confidentiality. If an agreement is reached, it will be made enforceable by the judge; otherwise the proceeding will end up with a judgment that can be appealed against, not before the intermediate court of appeal, but only before the French Supreme Court, that is, the *Cour de cassation*.[12]

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8. *See* arts. 843–844 of the French Code of Civil Procedure.
9. For instance, one address is [https://www.formulaires.modernisation.gouv.fr/gf/cerfa_11764.do].
10. *See* arts. 56, sec. 3, and 58, sec. 3. of the French Code of Civil Procedure, as modified by art. 18 of the decree no. **2015-282 of 11 March 2015 (***Décret n° 2015-282 du 11 mars 2015 relatif à la simplification de la procédure civile à la communication électronique et à la résolution amiable des différends*).
11. *See* art. 4 of the statute no. **2016-1547 of 18 November 2016 (***Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle***).**
12. *See* S. Guinchard, F. Ferrand & C. Chainais, Procédure civile 426–34 (3d ed. 2013).

Since 1 June 2016 a new, simplified procedure for the recovery of small claims has been in operation.[13] The creditor can avoid any judicial proceeding by simply resorting to a bailiff, provided that the credit does not exceed €4,000 and arises out of contracts or statutory obligations. Special rules determine which bailiff can be in charge of the procedure, but the interesting thing is that the creditor can petition the bailiff by means of a simple letter, a verbal statement or via electronic communication. Actually, all the exchanges between the bailiff and the parties can take place via an IT platform devoted to the recovery of small credits.[14]

The bailiff bears the responsibility of the whole procedure: he informs the debtor of the request made by the creditor and invites him to take part in the simplified procedure. Thanks to the bailiff's good offices, the parties are expected to reach an agreement on the amount to be recovered and the terms of payment. If an agreement is reached, the creditor receives from the bailiff an enforceable title that he will be able to use for the recovery of the money owed to him, should the debtor fail to honor the agreement. If the debtor fails to accept the invitation to take part in the simplified procedure or if no agreement is reached by the parties, the bailiff acknowledges the defeat of the procedure, and the creditor will be forced to resort to a contentious procedure for the recovery of his claim.[15]

The advantages of the procedure managed by bailiffs are several. The fact that the whole procedure can be conducted online, simply by filling in a few forms that are easy to access on a secure website, means a considerable savings in terms of time, which is made even more attractive if one keeps in mind that the debtor has only one month to decide whether or not he is willing to agree to take part in the simplified procedure. Another positive feature of the procedure is the reduced cost: when the creditor turns to the bailiff and the procedure begins, a payment of €14.92 is required. If the procedure is unsuccessful, no further fees are due. If, on the contrary, the parties reach an agreement, €30 will be charged to the creditor for the delivery of the enforceable title. Furthermore, a modest amount of money will have to be paid by the creditor as remuneration for the bailiff who managed the procedure: the remuneration is calculated by applying specific ratios to the amount of the recovered credit. In any event, the total cost of the procedure is truly reasonable, as it should always be for the disposition of small claims that are likely to be relinquished if the

13. This procedure was introduced by the decree no. 2016-285 of 9 March 2016 (*Décret n. 2016-285 du 9 mars 2016 relatif à la procédure simplifiée de recouvrement des petittes créances*).

14. The platform (website) is accessible via the following addresses: https://www.petitescreances.fr/ and https://www.credicys.fr/. The website is managed by the National Association of Bailiffs (*Chambre nationale des huissiers de justice*). *See* the order issued by the Ministry of Justice on the establishment of the platform: *Arrêté du 3 juin 2016 relatif à la mise en oevre par voie électronique de la procédure simplifiée de recouvrement de petites créances*, available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032657522&categorieLien=id.

15. *See* arts. R125-1–125-6 of the Code des procédures civiles d'exécution.

legal costs associated with their recovery is bound to exceed their value, which still happens – unfortunately – in some legal systems.

3. SPAIN: *JUICIO VERBAL* AND *MONITORIO NOTARIAL*

For claims whose value does not exceed the threshold of €6,000 the Spanish Code of Civil Procedure (in Spanish, *Ley de enjuiciamiento civil*, hereinafter LEC) provides for a simplified procedure called *juicio verbal* (oral proceeding).[16] As its denomination makes clear, it is a proceeding that is conducted orally before the judge, at least in principle. Better yet, the orality of the procedure was its main feature in the original version of the LEC, passed in 2000. At present, due to the reforms adopted in 2015, the oral character of the procedure appears to be diluted in favor of more formal and written procedural steps.

The complaint lodged by the plaintiff is written, but if the amount at stake does not exceed the sum of €2,000 the Code allows a "succinct demand" (my translation of the Spanish *demanda sucinta*), with the basic information concerning the identity of the parties, the remedy sought and the facts constituting the cause of action. Alternatively, the plaintiff can resort to standardized forms that can be downloaded from the website of the Spanish General Council of the Judiciary. It is worth noting that below the value of €2,000 the assistance of attorneys is merely optional, which makes understandable the reasons why the statement by which the court is petitioned can have a simple outlook or consist in a standardized form.

Before 2015, the defendant's answer to the plaintiff's **complaint** could be presented orally at the hearing. This feature of the *juicio verbal* made sense in the context of a procedure whose tenets were the principles that are normally associated with orality, meaning the principles of concentration and immediacy (the latter suggesting that the judge in charge of deciding the case must be the one in charge of the taking of evidence, too). In spite of that, it was widely accepted that this very feature was prejudicial for the plaintiff, since he was able to gain knowledge of the defenses of his opponent only at the hearing: a surprise effect deemed detrimental to the right of action and defense enshrined in article 24, section 1 of the Spanish Constitution.[17] The reforms of 2015 have radically changed the situation: now the defendant must lodge a written answer in which he is expected to disclose all his

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16. *See* arts. 437–447 of the LEC. On the *juicio verbal*, *see*, for instance, José Garberí Llobregat, El nuevo juicio verbal En la Ley de Enjuiciamiento Civil (Bosch 2015); A. José Vélez Toro, *El juicio verbal y la tutela judicial efectiva: Desajustes del modelo establecido en la Ley de Enjuiciamiento Civil*, 9 Revista de Paz y Conflictos, 263-96 (2016).
17. Art. 24, sec. 1 reads: "Every person has the right to obtain the effective protection of the Judges and the Courts in the exercise of his or her legitimate rights and interests, and in no case may he go undefended." This is the official translation into English of the Spanish Constitution of 1978, available at [http://www.congreso.es/constitucion/ficheros/c78/cons_ingl.pdf].

defenses. As for the plaintiff, if the value of the claim does not exceed the amount of €2,000 and therefore the assistance of an attorney is not mandatory, the defendant, too, can prepare his answer relying on a standardized form to be filled in.

Another far-reaching change brought about by the reforms of 2015 is the fact that the hearing will take place only insofar as the parties request (or, at least one party requests) the holding of the hearing. Therefore, the possibility exists that if the parties waive their right to a hearing, the proceeding will end up being exclusively written. Of course, the mutation of the *juicio verbal* into a written proceeding, lacking the 'event' that was considered its most important feature, that is, the hearing (*vista* in Spanish) devoted to the clarification of the factual terms of the dispute, the taking of evidence and the final arguments of the parties, seems almost a contradiction in terms. In spite of that, the text of the relevant rule is unambiguous where it provides that if neither party requests a hearing nor does the judge deem it necessary, the judgment on the case will be rendered immediately, presumably on the sole base of the plaintiff's complaint and the defendant's answer, without any further exchange of pleadings or procedural steps.[18] At the same time, it is hard to deny that for small claims, and especially for those that, due to their limited value, can be litigated by the parties in person, a written procedure that can be conducted simply by filling in ready-made forms is probably the best course of action. After all, even the ESCP, which is supposed to be the archetype of a simplified procedure aimed at granting access to justice in expedited and inexpensive ways, is designed as "essentially a written procedure. Oral hearings should only be held exceptionally where it is not possible to give the judgment on the basis of the written evidence or where a court or tribunal agrees to hold an oral hearing upon a party's request."[19]

Returning to the Spanish *juicio verbal*, if the hearing does take place, the LEC contemplates the possibility that the parties inform the judge that they have already reached an agreement or "show their willingness to reach an agreement" (my translation).[20] It is possible, too, that the proceeding is stayed, should the parties express their common intention to attempt mediation. If a settlement is submitted to the judge, he can homologate it, which means to make the agreement an enforceable instrument. If no settlement is reached by the parties either in court or out of court, the procedure will continue with the taking of evidence and a round of final arguments. Afterwards, the judge will issue the judgment, which is subject to appeal, provided that the value of the claim is above the amount of €3,000.[21]

Since 2015, another simplified procedure for the recovery of money claims is in operation. This procedure does not specifically concern small claims, because it is

18. *See*, in particular, art. 438, sec. 4 of the LEC.
19. *See* recital no. 11 of Regulation (EU) 2015/2421, *supra* note 4.
20. *See* art. 443 of the LEC.
21. *See* art. 455, sec. 1 of the LEC.

available for any money claims, no matter what their value is, provided that the claim is uncontested. The procedure, called *monitorio notarial*, is managed by notaries public and, because of that, can be defined as an out-of-court, non-judicial procedure.[22] It does not seem necessary to describe in detail the various steps of the procedure, which begins with an oral application lodged by the creditor upon presentation of the documents necessary to demonstrate that the credit exists "beyond any doubts" (my translation of the Spanish *la deuda … sea indubitada*). The notary will make delivery to the debtor of a formal request to pay the amount due within a short deadline (twenty days). The procedure is successful if the debtor meets with the notary and pays the amount due, keeping in mind that the debtor may appear before the notary for the sole purpose of challenging the claim, which will put an end to the notarial procedure and force the creditor to explore the regular judicial avenues to recover his claim. Furthermore, for the positive outcome of the procedure it is essential that the location of the debtor is known to the creditor, since the notary public is devoid of any powers of investigation as to the debtor's whereabouts. If the debtor does not meet with the notary or shows up, but neither pays nor challenges the claim, the notarial deed attesting the failure of the procedure will work as an enforceable instrument that the creditor will be able to use for the recovery of his credit according to the ordinary enforcement procedures.

The procedure managed by notaries public is quite informal, in view of the fact that the parties do not have to be assisted by their attorneys, and it is deemed the fastest and least expensive one among the different proceedings provided by Spanish law for the recovery of money claims. These very features, of course, are important most of all for small claims even though the odds of a failure of the procedure if the debtor does not pay or is nowhere to be found seem particularly high.[23]

4. ITALY: THE JUSTICES OF THE PEACE

The Italian legal system does not provide for any simplified procedures for small claims. Claims up to the value of €5,000 belong to the jurisdiction of the justices of the peace, who are lay judges placed at the bottom of the judicial pyramid. The problem

22. The procedure is governed by arts. 70 & 71 of the Notarial Law, as amended by the statute on non-contentious jurisdiction adopted in 2015 (*Ley 15/2015, de 2 de julio, de la Jurisdicción Voluntaria*). The text of the Notarial Law (in Spanish) can be accessed at https://www.boe.es/buscar/pdf/1862/BOE-A-1862-4073-consolidado.pdf. On the new procedure, *see*, for instance, J. Bonet Navarro, *Reclamación de deudas dinerarias no contradichas a través de notario (uno instrumento entre la deficiencia y la eficacia)* Revista Ceflegal, no. 190 (noviembre 2016), at 1–38, available at https://www.uv.es/~ripj/obraspdf/Reclamaci%C3%B3n%20deudas%20dinerarias%20no%20contradichas%20a%20trav%C3%A9s%20de%20notario.pdf: J. Banacloche Palao, Los Nuevos Expedientes y Procedimientos de Jurisdicción Voluntaria. Análisis de la Ley 15/2015, de 2 de Julio 259–62 (2015).

23. For this opinion, *see* R. Jan-Sánchez, *Small Value Claims and Digital Justice in Spain: Cost and Efficiency*, 2 Int'l J. Procedural L., 250, 260 (2017).

is that their jurisdiction shoots up to €20,000 for claims concerning the recovery of damages caused by traffic accidents.[24] Therefore it would be incorrect to identify the offices of justices of the peace as the small claims courts of Italy, also keeping in mind that whatever the amount at stake is, the procedure stays the same, with no simplified features for claims whose value is limited. It is true that below the threshold of €1,100 the parties can litigate in person,[25] but this is the sole saving grace of a procedure that is only a 'variation on the theme' of the ordinary procedure before the courts of first instance, whose rules apply insofar as the Code of Civil Procedure does not dictate any special regulations.

The future does not look bright for small claims in Italy. According to a statute that was passed in 2017, but will enter into force in 2021, the jurisdiction of the justices of the peace will increase dramatically, reaching the amount of €30,000 or €50,000 depending on the cause of action of the claim.[26] It is true that what makes a claim 'small' can vary according to an array of factors, but nobody can deny that a claim worth tens of thousands of euros is anything but a small claim. In any event, the future reform will increase the jurisdiction of justices of the peace without modifying the rules governing the procedure and, most of all, without providing for a real simplified procedural path for small claims. Another missed opportunity of the prospective reform is the lack of any reference to any easily accessible, standardized forms to be used at least for the cases that the parties can litigate in person.

Presently, the procedure before the justices of the peace is mainly written, even though (at least in theory) some room is left for orality. For instance, the complaint can be lodged verbally, in which case it is recorded by the judge, who also takes care of the serving of the complaint on the defendant.[27] Needless to say, in the contemporary practice and procedure before the justices of the peace oral complaints are unheard of. Similarly, at the hearing the justice of the peace is supposed to question the parties in order to gain first-hand knowledge of the facts in dispute and with a view to attempting their conciliation.[28] This oral dialogue between the parties and the judge is more often than not a mere formality, or a step that the judge can avoid with the certainty that his omission will not be sanctioned.

All in all, one could venture to say that the Italian legislators do not show any interest in providing expedited and inexpensive judicial procedures for small claims, probably with the hope that the many mandatory forms of ADR that are in operation are sufficient

24. Art. 7, secs. 1 & 2 of the Italian Code of Civil Procedure.
25. *See* art. 82, sec. 1 of the Italian Code of Civil Procedure.
26. The reform, which not only raises the financial value of the claims, but also extends the jurisdiction of the justices of the peace to a number of enforcement procedures and a few non-contentious proceedings as well, was adopted by legislative decree no. 116 of 13 July 2017.
27. *See* art. 316, sec. 2 of the Italian Code of Civil Procedure.
28. *See* art. 320, sec. 1 of the Italian Code of Civil Procedure.

to satisfy the need for access to justice for those who will end up relinquishing their claims rather than facing the delays and costs of litigation.[29] According to widespread public opinion, resorting to ADR is anyway better than doing nothing, even though what you get is often less than (or different from) what you really wanted to obtain, due to the fact that you must somehow compromise in order to reach an agreement with your opponent. One may subscribe to this point of view and think that it is just a different form of access to justice, a justice that it is not the traditional, classic one dispensed by the courts of law, but a multifaceted, informal justice that opens up a kaleidoscope of avenues for the vindication of one's rights. All of that may be true, but this author is proud to be old school in her belief that one of the duties of a State is to provide access to the court system without 'outsourcing' the administration of justice.

5. CONCLUDING REMARKS

The closing sentences of an essay on small claims published almost twenty years ago by two American authors read as follows: "Those in the legal community who share our commitment to a civil justice system that truly serves all American should join the reform efforts to expand and improve small claims courts. It really can make a difference."[30] Indeed, the treatment of small claims, whether through specialized courts or simplified procedures or a combination of both, is one of the test benches of a given legal system and its ability to satisfy the needs of ordinary citizens. In this regard, an interesting list of 'general guidelines' for the appropriate resolution of small claims can be found in the same essay mentioned above: no attorneys for the parties; sample forms to be filled in for the complaint of the plaintiff and the answer of the defendant; simplified rules of evidence; a single hearing held within a short time after the suit has been filed; and a decision issued at the closing of the hearing itself or announced within a few days. What seems critical is to avoid that the court in charge of small claims becomes solely "a debt collection agency where businesses routinely turn bad debts into uncontested judgments and individuals rarely participate as anything other than defendants".[31] Furthermore, while the claims may have a limited monetary value, this does not necessarily mean that they deal with uncomplicated and trivial issues. All of this must be taken into account in designing procedures that are simple, fast and inexpensive, but also able to guarantee to individuals the appropriate remedies for their legal problems.

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29. On the development of ADR methods in Italy with a confusing alternation between a mandatory and an optional character of the means that can be chosen to settle disputes, *see* E. Silvestri, *Too Much of a Good Thing: Alternative Dispute Resolution in Italy*, 21 Nederlands-Vlaams tijdschrift voor Mediation en conflict management, no. 4, 2017, at 77-90.
30. J.C. Turner & J.A. McGee, *Small Claims Reform: A Means of Expanding Access to the American Civil Justice System*, 5 UDC L. Rev. [University of the District of Columbia Law Review], 177, 188 (2000).
31. S. McGill, *Small Claims Court: A Vehicle for Social Change and the Case for Equitable Relief*, 26 J.L. & Soc. Pol'y, 90, 90–91 (2017).

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3

Adjudicating Uncertain Facts – The Case for Procedural Legitimacy

Judger des Faits Incertains – Le Cas de la Légitimité Procédurale

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Abstract: This paper is a commentary on the legitimacy of judicial fact-finding in civil litigation. Judges are called on to make authoritative factual findings in conditions of evidentiary uncertainty and the decision-making process cannot guarantee the accuracy of those outcomes. Given the inevitable risk of error, on what basis is the authority of judicial fact-finding legitimate? My exploration into this question leads me to set out a notion of *procedural* legitimacy that bridges two unavoidable aspects of adjudication: evidentiary gaps leading to factual uncertainty/indeterminacy and the need for justifiably authoritative dispute resolution. I show how the notion of procedural legitimacy enables a recognition that the civil litigation system, while inevitably imperfect, is nonetheless legitimate. The nuances of this claim are demonstrated by situating the procedural legitimacy theory within debates about the instrumental and non-instrumental values

of litigation procedures, drawing on the work of Robert Bone and Ronald Dworkin, among others. The notion that procedural propriety in civil litigation systems is key to maintaining legitimate judicial outcomes gestures towards the important role that legal players have in ensuring adjudicative legitimacy. As such, this paper serves as a call on all legal actors, whether practitioners, policy-makers, academics or adjudicators, to reflect deeply on their role in ensuring that cases are decided with procedural integrity because the legitimacy of Canadian civil litigation depends on it.

Key words: Civil adjudication. Civil litigation. Fact-finding. Procedural legitimacy. Procedural theory

Key words (French): Jugement Civil. Litige civil. Éstablissement des fait. Légitimité Procédurale. Théorie procédurale

INTRODUCTION

The foremost question for resolving most civil legal disputes is 'what happened?' Almost invariably, the events that led to the quarrel are uncertain, and ascertaining 'what happened?' requires speculation. Still, the dispute must be resolved, and that resolution is authoritative. My aim in this paper is to comment on why, and on what basis, judicial outcomes are justifiably authoritative, given the uncertain nature of fact-finding. In academic contexts, adjudicative legitimacy is usually considered from the perspective of whether a judge appropriately defined the applicable law, but as trial judges and lawyers would easily attest, so often, it is not the law at issue – it is the facts. This paper centralizes the judicial task of fact-finding and approaches adjudicative legitimacy from that important, yet under-explored starting point. My analysis results in recognizing the vital role of procedural propriety in ensuring legitimate judicial decisions of fact.[1] Below, I expound that position and demonstrate the importance of recognizing it. An implicit theme that runs through the argument and analysis presented throughout this paper is the invaluable role of lawyers and judges in maintaining the legitimacy of the civil litigation system, as it is these key players who are in the privileged position of being able to maintain and uphold procedural integrity.

In Part One, I start by posing a descriptive question – what constitutes valid fact-finding? My consideration of that question highlights the tension between the need for

1. I note at the outset that my concern in this paper is to demonstrate that procedural propriety is one among other necessary conditions of legitimate adjudication. Other necessary conditions may include the propriety of the substantive laws, and the substantive propriety of procedural rules as well. For instance, a procedural rule that prejudices one gender or race would clearly not lead to acceptable adjudicative outcomes in Canadian society. But my goal in this paper is not to comment on the appropriateness of particular procedural rules. My purpose is to highlight the importance of procedural propriety as a crucial element of legitimate adjudication, and demonstrate the significance of that claim in its own right.

authoritative, effective dispute resolution and the inevitability of factual uncertainty or indeterminacy in adjudication. This discussion yields my basic observation that accurate fact-finding is not a necessary pre-requisite for valid judicial fact-finding, and conversely, that procedural propriety is.

It is important to clarify at the outset that the terms 'valid' and 'legitimate' are used often in this paper, and they are distinct, though related. The term 'legally valid,' in my conception, denotes only the descriptive conclusion that when procedural integrity is maintained an outcome is valid in law. Legal validity does not imply that an outcome is necessarily just or good or desirable – it means only that it constitutes law. Having legal validity does, however, come with an important implication: when an outcome is legally valid, it is authoritative in the sense that it is broadly acquiesced as final, binding, and even coercively enforceable. I contend that since law must be authoritative in that way in order to be meaningful at all, it must also be justified. That is, there must be a justification for the fact that having legal validity means a societal norm is permitted to be authoritative and enforceable in the community. That justifying reason is what I refer to here as 'legitimacy.' When a legal outcome is legitimate, therefore, it has some sort of justifiability.

Since it is legal validity itself that brings authoritative implications, I reason that whatever gives rise to legal validity must *also* underpin the justifiability of that outcome's authority. Accordingly, if legal validity makes judicial outcomes (and the underlying factual determinations) authoritative, and procedural propriety grounds the legal validity of the factual findings, then procedural propriety must be a necessary characteristic of their legitimacy as well. This is the line of reasoning that leads to the conclusion that the framework for legitimate judicial fact-finding must have a fundamentally procedural character. Part One of this paper concludes, therefore, with two observations: First, that valid adjudicative fact-finding *requires* legitimacy, and second, that such legitimacy depends on the *processes* of resolving factual disputes – how was the evidence admitted, how was it evaluated, was the standard of proof appropriately employed, and so on.

Next, I discuss my agreement and disagreement with various ideas about the harms that result from factual inaccuracies, and the role that procedure plays in rectifying those harms. Through that discussion, I indicate the normative value of procedural legitimacy in fact-finding: what are the limits of procedural legitimacy, and what must it achieve in order to ensure acceptable civil adjudication.

PART 1. UNDERSTANDING ADJUDICATIVE FACT-FINDING

A. Introducing the Fact-Finding Tension

Almost any successful legal action depends on establishing the relevant facts as defined by the governing legal principles. One of the primary tasks of the courts is to

determine whether the facts that would give rise to a cause of action are established. The value of accurate determination of the relevant factual circumstances is obvious. But the adjudicative process cannot guarantee accuracy in fact-finding - it is impossible to infallibly know what happened and what will happen.[2]

Evidentiary gaps and factual uncertainty have a number of causes. First, there is the practical issue that adjudicative claims arise out of events of the past, so determining what happened cannot simply be observed. Rather, it has to be inferred based on whatever fragments of evidence are available and presented to the court. The available evidence may be scarce to begin with, there may be a lack of competent witnesses in injury claims and evidence may deteriorate over time.[3] Moreover, since adjudication requires relative efficiency to maintain its utility, waiting for additional evidence to become available may not be feasible.

Along with these practical issues, some legal principles prevent judicial access to relevant evidence in several ways. First, adversarial dispute resolution entitles parties to present evidence of their choice and binds decision-makers to make decisions on the basis of the evidence presented. The adjudicator is generally not at liberty to collect their own relevant information.[4] This does not invariably contribute to the risk of inaccuracy, but it demonstrates that commitment to the adversarial process can outweigh the commitment to accuracy. Similarly, legal admissibility rules also restrict what might otherwise be relevant evidence in order to protect some other legal principle. For instance, evidence subject to legal privilege is not admissible, even

2. Jerome Frank captures this thought succinctly in his chapter title "Facts and Guesses," in *Courts on Trial – Myth and Reality in American Justice* (New Jersey: Princeton University Press, 1973). Later, he comments that, "Guessing legal rights, before litigation occurs, is, then, guessing what judges or juries will guess were the facts, and that is by no means easy. Legal rights and duties are, then, often guessy, if-y" in *Courts on Trial* at 27.
3. In Walter Bloom and Harry Kalven Public Law Perspectives on a Private Law Problem – Auto Compensation Plans," (1964) 31(4) U Chicago L Rev 641 at 647, the authors note that some people have questioned the very viability of tort law for adjudicating injury claims arising out of motor vehicle accidents on the basis that evidentiary problems culminate such that the "actual trial involves an imperfect and ambiguous historical reconstruction of the event, making a mockery of the effort to apply so subtle a normative criterion to the conduct involved." Larry Laudan has made the same point in the context of criminal proceedings. Discussing the causes of evidentiary gaps in criminal trials, Laudan notes, "[the crime] is now in the past. What survive are traces of remnants of the crime. These include memories of the participants and eyewitnesses and physical evidence of the crime…. The police will come to find some, but rarely all, of these traces." Larry Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (Cambridge, New York: Cambridge University Press, 2006) at 16.
4. Michael Bayles makes this observation in "Principles for Legal Procedure," (1986) 5(1) Law & Phil 33 at 37: "Courts have limited investigative powers. At best, they can investigate matters relating to the specific case before them. They do not have the power to conduct a general investigation into, for example, business practices in an industry. In the common-law system, the burden of amassing and presenting evidence rests with the parties" [Bayles, "Principles for Legal Procedure"].

if the privileged evidence would reduce the factual uncertainty.[5] Moreover, some legal principles reflect a commitment to an efficacious dispute resolution system by prioritizing the finality of outcomes, even in instances where factual uncertainties exist. Rules around the introduction of fresh evidence on appeals are an example. Where a party wishes to introduce new evidence during an appeal of an action,[6]

> the onus is on the moving party to show that all the circumstances 'justify making an exception to the fundamental rule that final judgments are exactly that, final.' (Reference removed). In particular, the moving party must show that the new evidence could not have been put forward by the exercise of reasonable diligence at the original proceedings.

These comments illustrate the principle that once a fair trial has occurred, the outcome is legitimately final, and ought to be respected as such. While there may be justifiable reasons to re-open legal actions and even factual determinations, the efficacy of the adjudicative process would be significantly compromised if it was not the norm to accept judicial outcomes, including the underpinning factual findings, as final, even though the evidence presented to the court cannot be guaranteed to be complete.

In short, adjudication occurs in conditions of inevitable factual uncertainty, and that condition must be balanced against the need for an effective dispute resolution system. An accurate appraisal of the facts is necessary in order to ensure that the resolution of disputes accords with substantive legal principles. As Robert Summers puts it, "without findings of fact that generally accord with truth, the underlying policy goals or norms of the law could not be served."[7] The importance of accuracy in fact-finding is undeniable, yet accuracy is impossible to guarantee. Even so, for the administration of law to be meaningful, the adjudicative system must provide legally valid outcomes that constitute final, authoritative resolutions to legal disputes. On

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5. For a discussion of the evidentiary principles of privilege, see David Paciocco and Lee Stuesser, *The Law of Evidence* Revised 5ed, (Toronto: Irwin Law Inc., 2008) at 7 and for a discussion focusing on procedural aspects of privilege principles, see Janet Walker and Lorne Sossin, *Civil Litigation*, (Toronto: Irwin Law Inc., 2010) at chapter 9.
6. *Mehedi v 2057161 Ontario Inc* 2015 ONCA 670 (CanLii) at 13. *In 671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 (CanLII), [2001] 2 SCR 983, the Supreme Court accepted (at para 20 and 64), the test set out in *Scott v Cook*, [1970] 2 OR 769, for presentation of fresh evidence on appeal: First, would the evidence, if presented at trial, probably have changed the result? Second, could the evidence have been obtained before trial by the exercise of reasonable diligence?
7. Robert Summers, "Formal Legal Truth and Substantive Truth in Fact-Finding – Their Justified Divergence in Some Particular Cases" (1999) 18 Law & Phil 497 at 498 [Summers, "Formal Legal Truth"]. Alex Stein makes similar remark in *Foundations of Evidence Law* (Oxford, New York: Oxford University Press, 2005) at 2: "accuracy in fact-finding is a logical pre-requisite to proper administration of the controlling substantive law"; and at 10: "Accuracy in fact-finding…is a straightforward understandable objective of the law. Getting the facts right is a prerequisite to proper determination of the litigated entitlements and liabilities."

what basis, then, are adjudicative factual determinations legally valid? The first step to answering that question is to discern how the tension between factual uncertainty and the need for final and binding resolution of disputes is handled.

B. Valid Fact-Finding: Resolving the Fact-Finding Tension through Process

The tension between the need for a resolution to a legal dispute and the reality that factual accuracy cannot be guaranteed is reconciled by enabling facts to be found on a 'less than certain' standard of proof.[8] In civil cases, facts are proven on the balance of probabilities.[9] If it is more likely than not that the defendant's negligence caused the plaintiff's injury, for instance, then causation is taken to be a legal certainty – it is established as a 'legal fact.'[10] In this way, factual uncertainty morphs into legal certainty – relevant factual conditions are legally established, and the governing law is applied to those facts, resulting in a certain legal outcome – one that is authoritative and enforceable.[11]

Legal fact-finding, therefore, contemplates the chance that an event found as a legal 'fact' may not be a fact in reality. Still, the applicable legal rules will be applied on the basis that the legal facts are true. [12] This creates the potential for situations where,

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8. I note that standards of proof are also mechanisms of error distribution. A balance of probabilities standard ensures that the risk of erroneous outcome is equally distributed between the parties; the criminal 'beyond reasonable doubt' standard ensures that the accused faces a far lesser risk of an erroneous outcome. For my purpose above, this aspect of the standard of proof has less relevance. Above, I have highlighted that the standards of proof set the degree of certainty which is required to establish legal proof.
9. My argument here does not require a discussion of why the balance of probabilities standard of proof is acceptable. The crucial point is that fact-finding occurs on some standard of proof that is less than certainty. As a result, there is inevitable potential for legally valid, yet inaccurate outcomes. My argument depends only on the existence of a risk of inaccuracy implicit in adjudicative fact-finding. How much risk is tolerable is an important question, but that discussion is not required for the development of the argument at this stage.
10. I use the term 'legal facts' to denote facts that are established for the purpose of making a legal determination, whether or not the facts are actually true.
11. Of course, judicial outcomes can be appealed, but that does not diminish the authoritative nature of adjudicative outcomes. This is especially true in the fact-finding context, because appellate courts afford the highest degree of deference to the trial judge's fact-finding. This was most recently reaffirmed in *Benhaim v St-Germain*, 2016 SCC 48 at paras 36-39. Another stark testament to the recognition of the authoritative status of a valid judicial outcome is that civil trial decisions remain, by default, enforceable even pending appeal. See for example: R. 90.41 of *The Nova Scotia Civil Procedure Rules* and Rule 63 of the Ontario *Rules of Court*, which expressly hold that filing an appeal does not automate a stay of proceedings of the trial decision being appealed. Rule 14.48 of the *Alberta Rules of Court* and Rule 9 of the *British Columbia Rules of Court,* similarly hold that a court order would be required in order to stay the enforcement of a trial decision pending an appeal.
12. See Summers, "Formal Legal Truth," *supra* note 12, for an explanation of the potential instances where "truth" and "formal truth" (which distinction I refer to as "facts" versus "legal facts") diverge by the very design of the legal system, and the rationales for that divergence. In this paper,

Civil Procedure Review. v.10, n.2: mai.-ago., 2019.
ISSN 2191-1339 – www.civilprocedurereview.com

for example, a plaintiff is negligently injured, but the available evidence is insufficient to meet the standard of proof for a requisite factual element, so despite the violation of the plaintiff's legal rights, the defendant will not be liable to compensate her. Or, evidence may suggest that a defendant's negligence was more likely than not the cause of a plaintiff's harm, so liability is established, but there remains a significant risk that the defendant's negligence was not, in fact, the cause of the harm at all. In civil cases, through our system of fact-finding on a balance of probabilities standard of proof, we tolerate up to a 50% risk of such factually erroneous outcomes.

The implication that can be drawn from our method of fact-finding is that the validity of factual determinations is not contingent on their accuracy. Rather, we accept the validity of a determination of fact when it results from appropriate adherence to adjudicative procedures. Despite their potential incongruence with factual reality, the hypothetical outcomes noted above are acceptable because of their procedural propriety. That is, when parties present evidence in accordance with adversarial procedures including admissibility rules, and when the trier of fact relies on properly admitted evidence and weighs that evidence against the requisite standard of proof, the factual finding, along with the ultimate legal outcome, is acceptable, even if we do not know whether it is accurate, and sometimes, even if we know it is inaccurate.

Conversely, a legal outcome would be considered invalid in the event that the process of fact-finding is compromised. If, for instance, a lawyer presents inadmissible evidence and a trial judge relies on it, or misconstrues the applicable standard of proof, the resultant factual determination is, of course, not valid. That is true even if the factual finding is ultimately accurate. To give a simple example, if a judge erroneously applies the criminal 'beyond reasonable doubt' standard of proof in a civil claim for compensation for a negligently inflicted injury, the factual finding she arrives at may be accurate, but the outcome cannot be considered valid due to the procedural error of applying the wrong standard of proof.

So far, two observations regarding the legal validity of a judicial determination of fact have been presented. First, that fact-finding is valid on the basis of procedural propriety, and second, the converse, that a factual finding may be invalid on the basis of procedural impropriety. That is, outcomes that bear a risk of inaccuracy can be acceptable on the basis that fact-finding procedures were adhered to. And a factual finding can be unacceptable on the basis that the procedures of fact-finding were not adhered to, even if that factual determination is accurate. The crux of these observations is that the validity of judicial fact-finding does not depend on the ultimate accuracy of each determination; it depends on its procedural propriety.

Summers concludes that "...the concept of 'formal' legal truth, in those cases in which it diverges from substantive truth, is not necessarily something to be disparaged at all," paving the road to my inquiry into the requisite features that make 'formal legal truth' legitimate.

The conclusion that legal validity depends on the proper application of legal procedures is a descriptive one, but there are important normative implications contained within it. This is because when judicial outcomes are legally valid, they are authoritative in the sense that litigants and the society more generally acquiesce in the outcomes as non-optional, and permissibly enforceable. [13] If they did not, adjudicative outcomes would have no utility. Being authoritative in this way, I contend, judicial outcomes, including their factual determinations, require justification, which serves as a reason *why* legally valid outcomes are permissibly authoritative and *why* litigants, lawyers, and community members can agree to that. I refer to that justificatory reason as legitimacy.[14]

I reason that since legal validity implicates legal authority, and since legal authority must be justified, or, legitimate, then whatever gives rise to legal validity must *simultaneously* give rise to legitimacy as well. [15] On that basis, I hold that not only is the validity of judicial fact-finding grounded in procedural propriety, but that its legitimacy is too.

One upshot of this conclusion is that just as factually inaccurate outcomes can be legally valid, they can also be legitimate because neither their validity nor their legitimacy depends on their accuracy. Concluding that a factually inaccurate outcome is nonetheless legitimate (and therefore justifiably enforceable) would seem uncomfortable because it seems unjust. However, a generalized commitment

13. As Joseph Raz provides, "[l]aw is a structure of authority, and central to its functioning is the interplay between legislators and other authorities on one side, and the courts, which are entrusted with delivering authoritative interpretations of its norms, on the other side. Judicial interpretations are authoritative in being binding on the litigants, whether they are correct or not," in Joseph Raz, "Interpretation: Pluralism and Innovation," in Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford: Oxford University Press, 2009) at 320 [Raz, *Between Authority and Interpretation*]. I note that holding that judicial outcomes are authoritative does not mean that every individual in a society will always accept the authority of every, or even any judicial outcome. But to the extent that, as a society, we accept the validity of the Canadian political system and its outcomes, so we also generally-speaking, accept that judicial outcomes are authoritative. I also note that the concept of authority and its relation to law and legal legitimacy can be complex. Here, I rely only on the uncontroversial descriptive reality that when a rule, including a judicial outcome, is found to have legal validity, that outcome is final and binding on the litigants.
14. This understanding of legitimacy resonates with Jurgen Habermas's approach when he contends that legal norms must "*deserve* legal obedience. Such legitimacy," he holds, "should allow a law-abiding behavior that, based on respect for the law, involves more than sheer compliance." (Emphasis in the original.) Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, (Cambridge, Mass: MIT Press, 1996) at 198 [Habermas, *Between Facts and Norms*].
15. Compare this with Dan Priel, "The Place of Legitimacy in Legal Theory" (2011) 57 McGill LJ 1 at 6 who suggests that while normativity and legitimacy are related, they address two different issues: "the question of normativity asks, 'how are legal obligations possible?' whereas the political question of legitimacy asks 'what political conditions need to be in place for law to bind those subject to it?'" In my conception, these questions are inseparable, as I argue further below, drawing especially on the legal theories of Lon Fuller and Jurgen Habermas.

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ISSN 2191-1339 – www.civilprocedurereview.com

that factual inaccuracy can delegitimize an adjudicative outcome and revoke the acceptability of its authority is unsustainable. If subsequent awareness of factual error could delegitimize a legal outcome resulting in a revocation of the justifiability of its authority, then there would be no basis for considering judicial dispute resolution authoritative at all, because there is almost invariably a risk of factual error. When analyzing the value of the civil litigation process, it is important not to minimize or ignore its inevitable frailties. In my view, perfection (in the sense of eradicating the risk of inaccuracy) is unattainable, but legitimacy is not. This recognition clears the way for the claim that both the validity and the legitimacy of adjudicative outcomes must be sourced in the virtues of the process that gave rise to that outcome. But the uneasiness that naturally accompanies inaccurate, yet legitimate judicial outcomes must be addressed soundly. Below, I respond to questions about the injustice that may be associated with factual inaccuracies from the perspective of process-based legitimacy.

I start with Robert Bone's proposal in "Procedure, Participation, Rights"[16] There, he suggests that the answer to the adjudicative tension caused by factual uncertainty can be found through a re-conceptualization of 'injustice' in relation to inaccurate factual determinations. His response is premised on a comingling of substantive rights and procedural rights.[17] He suggests that the processes of administration and enforcement of laws deliberately limit the substantive rights that the laws provide for. In the torts context, for instance, while a plaintiff has a substantive right to compensation for negligently inflicted injury, that right is contingent on the procedures of adjudicating the plaintiff's claim. That process of adjudication includes a risk of factual error. This line of reasoning prompts the following comments from Bone, illustrating how the interpretation of the interplay between substance and procedure can affect the existence of a harm:[18]

> Has a moral harm occurred if the plaintiff is unable to sue successfully because of judicially-imposed procedural limits? The answer depends on the best interpretation of what the legislature did when it created the substantive right. One possible interpretation is that the legislature meant to adopt a substantive right conditioned on appropriate procedural implementation. If this interpretation is correct, then the right to compensation has an error risk already built in, so it is difficult to see how moral harm can occur when that risk materializes and a deserving plaintiff loses.

Accordingly, Bone advises that when an outcome is either deliberately factually erroneous, or is a result of procedural impropriety, it may be appropriate to consider

16. Bone, "Procedure, Participation, Rights," *supra* note 1.
17. *Ibid* at 1022.
18. *Ibid*. Note that the phrase "moral harm" that Bone employs here is borrowed from Dworkin, and is synonymous with the term "injustice factor," as I discuss further below.

the outcome to be an injustice, but where there is an innocent factual error, in the sense that all the appropriate procedures were adhered to but a factually erroneous outcome was rendered, there is no obvious injustice. [19]

Because Bone treats substantive rights and the processes of making factual determinations to resolving disputes about those rights as inextricable, he can deny the injustice that occurs when a person who is entitled to a certain legal outcome in principle is refused that outcome due to factual error. For me, this denial constitutes an avoidance of the uncomfortable reality that an adjudicative result that denies a particular outcome when it is deserved in principle *does* bear an injustice, in the sense that a litigant's legal right was not vindicated, even if there was no error in the process of adjudication, so the outcome is legally valid. As Ho puts it, "the person against whom a verdict is wrongly given is the victim of an injustice; it misses an essential force of her grievance to dismiss her plight as a mere misfortune."[20] And as Dworkin holds, that injustice factor exists whether or not it ever comes to light that a factual error occurred, and even if the error was wholly innocent.[21] In this respect, I agree with Ho and Dworkin: factual errors do result in a certain type of injustice - when injustice is understood as the failure to uphold a legal right.[22] And, importantly**,** it is the inevitability of that possibility that gives rise to the normative work accomplished by a procedural legitimacy framework.

Bone's idea of conceptually comingling substantive rights with the procedural rules of adjudication, which contemplate the risk of inaccuracy, de-problematizes factual uncertainty. It implies, in my understanding, that procedural correctness is synonymous with justice (provided that the procedures themselves are acceptable) because it denies the injustice that occurs when a factual error results from correct

19. Bone, "Procedure, Participation, Rights," *supra* note 1 at 1021-2.
20. Ho, *Philosophy of Evidence Law, supra* note 87 at 65.
21. Dworkin, "Principle, Policy, and Procedure," *supra* note 59 at 81.
22. This is not to say that factual inaccuracy is the only way that an adjudicative outcome can be rendered unjust, and even outcomes where the factual determinations were perfectly accurate may nonetheless be unjust. For instance, if a judge misapprehends the law, and thereby applies the wrong legal principle to an accurate set of facts, that outcome can be said to be unjust. Injustice can also occur when, for instance, a judge accurately determines that a fugitive slave is legally property of some owner and decides, in accordance with the law, that the slave must be returned to the owner. Here, one may argue that factual inaccuracy may have generated a more just result. But it is not the factual inaccuracy that would generate a more just response; the more just response would be generated because the factual inaccuracy would cause an unjust law to go unapplied. Injustice can occur as a result of unjust legal principles, even absent factual inaccuracy. But given the centrality of the legitimacy of factual determinations in this project, my focus is on the type of injustice that occurs through factual inaccuracy, not the injustices that occur due to unjust substantive laws or judicial misapprehension of the laws. Those circumstances do lead to improper adjudicative outcomes, even if the underlying fact-finding was accurate. Addressing those types of outcomes, and the injustice associated with them, is not central to the procedural legitimacy framework for legitimate fact-finding that I am developing.

adherence to the relevant procedural rules. Bone's approach parallels my purpose of demonstrating the significance of procedural propriety to some extent, but it is not the view I am presenting because it masks the true normative work that procedural propriety accomplishes.

Procedural integrity, in my proposal, grounds adjudicative *legitimacy,* which is the normative basis for the authority of judicial outcomes. This concept of legitimacy must not be confused with a guarantee of justice; rather, the normative work that it achieves is maintaining the integrity of a fallible judicial system that must tolerate a gap between perfect justice (which requires, among other things, factual accuracy) and legitimate adjudicative outcomes (which cannot depend on factual accuracy). We have little choice but to accept that a plaintiff who is entitled to win her claim in principle may not win at trial due to factual error. We may consider that an injustice. Nonetheless, that adjudicative outcome must still be legitimate in order for its authority to be defensible. As Lawrence Solum explains:

> When we know the outcome to be unjust, the justice of the outcome cannot be the source of its legitimacy. This conceptual point has a crucial corollary: only just procedures can confer legitimate authority on incorrect outcomes.[23]

To Solum's point, I add the qualifier that whether we 'know the outcome to be unjust,' is not significant because it is possible that we will never know whether a legal fact is true or not. That is, some relevant facts are inevitably uncertain, and some are simply indeterminate. For instance, where there is a difficulty in establishing causation of an injury due to medical or scientific evidentiary uncertainty, it may never be possible to know for sure whether the defendant's error really did cause the plaintiff's injury, or if some other medical condition caused it. By accepting probabilistic fact-finding, we embrace indeterminacy and the associated risk of inaccuracy and logical consistency requires that we must also be ready to accept the materialization of that risk, whether we know it has materialized or not. It is the *potential* for factually inaccurate outcomes that are nonetheless valid and legitimate that leads to the claim that the legitimacy of adjudicative factual determinations cannot depend on factual accuracy, and are, rather, contingent on procedural merits.

Accordingly, legitimacy bears a hefty normative weight: it gives us the reason that we can assert that a litigant should accept the authority of a valid law, even if she believes or even knows it to be producing a factually erroneous outcome. And the burden of maintaining legitimate adjudication, in light of factual uncertainty, must be borne by procedural propriety.

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23. Lawrence Solum, "Procedural Justice," *supra* note __ at 190. And elsewhere, he states: "The exercise of adjudicative power to bind an individual must be legitimate for the adjudication to be authoritative and, hence, to create content-independent obligations of political morality, to obey judicial decrees, and to respect the finality of judgments." (Solum, "Procedural Justice" at 278).

This leads, of course, to a number of questions. Most broadly, 'on what basis can the fact-finding procedures play their legitimizing role?' Surely, it cannot be the case that just any procedures will do. A flip of a coin, for instance, or an otherwise arbitrary fact-finding procedure, could not capture the rich normative foundations that one must demand of procedural legitimacy. Responses can be grouped into two categories: instrumental approaches and non-instrumental approaches.[24] Instrumental approaches are those viewpoints that perceive adjudicative procedures as a means to achieve particular ends. When such approaches are adopted, efforts to provide principles of procedure are oriented towards the effective achievement of some outcome. In the fact-finding context, the accuracy of the outcome is the central concern. Non-instrumental viewpoints are held by those that perceive adjudication as a process of dispute resolution and for whom adjudicative procedures have (or should have) some inherent or intrinsic value that is independent of the outcome itself. I turn now to situating the idea of procedural legitimacy being developed here among the pertinent aspects of various instrumental and non-instrumental viewpoints in relation to fact-finding.

PART 2. SITUATING AMONG INSTRUMENTAL AND NON-INSTRUMENTAL APPROACHES

Those who hold instrumental viewpoints of adjudication, and particularly adjudicative fact-finding, centralize the relationship between procedures and outcome accuracy. Acknowledging that accuracy cannot be guaranteed, instrumentalists attempt to determine which procedures justifiably manage the risk of inaccuracy by weighing the cost of errors associated with inaccuracy (like the harms associated with a false conviction or a false acquittal in the criminal context, or an inaccurate finding of liability, or inaccurate dismissal of a claim in a civil suit) with the costs of achieving better accuracy, generally assuming that higher accuracy comes at a higher cost.[25]

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24. These categories are referred to differently by different people. For example, Michael Bayles uses the "instrumental" and "non-instrumental" terminology that I adopt here in "Principles for Legal Procedure," *supra* note 8; Robert Bone opts for "outcome-oriented" and "process-oriented" in "Rethinking the "Day in Court" Ideal and Non-party Preclusion" (1992) 67 NYUL Rev 193; Richard B Saphire uses "substantive" and "inherent" in "Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection," (1978) 127 U Pa L Rev 111. Adopting the instrumental and non-instrumental categorization has enabled the most conceptual clarity for me, so I have adopted it here.
25. As Louis Kaplow notes in "The Value of Accuracy in Adjudication" (1994) 23 J Legal Stud 307 at 307, it is usually assumed that higher accuracy comes with higher economic cost, and that assumption seems sound [Kaplow, "Value of Accuracy"]. See Also Richard Posner, "An Economic Approach to the Law of Evidence" (1999) 51(6) Stan L Rev 1477; Richard A. Posner, "An Economic Approach to Legal Procedure and Judicial Administration," (1973) 2 J Legal Stud 399; Richard A. Posner, Economic Analysis of Law, 2nd ed. (Boston: Little, Brown and Co., 1977), p. 429; Gordon Tullock, *Trials on Trial* (New York: Columbia University Press, 1980) at 5-6.

Posner's economic analysis of law, for instance, refers to this type of analysis as the balance between "the cost of erroneous judicial decisions" and "the cost of operating the procedural system."[26] Capturing the central tenet of such cost-balancing based analyses, Kaplow holds that[27]

> [A]ccuracy is a central concern with regard to a wide range of legal rules. One might go so far as to say that a large portion of the rules of civil, criminal and administrative procedure and rules of evidence involve an effort to strike a balance between accuracy and legal cost.

Accordingly, evaluation of adjudicative fact-finding procedures occurs on the basis of whether rules that increase legal costs for the sake of accuracy, and vice versa, are desirable by determining the various harms associated with inaccuracy and comparing it to the costs that come with decreasing the risk of such inaccuracy, making them fundamentally utilitarian models. To give a simplified example, an economic analysis of adjudication may hold that the harm associated with a wrongful conviction is greater than the harm associated with an inaccurate civil claim. This difference in harm would justify the more onerous criminal standard of proof beyond a reasonable doubt compared with the less onerous balance of probabilities standard of proof in the civil context.

Ronald Dworkin has provided one of the most intricate and compelling explanations of why such utilitarian models cannot tell the full story of managing factual accuracy. He explains that these models do not duly account for individual rights protected by substantive law, and offers a theory of managing factual uncertainty that provides two procedural rights that correspond to the rights set out by the substantive law. Still, his approach remains fundamentally instrumental, and is, in my view, an exemplar of instrumental approaches.[28] Setting out his approach enables me to highlight the lessons that it can contribute to the version of procedural legitimacy that I ultimately propose, as well as the points of divergence between my approach and those that are exclusively instrumental.

In *Principle, Policy, Procedure*,[29] Dworkin considers whether a society that provides its subjects with certain rights can be considered 'morally consistent' if it administers those rights through a process that compromises accuracy for the sake of the societal benefit of less costly legal procedures. For instance, if we have substantive rights to not

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26. Richard Posner, Economic Analysis of Law 8th ed. (New York: Aspen Publishers, 2011) at 757.
27. Kaplow, "Value of Accuracy," *supra* note 103 at 307-308.
28. Michael Bayles refers to Dworkin's approach as "'multi-value instrumentalism', that is, an approach that evaluates procedures by seeking to maximize several values" in "Principles for Procedure, " *supra* note 8 at 45.
29. Ronald Dworkin, "Policy, Principle, Procedure" in *A Matter of Principle* (Massachusetts: Harvard University Press, 1985).

be convicted of a crime if innocent, should we also have a right to the most accurate procedures available to determine our innocence? Similarly, in the civil context, tort law provides us with a legal entitlement to be compensated if we suffer a negligently inflicted injury, so should we also have corresponding procedural rights to an accurate determination of whether we suffered an injury and the extent of its damage?[30] In taking up these questions, Dworkin analyzes whether a utilitarian cost-benefit analysis can adequately respond to the dilemma posed by the practical inability of guaranteeing factual accuracy in the adjudicative process. Dworkin starts by introducing what he calls the "cost-efficient society" as follows: [31]

> This society…designs criminal procedures, including rules of evidence, by measuring the estimated suffering of those who would be mistakenly convicted if a particular rule were chosen, but would be acquitted if a higher standard of accuracy were established, against the benefits to others that will follow from choosing that rule instead of a higher standard.

In one respect, Dworkin explains, there is some consistency between the substantive right to not be convicted if innocent and the criminal procedure rules, because although factual errors are permissible, factual errors would not be acceptable if they are deliberate. That is, a person who is known to be innocent cannot be convicted.[32] This society, Dworkin explains, "accepts the risk of innocent mistakes about guilt or innocence in order to save public funds for other uses, but will not permit deliberate lies for the same purpose."[33] But this, for Dworkin, is not enough.

Dworkin's account for why it is not enough begins with a clarification of the nature of the harm that occurs when a factually inaccurate adjudicative outcome is rendered. He explains the impact of inaccuracy by introducing the concept of the "injustice factor" or "moral harm." The injustice factor arises wherever a substantive right, like the right to be free from conviction if innocent or the right to compensation for a negligently inflicted injury, is not vindicated due to factual error:[34]

> Someone who is held in tort for damage caused by negligently driving, when in fact he was not behind the wheel, or someone who is unable to pursue a genuine claim for damage to reputation because she is unable to discover the name of the person who slandered her…has suffered an injustice…

30. Stated in a criminal law context, Dworkin asks, "Does if flow, from the fact that each citizen has a right not to be convicted if innocent, that he has a right to the most accurate procedures possible to test his guilt or innocence, no matter how expensive these procedures might be to the community as a whole?" Dworkin, "Principle, Policy, and Procedure," *supra* note 59 at 72.
31. *Ibid* at 79.
32. *Ibid*.
33. *Ibid* at 80.
34. *Ibid* at 92. This is consistent with my comments above.

This harm arises whether the inaccurate outcome was an innocent mistake or deliberate (though there is greater harm when deliberate inaccuracy occurs).[35] It is an objective harm: it makes no difference whether anyone, including the victim of the injustice factor, knows about it, accepts it, or has any concern whatsoever for it.[36] It exists in addition to the bare harm that comes with an inaccurate outcome – frustration, irritation, even anger or outrage.[37] Dworkin explains that because of its objective quality, the injustice factor cannot be accounted for in a utilitarian cost-benefit analysis because a utilitarian analysis can only capture a manifest harm that is subjectively experienced. [38]

For Dworkin, the existence of the injustice factor grounds the requirement for procedural rights to accuracy. Being rights, these procedural guarantees would trump collective concerns, taking them outside a purely utilitarian justification scheme. That is, certain procedural rights cannot be compromised on the basis of weighing the societal cost of more stringent fact-finding procedures, like less efficient adjudication, against the injustice suffered in the event of inaccuracy. This is because the injustice caused by inaccuracy may not be “suffered” at all, but it exists nonetheless.[39]

Although Dworkin argues that some procedural rights of accuracy in complement to substantive rights are a necessary aspect of an acceptable adjudicative system, he does not advocate the overly onerous guarantee of the most accurate possible adjudicative procedures. A society that absolutely prioritizes adjudicative accuracy, Dworkin explains, would be unable to “devote public funds to amenities like improvements to the highway system, for example, so long as any further expense on the criminal process could improve its accuracy. “Our own society,” Dworkin notes, “does not observe that stricture, and most people would think it too severe.[40]

In furtherance of finding a middle ground between no right to accuracy, and an absolute right to accuracy, Dworkin calls for adherence to two principles of “fair play” that correspond to his general commitment to ensuring a legal system that maintains integrity through assurance of equal concern and respect for legal subjects.[41] These

35. *Ibid*.
36. *Ibid* at 80: “[The ‘injustice factor’] is an objective notion which assumes that someone suffers a special injury when treated unjustly, whether he knows or cares about it, but does not suffer that injury when he is not treated unjustly, even though he believes he is and does care.”
37. *Ibid.*
38. For Dworkin’s more detailed explanation of this point, see generally *Ibid* at 81-84. At 81, Dworkin demonstrates why a society that fixes its adjudicative fact-finding procedures through a utilitarian calculus makes no place for the injustice factor, which exists even when “no one knows or suspects it, and even when – perhaps especially when – very few people very much care.”
39. *Ibid*.
40. *Ibid* at 84.
41. *Ibid*: “I propose the following two principles of fair play in government. First, any political decision must treat all citizens as equals, that is, as equally entitled to concern and respect…. Second, if a

two principles of fair play manifest in Dworkin's proposal as two procedural rights that involve ensuring a coherent scheme for the distribution of the risk of factual errors, and consistent adherence to that scheme.[42]

First, everyone has a right to be subjected to only those procedures that assign the correct level of importance to the injustice factor that may occur as a result of those procedures.[43] Dworkin refers to this as a "background and a legislative right," in the sense that the drafters of the rules of adjudicative procedure must set rules that correctly identify the potential of the injustice factor and its harm.[44] The 'correctness' of such a procedural rule depends on whether it accords with the general scheme of risk tolerance in a society. This procedural right calls for a legal system to maintain an internal integrity in terms of its theory of risk distribution. Consider, for example, a procedural rule that calls for a balance of probabilities standard of proof when adjudicating negligently inflicted injuries. If a court or legislator then introduced a procedural rule that reduced the standard of proof to a *de minimis* standard if the claim is against a doctor, then a defendant doctor may argue that such a rule violates her first procedural right, because it does not cohere with the broader risk allocation scheme within the society which is more protective of the medical profession.

Second, Dworkin suggests that people are entitled "to procedures consistent with the community's own evaluation of moral harm embedded in the law as a whole."[45] This is a right of equal and consistent treatment. "It holds the community to a consistent enforcement of its theory of moral harm, but does not demand that it replace the theory with a different one...." [46] Dworkin explains this as a "legal right. It holds, that is, against courts in their adjudicative capacity."[47] This is the application aspect of Dworkin's rights.[48] When a litigant asserts this right, she does not question

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political decision is taken and announced that respects equality as demanded by the first principle, then a later enforcement of that decision is not a fresh political decision that must also be equal in its impact in that way. The second principle appeals to the fairness of abiding by open commitments fair when adopted – the fairness, for example, of abiding by the result of a coin toss when both parties reasonably agreed to the toss."

42. The two rights that Dworkin provides are paralleled in his broader theory of integrity: "We have two principles of political integrity: a legislative principle, which asks lawmakers to try to make the total set of laws morally coherent, and an adjudicative principle, which instructs that the law be seen as coherent in that way, so far as possible." Dworkin, *Law's Empire*, *supra* note 44 at 176.
43. Dworkin, "Principle, Policy, and Procedure," *supra* note 59 at 89 in the criminal context, and at 93 for the application in the civil context.
44. *Ibid* at 93: "Everyone has the right that the legislature fix civil procedures that correctly assess the risk and importance of moral harm, and this right holds against the courts when these institutions act in an explicitly legislative manner…."
45. *Ibid* at 89.
46. *Ibid* at 90.
47. *Ibid* at 93.
48. *Ibid* at 93: "It is a legal right to the consistent application of that theory of moral harm that figures in the best justification of settled legal practice."

Civil Procedure Review. v.10, n.2: mai.-ago., 2019.
ISSN 2191-1339 – www.civilprocedurereview.com

the substance of the procedural rules, but she demands a consistent application of them. She could assert this right when, for instance, her expert evidence is improperly deemed inadmissible, or if the trier of fact fails to properly assess the reliability of expert evidence, or when the wrong standard of proof is applied. In such cases, the litigant does not claim that the admissibility rules or the standards of proof are improper; rather, she demands that she be subjected to those procedural rules consistently as an equal member of society.

These rights, Dworkin concludes, "provide a middle ground between the denial of all procedural rights and the acceptance of a grand right to supreme accuracy."[49] I find the concept of the injustice factor associated with factual inaccuracy - even when that inaccuracy is innocent - helpful and accurate. And the move to introduce procedural rights on the basis of the inability to guarantee factual accuracy is in keeping with my theme of highlighting the significance of procedural propriety. In addition, through the idea that adherence to procedural rights enables and maintains equal concern and respect for litigants, Dworkin's theory provides at least some grounding for the idea that procedural integrity can provide legitimacy to the authority of factual determinations that arise through a fact-finding system that accepts some risk of inaccuracy.

But there are unaddressed tensions in Dworkin's proposal that stem, I suggest, from his fundamentally instrumental approach to adjudication. Since his central focus is the potential inaccuracy of the ultimate factual determination, the procedural rights that he advocates are exclusively oriented towards the fair management of the risk of that inaccuracy. In my view, this approach fails to assign enough normative value to adjudicative procedures in their own right, independent of any relationship to outcome accuracy. While Dworkin's procedural rights provide helpful guidance and can play a crucial role in the procedural legitimacy proposal, they cannot suffice on their own to ground the legitimacy of adjudicative fact-finding. That is, Dworkin's procedural rights may be necessary conditions of legitimate judicial fact-finding procedures, but they are under-inclusive.

The problem with Dworkin's proposal becomes evident when one tries to reconcile the tension between the rights provided by the substantive law (like the right to be compensated if negligently injured) and procedural rights. The procedural rights he articulates are necessarily somewhere between "the extravagant and nihilistic" [50] – a society cannot reasonably assure its citizens of a right to the most accurate possible fact-finding procedures and still maintain expeditious or cost-effective dispute resolution.[51] Accordingly, Dworkin's procedural rights guarantee fair distribution of the risk of

49. *Ibid*. Dworkin explains his aim in "Principle, Policy, and Procedure" as seeing "whether a middle ground can be found between the impractical idea of maximum accuracy and the submersive denial of all procedural rights" at 77.

50. Dworkin, "Principle, Policy, and Procedure," *supra* note 59 at 78.

51. *Ibid* at 78.

factual error that duly recognizes the harm that accompanies inaccuracy.[52] Being risk distribution rights, these procedural guarantees contemplate the potential for factual inaccuracy. Should that risk manifest, the injustice factor would exist, because that moral harm arises even in instances of innocent errors. Therefore, in my reading, the injustice factor associated with factual inaccuracy can occur even if the procedural rights that Dworkin advocates are fully respected.

Dworkin seems to be suggesting that adherence to the procedural rights would justify a system that must accommodate potential injustice arising from inaccuracy. Presumably, the procedural rights can bear that justificatory role because they ensure that litigants are treated equally and non-arbitrarily in conditions of inevitable uncertainty. If this is a correct reading, then Dworkin's argument is that the acceptability of judicial fact-finding depends on the maintenance of procedural rights, since even outcomes that bear a potential injustice of factual error can be accepted on the basis of adherence to the procedural rights. The logical extension of this argument is that it is not the vindication of the substantive right that gives legitimacy to the outcome – rather, that legitimacy comes from the vindication of the procedural rights. That means that the legitimacy of *accurate* judicial factual decisions must *also* depend on the observance of procedural rights.

Suppose, for instance, that a judge applies the criminal standard of proof in a civil case and finds against the plaintiff. The outcome that she renders is factually accurate, but clearly, the procedural rights have been violated. Presumably, this outcome is unacceptable in Dworkin's proposal because of the procedural rights violation, even though the outcome is accurate. Holding otherwise would be to hold that if an outcome is factually accurate, a violation of procedural rights becomes irrelevant, and factual accuracy could be pursued at the expense of the procedural rights, on the basis that the ends justify the means.

Accordingly, in order for a procedural theory of legitimate fact-finding to be workable, procedural guarantees must ground the acceptability of *all* factual determinations, whether those determinations are ultimately accurate or inaccurate. As such, a procedural theory for legitimate factual determinations must be able to accomplish two things: it must provide a reason to accept factually inaccurate outcomes (which Dworkin's rights arguably can do); but it must also give us a clear, principled reason to reject factually accurate outcomes where a procedural compromise has occurred. The procedural rights that Dworkin articulates, while helpful, cannot fully accommodate the second requirement. That is because his procedural rights provide

52. Dworkin provides an intricate conceptual argument for why a right to the most accurate possible procedures is not required for an acceptable adjudicative system beyond the practical problem of the impact of such a commitment on societal resources. His comments in that respect are not significant for my critique here, because here I depend only on the uncontroversial fact that Dworkin does not, of course, advocate for the most accurate possible procedures.

for the assurance of consistent and coherent treatment only in terms of managing the risk of outcome inaccuracy. This restricts the extent of their promise of providing equal concern and respect, as illustrated in the following two examples.

Suppose it is decided that Canadians who are visible minorities will not be permitted to present their own evidence in civil actions, and instead all evidence will be selected and presented on their behalf, as competently as possible, by white representatives. All judicial fact-finding will occur based on the evidence put forth by the white representatives. In such a system, both of Dworkin's procedural rights could be satisfied because the applicable principles in relation to fact-finding and risk of error may be perfectly coherent and applied consistently. Yet it is unacceptable to claim that a fact-finding process that prevents visible minority individuals from participating fully in decision-making can be legitimate. [53] That is true even if there is no difference in the chances of obtaining an accurate outcome between a system that permits everyone to participate and one that does not. In other words, we would not have a good enough reason to expect any minority person to accept the legitimacy of a judicial outcome when the outcome arises through a process that excludes their participation, whether the outcome is factually accurate or not, and even if Dworkin's procedural rights are honoured.

Now suppose that a society decides that in instances where evidence indicates that there is a 50-50 chance that a fact is true or not true, it will break the tie through a coin toss. For example, imagine that a patient suffers some medical detriment after being treated negligently by a doctor, but that medical consequence was just as likely to happen even absent the doctor's negligence. In that claim, there is a 50-50 chance that the doctor's conduct caused the injury. Under current Canadian rules of tort litigation, we would conclude that the plaintiff has not satisfied her burden of proof, so the claim must be dismissed. But suppose that in a hypothetical society, such 50-50 situations are broken by a coin-toss. If the coin falls on its head, the plaintiff wins the case, and if it falls on its tail, the defendant wins. That coin-toss process simply distributes the risk of inaccuracy equally between two parties, and it can be applied consistently wherever there are 50-50 situations. It could satisfy Dworkin's procedural rights. Yet there is something deeply problematic about a coin-toss deciding a legal right, because it is arbitrary decision-making, even though it arguably has no impact on the chances of getting the outcome right in the 50-50 cases.

The procedures in both examples seem to maintain the important requirement that litigants should be treated equally and coherently within the system of management of inaccuracy that exists in a given society, but they fail to truly treat litigants with equal concern and respect. This is more obvious in the first example because removing a class of legal subjects from a decision-making process that will result in an authoritative

53. Compare to Owen Fiss, "The Allure of Individualism," (1993) 78 Iowa L Rev 965, where he argues that having a full representation of ones interests could satisfy a demand for participation in a adjudicative procedure.

outcome is clearly outrageous. In the second example, although the litigants are treated equally, it seems more accurate to say they are treated with equal *dis*respect because they are bound to a decision that results from an arbitrary fact-finding process. The key point is that even if Dworkin's coherence and consistency requirements are respected, and even if the ultimate outcome produced is accurate, such processes are not equipped to provide for legitimate decision-making.

Since the procedural rights that Dworkin advocates are exclusively concerned with the fair management of the risk of inaccuracy, they fail to account for other intrinsic values of the process of arriving at a factual conclusion, irrespective of the impact of the procedures on outcome accuracy. And those intrinsic procedural values are important because as I have noted above, the process must legitimize all judicial fact-finding, even accurate fact-finding. In order to discharge this normative burden, the fact-finding procedures must embody values that are independent of outcome accuracy, in addition to the fair management of potential inaccuracy, as Dworkin's proposal provides. Robert Summers has stated the point precisely as follows:[54]

> good result efficacy is not the only kind of value a process can have *as a process*.… [A] process may also be good insofar as it implements or serves "process values" such as participatory governance and humanness. These forms of goodness are attributable to what occurs, or does not occur, in the course of a process. They are thus process--oriented, rather than results-oriented.

This conclusion prompts a turn to non-instrumental approaches to judicial decision-making, and particularly fact-finding. Evident in the above two examples, for me, processes that disallow participation, and that are in some way irrational or arbitrary, are unacceptable because they fail to display due respect for legal subjects. Grounding process values in notions of dignity and respect for the agency of litigants is well known. Jerry Mashaw is usually credited with advancing an influential dignitary theory of law.[55] Others have pointed to numerous values that ought to be considered valuable aspects of procedures. Bayles, for instances, points to a number of principles suggesting that processes should maintain values of peacefulness, voluntariness, meaningful participation, fairness through equal treatment, the intelligibility of procedures, timeliness, and finality.[56] Others have focused on autonomy, and have

54. Robert Summers, "Evaluating and Improving Legal Process – A Plea for 'Process Values' in *The Jurisprudence of Law's Form and Substance (Collected Essays in Law)* (Brookfield, Vermont: Ashgate Publishing Ltd, 2000) at 115-116.
55. See Jerry Mashaw, "The Quest for a Dignitary Theory" (1981) 61 B U L Rev at 902-904. See Waldron, "Rule of Law," *supra* note 60 for comments on the theme of dignity that permeates the value implicit in rule of law. See also Jeremy Waldron, "How Law Protects Dignity" (2012) 71 Cambridge L J 200.
56. Bayles, "Principles for Procedure," *supra* note 8 at 53-56. See also Robert Summers, "A Plea for 'Process Values'" in *The Jurisprudence of Law's Form and Substance (Collected Essays in Law)* (Brookfield, Vermont: Ashgate Publishing Ltd, 2000).

often concluded that participation, in some form, is a key feature of acceptable legal procedures, grounded in those values.[57] Participation rights have also been lauded from the perspective of their role in positively influencing a litigant's subjective satisfaction with the outcome, even when unfavourable.[58] Lawrence Solum has concluded that while the need for participation cannot be reduced to any one particular value like dignity or autonomy, participation is a requisite feature of legitimate adjudicative decision-making.

Jurgen Habermas has notably linked the need for participation to rational decision-making. In his theory, a law is rationally acceptable when it is a product of a rational discourse process. Rational discourse requires the equal and free exchange of information and reasons and a commitment on the part of participants that the force of reason alone will motivate the outcome. When those features are present in the decision-making process, the emergent law can be said to be rationally acceptable, irrespective of its ultimate substantive content. This demand for rationality would not be satisfied in a coin-toss procedure or other such arbitrary procedure, nor would it be satisfied absent meaningful participation.[59]

The differences between instrumental and non-instrumental approaches to adjudication map directly onto the tension inherent in adjudicative fact-finding that was presented at the beginning of the paper: part of the purpose of the adjudicative process must be to arrive at the "truth" in the sense of ascertaining what facts occurred that ultimately gave rise to the legal claim. If a fact-finding procedure was more often wrong than right, then claiming its legitimacy would be difficult. Instrumental

57. For example, Robert Bone, "Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity" 46 Vad L Rev 561 at 619 notes: "ideal in American adjudication is linked to a process-oriented view of adjudicative participation that values participation for its own sake. Participation is important because it gives individuals a chance to make their own litigation choices"; Martin H. Redish & Nathan D. Larsen, "Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process," (2007) 95 Cal L Rev 1573 at 1578 make note of "a foundational belief in the value of allowing individuals to make fundamental choices about the judicial protection of their own legally authorized rights."

58. Tom Tyler's work in this respect is a well known. See for instance, Tom Tyler, "The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings, (1992) 46 SMU L Rec 433; Tom Tyler, "What is Procedural Justice?: criteria used by Citizens to Assess the Fairness of Legal Procedures" (1988) 22 Law & Soc'y Rev 103, 106; see also Stephen LaTour, "Determinants of Participant and Observer Satisfaction with Adversary and Inquisitorial Modes of Adjudication" (1978) 36 J Personality & Soc Psychol 1531. See also Frank Michelman, "Formal and Associational Aims in Procedural Due Process" (1977) 17 Due Process: NOMOS 127 for (non-empirical) comment that the intrinsic value of participation may be, in part, the psychological value that it affords to the individual.

59. It is worth mentioning here that participation is also sometimes argued from an instrumental standpoint. In such points of view, participation is necessary because it improves outcome accuracy. For instance, Lawrence Tribe describes this view as, "the purpose of procedures is less to assure *participation* than to *use* participation to assure *accuracy*." Lawrence Tribe, American Constitutional Law 2nd ed, (1988) emphasis in the original.

approaches rightly emphasize that fact-finding processes must be oriented towards achieving a truthful outcome. This orientation towards correctness of outcome is the key feature of David Estlund's development of a theory of "epistemic proceduralism" in the analogous context of democratic decision-making. Making the point that epistemic correctness matters to legitimacy by reference to jury-trials, Estlund remarks:[60]

> The jury trial would not have this moral force [i.e. the legitimate authority] if it did not have its considerable epistemic virtues. The elaborate process of evidence, testimony, cross-examination, adversarial equality, and collective deliberation by a jury all contribute to the ability – certainly very imperfect – of trials to convict people only if they are guilty, and not to set too many criminals free. If it did not have this tendency, if it somehow randomly decided who goes punished and who goes free, it is hard to see why vigilantes or jailers should pay it much heed. So its epistemic value is a crucial part of the story. Owing partly to its epistemic value, its decisions are (within limits) morally binding even when they are incorrect.

I agree with the sentiments in the above quotation: epistemic value is crucial, but it is important to emphasize that it only tells part of the story. Along with having a fact-finding role, adjudication, including adjudication of factual disagreements, is also rightly understood as a process of resolving disputes efficiently and fairly.[61] Non-instrumental approaches remind us that the process of resolving disputes must be principled, irrespective of the ultimate outcome. Both of these aspects of adjudication must maintain relevance within a theory of legitimate fact-finding. For instance, a process wherein a trial judge has no demonstrable interest in truly ascertaining facts and decides facts through an arbitrary coin-toss cannot be redeemed by even the most robust participation rights. Simultaneously, without a commitment to principled dispute resolution, even the search for truth can become unfair and illegitimate.

Accordingly, the procedural legitimacy model that I would endorse is situated in between the models of procedural justice that John Rawls famously describes as "imperfect procedural justice" and "pure procedural justice."[62] Imperfect procedural

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60. Estlund, *Democratic Authority, supra* note 55 at 8. Estlund's more general thesis is that "Democratic procedures are legitimate and authoritative because they are produced by a procedure with a tendency to make correct decisions. It is not an infallible procedure, and there might be more accurate procedures. But democracy is better than random and is epistemically the best among those that are generally acceptable in the way that political legitimacy requires." As I note above, the epistemic qualities of fact-finding procedures are crucial. But those epistemic features must be supplement with other non-instrumental procedural features in a robust theory of legitimate fact-finding. That is because, such a theory must be able to provide a framework to assess when epistemic values can be compromised in pursuit of other values, and to what extent.
61. As Michael Bayles puts it, "Two general purposes are inherent in the above concept of adjudication - resolving disputes and finding the "truth."" Bayles, "Principles for Procedure," *supra* note 8 at 39.
62. John Rawls, *Theory of Justice* Revised Edition (Harvard University Press, 1977, 1999) at 73-78.

justice holds that there is a procedure-independent criterion for justice, and the procedure cannot guarantee that outcome. In the context of fact-finding, that model would hold that factual accuracy is the relevant procedure-independent criterion. A pure procedural model holds that there is no procedure-independent criterion to assess outcomes, and that procedure guarantees correct outcomes.[63]

I suggest that acknowledging the importance of factual accuracy is crucial, but factual accuracy is not an appropriate criterion to assess the legitimacy of the outcomes of judicial procedures *because* factual accuracy cannot be guaranteed. A workable procedural model should be considered imperfect in the sense that factual accuracy cannot be guaranteed, while also being a substantiated version of pure procedural justice which requires that the significance of factual accuracy, along with other important values, be reflected in the procedures of fact-finding in order to achieve legitimate outcomes. As Habermas puts it (albeit in the context of majority rule in the democratic process), legitimacy is derived from an "'imperfect,' but 'pure' procedural rationality."[64]

In sum, Dworkin's theory (an exemplar of instrumental approaches) provides an important starting point for understanding a basis on which outcomes that bear a risk of factual inaccuracy may nonetheless merit their authority by calling for a principled method of managing the risk of factual error through consistent and coherent treatment of litigants. Still, there are gaps in his approach that could lead to unfair dispute resolution. Non-instrumental approaches that insist that procedures have inherent virtues that must be maintained can help to fill those gaps. A theory that combines both approaches would be best suited to provide a justifying framework for authoritative judicial determinations of fact, whether those factual determinations are accurate or inaccurate. Such a theory would enable answers to the following questions:

(1) Why, and on what basis, can the authority of factual findings be legitimate despite being (or potentially being) inaccurate?

And

(2) Why, and on what basis, should accurate outcomes be considered illegitimate due to procedural compromises?

A theory of procedural legitimacy must be able to answer *both* of these questions in order to be able to provide a framework that can be used to assess the propriety of fact-finding procedures, including assessing when, and to what extent, epistemic

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63. *Ibid*.

64. Jurgen Habermas, "Reply to Symposium Participants Benjamin N Cardozo School of Law" (1995-1996) 17 Cardozo L Rev 1477 at 1494-1495. For more on Habermas and Rawls, see James Cledhill, "Procedure in Substance and Substance in Procedure: Reframing the Rawls-Habermas Debate" in Finlayson, J. G. and Freyenhagen, F., eds, *Habermas and Rawls: Disputing the Political* (New York: Routeledge, 2011).

concerns can be compromised in pursuit of other values.[65] A fulsome framework of procedural legitimacy for judicial fact-finding depends on determining which values should be represented in fact-finding processes and to propose principles that can guide questions about how those values should relate to one another and how they can manifest in fact-finding rules.

FINAL COMMENT

The important work of further substantiating the procedural legitimacy framework is invoked by this paper, but not taken up fully here. Here, the purpose is to demonstrate the normative significance of procedural propriety is when it comes to maintaining legitimate civil adjudication. It highlights that while lawyers are certainly right to advocate powerfully with a view to achieving outcomes that are desirable for their clients, their commitment to maintaining procedural integrity must be paramount.

My inquiry into adjudicative legitimacy begins from the premise that judicial fact-finding will always occur based on probability and will always bear the risk of inaccuracy. Leaving aside the question of the propriety of the substantive legal norms themselves, the inquiry into reconciling the inevitability of factual uncertainty and the need for authoritative dispute resolution has enabled the conclusion that procedural propriety is a necessary condition for adjudicative legitimacy. The analysis here calls on all legal actors – practitioners, policy-makers, academics, and adjudicators – to think deeply about their own roles in ensuring that all cases are decided with procedural integrity. The legitimacy of any civil litigation system would depend on it.

65. As I noted in Part One, the legal system has rules that clearly prioritize values besides outcome accuracy.

5

LE JUGE COURTOIS

THE COURTEOUS JUDGE

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Resumé: Le présent article analise l'occurence de la courtoisie dans l'exercice de l'activité judiciaire. Pour cela, il va de l'étude de la courtoisie dans la bibliographie non juridique pour ensuite, vérifier la possible application du thème dans le champ juridique, en focalisant sur l'activité juridictionnelle. Comme paramètre pour la conceptualisation de la courtoisie, nous partons de l'entendement du thème par la Comission Ibero-Américaine de l'Étique Judiciaire – CIJE, un des organes de la *Cumbre Judicial Iberoamericana*. Après avoir vérifié l'importance de la courtoisie par le magistrat dans le traitement des avocats, huissiers et jugés, nous pouvons en déduire l'importance des magistrats de vocation bien comme la nécessité de la recherche, par ce professionnel, des connaissances au delà du champ juridique y compris avec l'appuis institutionnel pour cette fin.

Mots clés: Activité Juridictionnelle. Courtoisie. Courtoisie juridictionnelle. Coopération Processuelle. Éthique Judiciaire.

Abstract: This paper analyzes the occurrence of courtesy in the judicial activity exercise. For this pourpose it starts the courtesy study by non legal bibliography and then check the possible application of this theme in legal field, focusing on the jurisdictional activity. As a parameter to the subject in civil procedural field it uses the understanding of courtesy of the Ibero-American Commission of Judicial Ethics, one of the organs of *Cumbre Judicial Iberoamericana*. After verifying the importance of courtesy by the magistrate in dealing with lawyers, justice employees and claimants, it concludes for the importance of devoted judges as well as the need to search for professional knowledge beyond the legal field including institutional support to it.

Keywords: Jurisdictional activity. Courtesy. Jurisdictional Courtesy. Procedural Cooperation. Judicial ethics.

Sommaire: 1. Introduction; 2. De la courtoisie; 3. Du juge courtois; 4. Courtoisie et coopération; 5. Courtoisie dans le traitement de l'avocat; 6. Courtoisie dans le traitement des huissiers de justice; 7. Courtoisie dans le traitement du jugé; 8. Épilogue: l'enseigenment de la courtoisie; 9. Considerations finales; References.

1. INTRODUCTION

Dworkin, dans les études qui peuvent être rencontrées dans son livre *Levando os direitos a sério*[1], a créé, en une de ses leçons, une métaphore pour démontrer comment le devoir de juger est l'un des plus ardu. L'auteur défend que le magistrat, pour arriver à une décision juste, celle-ci ne devrait pas avoir pour fondements ce qu'il appelle "d'arguments de politique"[2] qui prendraient en compte non pas le cas concret en discussion, mais seulement les intérêts de la collectivité. Ceci devrait arriver pour que la personne en jugement ne soit pas utilisée comme bouc émissaire à être exemplairement puni pour alerter les possibles contrevenants sur la lourde main de la loi. Au-delà de ceci, le juge imaginé par Dworkin devrait juger le cas sans entrer en contradiction avec les décisions antérieures, afin d'éviter les changements de position casuels par le système judiciaire. Enfin, le magistrat devrait tenter de ne pas considérer, dans ses pondérations, ses propres préjugés. La décision devrait être la plus impartiale possible.

1. DWORKIN, Ronald. *Levando os direitos a sério* / Traduction de Nelson Boeira. – 3. ed. – São Paulo: Editora WMF Martins Fontes, 2010.
2. Ibidem, p. 129.

Reconnaissant la difficulté de la mission, Dworkin a baptisé cet incroyable juge de *Juge Hercule*[3] : seuls les pouvoirs surhumains permettraient une décision vraiment juste.

La métaphore du Juge Hercule est suffisamment connue dans le monde académique. Toutefois, bien pensées les choses, cette métaphore laisse de côté quelques aspects importants, incontournables pour quelconque magistrat que prétende faire justice, comme, par exemple, la structure de laquelle se vaut le juge pour réaliser son office, ou comme il doit être préparé pour affronter les problèmes très variés qui lui sont présentés.

Dès lors qu'il n'a pas été la préoccupation de Dworkin (2010), dans les leçons citées, des réflexions sur des tels thèmes, l'objectif de ces pages est d'expliquer non pas tous, mais juste un de ces aspects communément ignoré par les studieux du droit. Ainsi, à partir de maintenant, nous proposons de focaliser l'attention non pas sur la force de ce juge Hercules ou sur sa sagacité face à des grands problèmes, mais démontrer que, si dans les cas difficiles le juge doit avoir presque la force surhumaine, c'est justement dans sa plus vertueuse humanité, libre de quelconques mysticismes, que le juge peut rencontrer les différentes façons de gagner le respect, l'appuie, l'empathie de ceux qui l'entourent pendant sa prise de décision. Cette étude traite du *Juge Courtois*.

Pour expliquer le sujet, la méthodologie choisie a été très simple. Un chapitre concernant à la courtoisie – de sa compréhension commune –, l'autre exclusivement sur le juge et le pouvoir qu'il exerce et un troisième abordant la courtoisie dans sa perspective de l'activité judiciaire. Ensuite, nous avons réalisé une brève étude sur la courtoisie que le magistrat doit rendre aux avocats, aux huissiers de justice et aux autres collaborateurs bien comme au jugé. Pour des fins didactiques, chaque chapitre contient, à sa fin, une brève conclusion des principaux points y abordés.

2. DE LA COURTOISIE

Courtoisie, par les mots de Mercedes, est un:

> Mode de vivre dans l'amabilité, dans la considération et dans le respect des autres et de soi-même. Nous connaissons tous des personnes qui quand elles entrent dans une salle, amènent avec elles un nuage chargé. Mais nous connaissons aussi certaines personnes qui arrivent apportant la lumière du soleil[4].

Quoique l'explication ci-dessus paraisse presque poétique, elle permet une bonne notion de ce que l'on attend d'une personne courtoise. En une rapide et incomplète leçon, nous pouvons dire qu'est courtois celui qui agit avec respectabilité, politesse, attention et loyauté. Ceci parce que des personnes ainsi laissent le milieux dans lequel ils vivent et interagissent plus approprié aux bonnes pratiques.

3. Ibidem, p. 165.
4. MERCEDES, Mary. *O livro da cortesia:* a arte de viver com você mesmo e com os outros / traduction Jefferson Luiz Camargo. São Paulo: Martins Fontes, 2002, p. 1.

Dans ce sens, Padovani, à l'ouverture de son livre sur la courtoisie et étiquette[5], rappelle que chaque être humain est un monde autour duquel tournent les autres. Cette interaction sociale constante objective la satisfaction physique et spirituelle de chacun et est soutenue par une série des normes fondamentales[6] basées sur l'équilibre stable de la balance de justice, ayant dans l'un des bras les devoirs et dans l'autre les droits. Le respect et la considération que les personnes se doivent les unes aux autres sont, de cette forme réciproques.

Ces normes sont créées par une autorité compétente et, en cas de désobéissance, il doit advenir une sanction de ceux qui essaient de déséquilibrer la balance de l'équité. Toutefois, achève Padovani, par-dessus de toute cette loi institutionnalisée, par-dessus de quelconque règle de droit de la vie dans une Société organisée, les règles existent découlantes de l'éducation reçue, autant plus subtiles et minutieuses que la grandeur du niveau de culture des personnes qui se sentent soumises à ces règles "Étant déterminé que son observation et son strict accomplissement est une attitude spontanée de sa propre particularité"[7]. Ces règles sont celles que Padovani a appelées de courtoisie.

Les observations de Padovani laissent noter que la personne courtoise agit ainsi non pas pour se livrer des éventuelles sanctions, mais parce qu'elle croit que sa conduite doit répondre en respect, politesse et considération envers le prochain. La conclusion est importante pour qu'il s'aperçoive la "fausse courtoisie" quand cela arrive.

Pour ce travail, nous considérons la "fausse courtoisie" celle qui, malgré le fait d'être poli et attentionné envers les autres, ainsi la personne se comporte non pas parce qu'elle croit ceci être la bonne manière du traitement social, mais pour : a) éviter que les autres parlent mal d'elle ; b) démontrer les qualités qu'elle ne possède pas pour être louée ; c) obéir à une certaine détermination externe et d) cacher ses réelles intentions en se comportant de la manière que l'interlocuteur aimerait comme stratégie de réussir à un certain objectif propre.

Comte-Sponville parlant de la politesse, il la traite comme la première vertu et peut-être la mère de toutes les autres, étant, cependant, la plus pauvre et la plus superficielle. Ceci parce qu'elle "ne tient pas du tout compte de la morale, tout comme la morale de la politesse. Un nazi poli ça change quoi du nazisme ? Ça change quoi de l'horreur ? Cela ne change rien, c'est clair, que la politesse est bien caractérisée par ce *rien*"[8]. C'est pour cela que l'auteur parvient à conclure que la politesse est juste l'apparence de la vertu.

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5. PADOVANI, Irma. *Cortesía y distinción – etiqueta y trato social* / 5. ed. Barcelona: Editorial Sintes, 1968.
6. La locution "normes fondamentales" n'est pas associée à son aspect juridique.
7. PADOVANI, op. cit., p. 6.
8. COMTE-SPONVILLE, André. *Pequeno tratado das grandes virtudes* / Traduction de Eduardo Brandão. São Paulo: Martins Fontes, 1995, p. 13.

Traitant de l'apparente contradiction en affirmant que la politesse, en même temps, "est l'origine des vertus" et "non une vertu", Comte-Sponville enseigne que l'origine des vertus ne pourrait pas être, elle-même, une vertu. En réalité, elle est l'origine des autres vertus pour son aspect temporel. L'enfant, avant d'apprendre les vertus de plus (comme la fidélité, la prudence, la tempérance, l'humilité, etc.), doit apprendre à être poli sans, toutefois, comprendre la raison de cette politesse. "La politesse est une petite chose, qui prépare les grandes"[9].

Les observations ci-dessus rappellent que c'est de la politesse que tout commence, y compris la courtoisie. Cependant, si la politesse peut être juste aparente, le même ne peut se dire de la courtoisie. Qui agit d'une façon apparemment courtoise, mais avec des petites intentions, peut même être poli, mais pas courtois.

La courtoisie englobe plus que la politesse. Bien qu'elle ne puisse être millimétriquement considérée, elle comprend les notions telles que la respectabilité et la considération. Pendant que la politesse peut être vide de sens la courtoisie trouve son fondement dans la morale qui lui confère le contenu et la robustesse.

3. DU JUGE COURTOIS

Si le thème antérieur n'a pas conceptualisé d'une forme minutieuse la courtoisie, c'est à cause de la difficulté de la tâche. Réfléchissant bien. Nous ne pouvons réaliser une délimitation *a priori* et exhaustive de ce que l'on entend par courtoisie. Il y a le risque d'oublier certain aspect important. C'est pour cela que les leçons du thème antérieur ont donné juste les contours du phénomène. Par la suite, nous traiterons du thème courtoisie dans la perspective de la façon d'agir d'un juge. Pour ce faire, certains mots brefs sur son activité sont importants.

Quand nous parlons de l'activité judiciaire, deux aspects ne peuvent être ignorés: actuellement dans les états démocratiques, les juges sont : a) des agents publics, b) exerçant un grand pouvoir qui ne leur appartient pas.

Si quelconque personne doit traiter avec amabilité, considération et respect ses pairs, peut-être qu'on ne peut exiger moins que ça quand l'on exerce une activité publique. Au-delà de ça, la mission du magistrat est indispensable, car la collectivité dépend de lui pour résoudre les différends journaliers et, dans le cas du juge, il y a un aspect digne d'attention. C'est que le juge, en rendant justice, en décidant des questions qui lui sont soumises, il est en train d'exercer un immense pouvoir. Toutefois – et ceci ne peut jamais être ignoré –, ce pouvoir n'est pas de sa propriété. Le pouvoir exercé par le magistrat est, en réalité, du peuple. La responsabilité exercée par le juge est double : il exerce la charge publique et, pour ceci, manipule l'une des choses les plus importantes du peuple : son pouvoir politique.

9. Ibidem, p. 20.

La pertinence de cette activité judiciaire justifie un agissement éthique et, par conséquente courtois. Mais si le juge doit exercer sa mission avec courtoisie, quelqu'un peut susciter la nécessité des normes établissant celle-ci.

Agir par courtoisie à partir de la détermination des normes serait quelque chose de contradictoire. La courtoisie par détermination ou obligation correspond à ce que nous appelons dans le thème antérieur de "fausse courtoisie".

Toutefois, ceci ne traduit pas l'impossibilité des énoncés normatifs sur le thème. Pour mieux expliquer : il n'y a pas de problème dans les énoncés prescrivant le traitement avec courtoisie. Le problème est le fait d'agir avec courtoisie à cause de cet énoncé, mais sans quelconque intention de le faire. Ça serait un comportement poli, mais pas courtois.

Le Code du Procès Civil Brésilien de 2015 n'apporte pas expressément la nécessité d'un juge agir avec courtoisie[10]. Ceci, cependant, ne l'amoindrit pas. Il suffit de voir que le chapitre VII du Code Ibéro-Américain de l'Éthique Judiciaire (CIEJ), un des organes de la *Cumbre Judicial Iberoamericana*, une structure de consultation, coopération et échange d'expériences, qui sont articulés par le biais des plus hauts niveaux du Pouvoir Judiciaire des pays de la Péninsule Ibérique et de l'Amérique Latine[11].

Cette commission, en proposant le code modèle sur le thème de l'éthique judiciaire, a mis en exergue la préoccupation de la développer "avec un objectif à atteindre ce que nous pourrions appeler de 'meilleur' juge possible pour nos sociétés"[12]. Encore plus importants sont les suivantes observations extraites de l'exposition des motifs du code :

> L'éthique judiciaire inclut les devoirs judiciaires qui se réfèrent à des conduites plus significatives pour la vie sociale, mais prétend aussi que son accomplissement répond à une acceptation de ces valeurs par sa valeur intrinsèque, ceci est, basé dans les raisons Morales. [...] C'est pourquoi, l'éthique judiciaire implique le rejet tant des standards des conduites propres d'un "mauvais" juge, comme celles d'un juge simplement "médiocre", qui s'accommode avec le minimum juridiquement exigé.[13]

Le Code Modèle de la CIEJ ne met pas l'accent juste sur l'importance de l'éthique judiciaire, mais apporte les paramètres éclaircissants de la conduite éthique judiciaire. Parmi ses éclaircissements, il se trouve la préoccupation

10. Ensuite, nous aborderons avec plus de détails sur coopération et courtoisie.
11. Pour plus de détails, il suffit de consulter le site de la *Cumbre Judicial*. Disponible sur: <http://www.cumbrejudicial.org/web/guest/inicio> Accédé le 06 jul. 2015.
12. ATIENZA, Manuel; VIGO, Rodolfo Luís. *Código ibero-americano de ética judicial.* Brasília: CJF, 2008, p. 29.
13. ATIENZA, Manuel; VIGO, Rodolfo Luís. *Código ibero-americano de ética judicial.* Brasília: CJF, 2008, p. 29.

spécifique sur le thème "courtoisie" dans le chapitre VII du Côde qui dispense cinq articles sur la question[14].

L'article 48 dispose : "Les devoirs de courtoisie ont leur fondement dans la morale et son accomplissement contribue pour un meilleur fonctionnement de l'administration de la justice." Cette perspective correspond à ce qui est exposé dans les lignes précédentes.

Dejà dans l'article 49:

> La courtoisie est la forme d'extérioriser le respect et la considération que les juges doivent à leurs collègues, et aux autres membres de la répartition judiciaire tels que, les avocats, les témoins, les jugeables et, en général, à tous ceux qui se rapportent avec l'administration de justice.

Malgré qu'il soit désirable les conduites décrites dans l'article 49, il est important de souligner que: il ne suffit pas d'extérioriser les conduites liées si l'on ne les croit pas être la manière correcte et désirable d'agir.

L'article 50 traite plus de la coopération que de la courtoisie en établissant que "Le juge doit donner des explications et éclaircissements qui lui ont été sollicités, dans la mesure où elles seraient justifiées opportunes et n'impliqueraient pas la vulnérabilité de quelconque norme juridique." Nous aborderons la coopération et courtoisie dans le prochain thème.

L'article 51 traite de la situation dont se rappelle rarement le législateur. La relation entre le magistrat et son équipe. Voilà la prévision: "Art. 51 dans le cadre de son tribunal, le juge doit se rattacher avec les fonctionnaires, auxiliaires et tout le personnel sans engager – ou paraître le faire - par favoritisme ou quiconque autre conduite arbitraire."

Enfin, l'article 52 éclaircit l'attitude du magistrat envers ceux qui ne sont pas d'accord avec ses décisions: "Art. 52 Le juge doit montrer une attitude tolérante et respectueuse en ce qui concerne les critiques de ses décisions et de son comportement."

La magistrature brésilienne a aussi traité de la courtoisie dans son code d'éthique. L'article 22 établit que le magistrat "a le devoir de courtoisie envers les collègues, les membres du Ministère Publique, les avocats, le personnel, les parties, les témoins et tous ceux qui se rapportent avec l'administration de la Justice. Paragraphe unique. Il s'impose au magistrat l'utilisation d'un langage harmonieux, poli, respectueux et compréhensible"[15].

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14. ATIENZA, Manuel; VIGO, Rodolfo Luís. *Código ibero-americano de ética judicial.* Brasília: CJF, 2008, p. 41.
15. Disponible en: < http://www.cnj.jus.br/publicacoes/codigo-de-etica-da-magistratura > Accès en 18, jul. 2016.

À partir des observations extraites de l'exposition des motifs du Code Modèle de la CIEJ, de ses articles qui traitent de la courtoisie, bien comme du Code d'Éthique de la Magistrature Brésilienne, au moins trois conclusions sont possibles.

La première a déjà été exhaustivement traitée. Malgré que parfois les préceptes qui traitent de la courtoisie se réfèrent à la façon dont elle est présentée, elle ne doit pas être juste apparente. C'est-à-dire: le juge ne sera pas courtois s'il ne croît pas dans la valeur intrinsèque de ses attitudes. Le juge apparemment courtois, mais qui méprise l'importance et le contenu de cette courtoisie et du comportement éthique n'a pas la vocation et doit repenser le maintient de sa condition dans la juridiction.

La seconde conclusion est celle que la courtoisie contribue à la propre légitimation de la structure judiciaire, consistant en la réponse au titulaire du pouvoir politique dont la confiance faite au judiciaire n'a pas été en vain. Un judiciaire éthique ne s'essouffle guère en juge courtois, mais un juge courtois est un indice d'une éthique judiciaire engagée avec la tutelle de justice due des jugés.

La troisième conclusion est que le Code Modèle de la CIEJ n'a pas prétendu établir le concept fini de la courtoisie, délimitant juste les paramètre pour sa configuration, malgré que des tels paramètres ne traitent toujours pas nécessairement de la courtoisie, étant parfois confondue avec les autres institutions comme la coopération.

La courtoisie, de ce qui est exposé, a des configurations variées. Elle va dès la plus intime perception du juge sur ce qu'est la justice et sa fonction dans sa promotion jusqu'à la façon dont elle traite avec les éventuelles critiques publiques sur ses décisions.

Suivant l'option du Code Modèle de la CIEJ, il est préférable, dans cette étude, de ne pas se délimiter un concept fini de la courtoisie dans le contexte judiciaire. Les paramètres ci-dessus donnent déjà un joli contour sur le thème. Cependant, dans le but d'améliorer la discussion, nous proposons une analyse plus approximative sur au moins trois aspects de la courtoisie: a) La courtoisie dans le traitement de l'avocat; b) la courtoisie dans le traitement des huissiers de justice et c) la courtoisie dans le traitement du jugé. Avant, toutefois, c'est à nous de différencier la courtoisie de la coopération, notamment avec la croissance des discussions sur ce second thème.

La courtoisie que doit pratiquer le juge n'a pas des limites précises. Elle a ses fondements dans la morale et recouvre des thèmes importants tels que le respect et la considération que le juge doit rendre à ceux qui l'entourent. La courtoisie est un pilier important d'un judiciaire éthique et contribue à la consolidation et légitimation de cette institution avec les titulaires du pouvoir politique: le peuple.

4. COURTOISIE ET COOPÉRATION

La coopération, dans le contexte du procès civil brésilien, rencontre actuellement une fertile production académique, notamment à partir du récent Code de Procédure Civile Brésilien et son art. 6º: "Art. 6º Tous les sujets du procès doivent coopérer entre eux pour qu'il s'obtienne, un temps raisonnable, une décision de mérite juste et effective".

Dans ce contexte, Mitidiero explique que la collaboration:

> C'est un modèle qui vise la division d'une manière équilibrée des positions judiciaires du juge et des parties dans le procès civil, le structurant comme une véritable communauté de travail (Arbeitsgemeinschaft), dans laquelle se privilégie le travail processuel avec les juges et les parties ensembles (prozessualen Zusammenarbeit)[16].

La collaboration détermine quelques conduites non seulement pour le magistrat, mais pour tous les sujets du procès. L'objectif est de distribuer la responsabilité dans la conduite du processus.

En perspective similaire, du moins en ce qui concerne la coopération comme l'institut qui établit un modèle de procès, Didier Jr. enseigne que dans le modèle du procès coopératif, il arrive un redimensionnement du principe du contradictoire pour inclure l'organe judiciaire dans le rôle des sujets du dialogue processuel. Il s'améliore la décision par la valorisation du contradictoire[17]. Les parties ne portent pas seules la charge d'amener les fondements pour que le juge décide et celui-ci n'est pas le conducteur inquisitorial du processus. Il y a une division des tâches. Toutefois, si pendant les débats réalisés dans le procès le juge assume la position de parité avec les parties, au moment de la décision, l'activité est solitaire, exclusive de l'organe juridictionnel, totalement asymétrique.

C'est possible de vérifier la configuration du principe de la coopération par le juge à partir de certaines conduites d'une observation nécessaire de sa part. Par exemple, il y a le devoir d'éclaircissement aux parties du judiciaire en au moins deux sens. Les tribunaux doivent solliciter l'éclaircissement à différentes parties quand ils ne comprendraient pas leurs postulations et doivent, eux-mêmes éviter les décisions confuses et, quand elles arriveraient, il y aura le devoir de les éclaircir[18].

C'est possible de parler dans le devoir de la consultation consacrée dans l'art. 10 du Code de Procédure Civile Brésilien, *in verbis*: "Le juge ne peut décider, en quelconque degré de juridiction, sur base du fondement à propos duquel il ne soit pas donné aux parties l'opportunité de se manifester, même s'il s'agit de la matière sur laquelle il doit décider d'office".

Encore sur la coopération du magistrat, on peut identifier le devoir de prévention manifesté en divers moments du code, toujours dans le sens d'essayer de pointer les éventuels défauts dans le procès en temps habile de les assainir pour arriver à l'objectif de la procédure juridictionnelle: décision du mérite, juste et effective. Les

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16. MITIDIERO, Daniel. *Colaboração no processo civil:* pressupostos sociais, lógicos e éticos / 3. ed. rev., atual. e ampl. de acordo com o novo código de processo civil. São Paulo: Editora Revista dos Tribunais, 2015, p. 52.
17. DIDIER JR., Fredie. *Curso de direito processual civil:* introdução ao direito processual civil, parte geral e processo de conhecimento. 17. ed. Salvador: Ed. Jus Podivm, 2015, p. 125.
18. DIDIER JR., Fredie. *Curso de direito processual civil:* introdução ao direito processual civil, parte geral e processo de conhecimento. 17. ed. Salvador: Ed. Jus Podivm, 2015, p. 128.

décisions ultimes doivent être évitées à tout prix. À titre d'exemple l'article 76 du Code de Procédure Civil Brésilien: "Art. 76. Une fois vérifiée l'incapacité processuelle ou l'irrégularité de la représentation d'une partie, le juge suspendra le procès et désignera un délai pour que le vice soit assaini."

Une chose intéressante à mettre en exergue à partir de l'exposé est que la coopération est une norme. Ce qui signifie: elle doit être observée par les sujets du procès[19] et impute aux sujets du procès, et non seulement au juge, une série de devoirs.

La courtoisie, d'un côté, malgré qu'elle puisse être prévue dans les énoncés normatifs, elle ne sera présente que si le magistrat croit agir de manière correcte. Pendant que la coopération est visualisée à partir des conduites concrètes par les parties, la courtoisie n'a pas de mécanismes pour son évaluation. Il n'est pas possible de savoir si le magistrat qui se comporte avec politesse le fait ainsi parce qu'il croit ceci être la conduite due.

Le présupposé éthique de la coopération est, par-dessus tout, la bonne foi objective, standard normatif de l'observation nécessaire. Le présupposé éthique de la courtoisie n'est pas aussi facilement identifiable. Tel qu'exposé dans les lignes antérieures, il dépendra de chaque individu et de sa croyance dans la nécessité d'agir avec politesse, loyauté, respectabilité et considération.

Souvent, il est possible d'identifier et pointer les conduites non coopératives qui peuvent survenir pendant le procès. De l'autre côté, il peut y avoir des cas dans lesquelles la conduite du magistrat se montre apparemment pleine de courtoisie quand, en réalité, c'est le pure semblant.

La cooperation a un aspect *externe au juge*. Ceci parce que, actuellement, le procès doit être vu comme une *communauté de travail*, "[...] dans laquelle tous les sujets processuels doivent agir par le biais interdépendant et auxiliaire, avec responsabilité, dans la construction des prononcés judiciaires et en son effectivation"[20].

La courtoisie, de l'autre côté, a un aspect *interne au juge*. Il n'arrive pas de courtoisie par un devoir partagé ou par exigence normative. Elle arrive par entendement personnel du magistrat que, agir de façon courtoise est nécessaire et est la chose idéal à faire. Il lui est possible d'agir de façon coopérative, mais sans courtoisie. De l'autre côté, en agissant avec courtoisie, certainement la coopération sera prestigieuse.

Il y a beaucoup de travaux traitant de la coopération dans le procès civil. Il n'y en a pas traitant de la courtoisie, au moins en ce qui concerne la nécessité que

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19. Avec l'explication plus détaillée de cette affirmation, nous indiquons: DIDIER JR., Fredie. Fundamentos do princípio da cooperação no direito processual civil português. 1. ed. Coimbra: Coimbra Editora, 2010, item 3.3.

20. THEODORO JR., Humberto. *Novo CPC – Fundamentos e sistematização /* Humberto Theodoro Júnior, Dierle Nunes, Alexandre Melo Franco Bahia, Flávio Quinaud Pedron. Rio de Janeiro: Forense, 2015, p. 60.

l'on ait des juges courtois. Ceci entrave la construction dogmatique de ce qui peut être la courtoisie. Tel que montré, il y a des moments pendant lesquels l'on parle de la coopération ou politesse en pensant parler de la courtoisie. Cette entrave dans l'identification de l'institut entraîne des difficultés dans le développement des mécanismes qui éclaircissent l'importance du thème.

La coopération est une norme et détermine les conduites aux sujets processuels, y compris au juge. Entre ses conduites, se met en évidence les devoirs d'éclaircissement, prévention et consultation. La courtoisie, malgré qu'elle puisse être prévue dans la loi, elle n'est pas identifiable facilement, car le magistrat peut être en train d'agir de manière polie, mais feinte.

5. COURTOISIE DANS LE TRAITEMENT DE L'AVOCAT

Une des plus classiques oeuvres sur la relation entre juges et avocats est celle de Calamandrei intitulée : *Eles, os juízes, vistos por nós, os advogados*. Dans cette oeuvre, le juriste italien fait des curieuses affirmations: "Le juge est un avocat amélioré et purifié par l'âge. Les années lui ont pris les illusions, les excès, les déformations, l'accent et, peut-être même, la généreuse impulsivité de la jeunesse"[21]; "L'avocat est l'effervescente et généreuse jeunesse du juge. Le juge est la vieillesse reposée et ascétique de l'avocat"[22]; "[...] l'âme du juge est composée de deux embryons de l'avocat, mis l'un contre l'autre, comme des Jumeaux de la Bible, condamnés à se combattre depuis le sein maternel"[23].

La lecture de cette oeuvre peut laisser transparaître que la courtoisie du juge envers l'avocat commence justement à partir de la courtoisie de celui-ci envers celui-là. La courtoisie serait un désastre, un échange de générosités entre cavaliers. Il est nécessaire de défaire cette conclusion.

Nonobstant avocats et juges soient engagés dans un comportement éthique, tous ont les rôles distincts dans le procès. Comme nous l'avons vu, en décidant, le magistrat exerce un pouvoir qui lui est confié par le peuple. L'avocat, bien qu'engagé avec la justice, il est impossible de feindre qu'il a des engagements avec son client. Le juge rend toujours des comptes directement à la Société; y compris l'avocat, - et des fois exclusivement – à son client.

La différence entre les activités de décider et de promouvoir une cause est y compris mise en exergue par quelques uns quand ils traitent de l'argumentation et de la rhétorique judiciaires. Livet enseigne qu'il s'est coutume d'affirmer "que

21. CALAMANDREI, Piero. *Eles, os juízes, vistos por nós, os advogados /* Traduction de Ary dos Santos. 4. ed. Lisboa: Livraria Clássica Editora, 1971, p. 49.
22. CALAMANDREI, Piero. *Eles, os juízes, vistos por nós, os advogados /* Traduction de Ary dos Santos. 4. ed. Lisboa: Livraria Clássica Editora, 1971, p. 49.
23. CALAMANDREI, Piero. *Eles, os juízes, vistos por nós, os advogados /* Traduction de Ary dos Santos. 4. ed. Lisboa: Livraria Clássica Editora, 1971, p. 53.

l'argumentation vise à convaincre avec des bonnes raisons, et la rhétorique, à persuader, même avec des mauvaises raisons"[24]. Dans ce sens, complète, la rhétorique est d'usage par l'avocat alors que l'argumentation, par le juge.

Mais le fait est que la courtoisie du juge envers les avocats abstrait l'idée que reçoive premièrement celui-là la courtoisie de celui-ci. Il n'est pas question de rétribution de gentillesse. Par ailleurs on ne peut pas penser de la courtoisie comme une faveur. Le magistrat agit avec courtoisie parce qu'il croit que le respect et la considération sont intrinsèques à son activité. Le magistrat qui dédaigne l'avocat oublie que sa conduite doit servir d'exemple pour les autres. Les avocats non courtois envers les magistrats sont tolérés. Les juges non courtois envers les avocats, stigmatisés.

Le magistrat a le devoir de coopérer avec les autres sujets du procès, y compris avec l'avocat, afin de celui-ci puisse mieux accomplir son rôle. Ceci est dit, car il n'est pas rare de rencontrer, par exemple, des décisions rejetant les pétitions sans explication claire de la raison de ce rejet. La situation est aggravée quand il arrive que l'avocat recherche à savoir finalement auprès du juge la raison du rejet et reçoit comme réponse qu'il n'est pas de la responsabilité de celui-ci d'enseigner l'office de celui-là. Ces conduites tendent à diminuer à partir de la prévision de la coopération dans l'art. 6º du Code du Procès Civil Brésilienn et de la construction doctrinaire et jurisprudentielle concernant le thème. Il n'est pas possible, cependant, de contrôler si le magistrat, même en agissant de manière coopérative, le fait par courtoisie.

Le magistrat doit être courtois envers l'avocat indépendamment du traitement de celui-ci envers celui-là. La coopération dans le procès par le juge peut arriver sans courtoisie, mais ce n'est pas la situation idéale.

6. COURTOISIE DANS LE TRAITEMENT DES HUISSIERS DE JUSTICE

Le Judiciaire ne se résume pas à la personne du juge. Pour qu'il exerce ses fonctions avec satisfaction, il est nécessaire de compter sur l'immense structure étatique physique, technologique et humaine. Cappelletti, dans ses études sur l'accès à la justice, a souligné l'importance de cette structure étatique dans la concrétisation de la justice[25]. Pour le thème, Il a consacré ce qui a appelé de troisième vague de l'accès à la justice en proposant une nouvelle approche de l'accès à la justice englobant les préoccupations non seulement dans les reformes législatives des procédures, mais dans la propre structure des tribunaux. Le matériel humain, on aperçoit, qu'il est indispensable dans la concrétisation de la justice.

24. LIVET, Pierre. *Argumentação e retórica jurídica*. In: Dicionário da cultura jurídica / organisation Denis Alland e Stéphane Rials / Traduction Ivone Castilho Benedetti; révision technique Márcia Villares de Freitas – São Paulo: Editora WMF Martins Fontes, 2012, p. 85.

25. CAPPELLETTI, Mauro. *Acesso à Justiça* / Traduction de Ellen Gracie Northfleet. Porto Alegre, Fabris, 1988, p. 72.

Le magistrat traite journalièrement avec les huissiers. Ce sont eux qui préparent les temps de travail, organisent les secrétariats, réalisent les recherches jurisprudentielles etc. Sans ce service indispensable, l'activité judiciaire serait pratiquement impossible.

La courtoisie du juge envers ses partenaires de travail est l'exigence qui a mérité, y compris, un propre article dans le Code Modèle de la CIEJ: "Art. 51 Dans le cadre de son tribunal, le Juge doit se rapporter avec les fonctionnaires, auxiliaires et embauchés sans encourir – ou sembler le faire – par favoritisme ou quelconque type de conduite arbitraire."

Pour ne pas paraître du même, il est appliqué au thème ce qui est déjà étudié sur la courtoisie juridictionnel dans le chapitre 3, avec l'unique observation concernant la nécessité de comprendre comme dignes de cette courtoisie non seulement les huissiers, mais aussi les procureurs, les défenseurs publics et le reste du personnel qui se rapporte avec l'administration de la justice dans les thermes de l'article 49 du Code Modèle déjà référé. À propos des procureurs et défenseurs il est applicable aussi, avec les adaptations dues, ce qui a été dit sur la courtoisie du magistrat envers les avocats dans le chapitre 5.

Toutes les autres personnes qui gravitent d'une façon plus proche autour du magistrat l'aidant dans sa mission d'appliquer la justice comme huissiers, procureurs, défenseurs doivent aussi être traités avec courtoisie.

7. COURTOISIE DANS LE TRAITEMENT DU JUGÉ

La courtoisie dans le traitement du jugé a été laissé en dernier par option didactique. Pour cette recherche, il est question de l'aspect le plus important du thème de façon à mériter le terminer.

Si l'on invite quelqu'un à aller à une fête, à un supermarché, au musée, à la poste, au cinéma ou à un autre lieu public il n'y aura pas assez de résistance de la part de l'invité du moment qu'il y ait une brève relation de convivialité entre lui et son interlocuteur. Cependant, si l'on invite quelqu'un à aller à quelconque des organes du juridique, à un commissariat, à une audience judiciaire quelconque et si l'invité n'est pas quelqu'un d'initié dans le domaine judiciaire une résistance naturelle surgit. Ceci arrive parce qu'il y a une notion de sens commun que les tribunaux de justice, forums et postes de polices ne sont pas des lieux pour des « gens de qualité ». À titre d'explication: pour les individus moins éclaircit, on ne va au Judiciaire ou à un poste de police que quand on ne respecte pas la loi. Pour cette raison, pour beaucoup, l'allée au Judiciaire est un vrai martyr.

Qui a déjà accompagné une audience perçoit que les parties ne savent pas, la plupart du temps, comment se comporter. Répondent à des questions qui leur sont faites avec tremblement et hésitation. Beaucoup font un malaise. Il y en a même qui « bloquent » et ne savent rien verbaliser quand ils se trouvent devant un juge et ou un procureur.

Quoique l'avocat soit meilleur dans la préparation de son client pour affronter une audience judiciaire, c'est pendant le moment solennel de l'acte que la peur et l'insécurité des parties se révèlent.

Il est important de noter que ceci n'arrive pas nécessairement parce que le jugé est coupable. Peut que ce soit justement le contraire. Il y a des gens que ne comprennent pas le motif pour lequel, étant innocents, ils doivent comparaître au judiciaire.

Le magistrat doit être conscient de ces faits.

C'est curieux que ces personnes vacillantes en présence du juge appartiennent au peuple. Elles sont les vrais titulaires du pouvoir qui craignent n'en ayant pas, dans la plupart des cas la conscience.

S'occuper avec courtoisie du jugé c'est, dans l'ultime analyse, une façon du magistrat de démontrer le respect au titulaire du pouvoir qu'il exerce. C'est prouver que la mission qui lui est confiée est en train d'être réalisée dignement. C'est consolider la légitimation du judiciaire pour décider.

Le juge courtois ne fait pas de la faveur aux parties. En réalité, la relation entre le juge/jugé est, mauvaise comparant, et laissant de côté les particularités du cas en décision, la relation entre embauché et patron. Le peuple est seigneur du juge et non le contraire.

La relation entre l'activité judiciaire et le peuple n'a pas toujours été aussi pacifique qu'elle se configure actuellement. Au moins dans les pays de tradition *Civil Law*. Merryman et Pérez-Perdomo[26] rappellent qu'avant la révolution française il y avait, dans les pays européens continentaux, un grand manque de confiance des jugés envers les magistrats. Énormes étaient la corruption, la dénaturation de la part des juges qui perpétraient des absurdes et injustices et demeuraient impunis.

Dans ces pays, quand la bourgeoisie a assumé le pouvoir, la loi est devenue un paramètre pour l'activité judiciaire. Le juge ne pourrait pas aller au-delà de ce que la loi lui permettrait. Progressivement, néanmoins, le judiciaire a regagné la confiance perdue et, présentement, il peut s'affirmer sa pertinence en rapport avec d'autres activités étatiques (législative et exécutive). N'étant pas l'objet de la présente recherche les raisons de ceci, le fait est que, de nos jours, le judiciaire a un rôle important dans la concrétisation de la justice ne se limitant plus à la lettre incolore des lois.

Le manque de confiance du jugé, s'il existe encore, du moins ce n'est pas autant au point de faire insurger dans la population un désir de lutter contre ce phénomène de l'augmentation de la pertinence judiciaire qui s'observe. Au moins pour le moment.

Bien que le Code Modèle de la CIEJ n'ait pas mis en exergue la nécessité de courtoisie du juge envers le jugé, ceci est l'un de ses aspects les plus importants.

26. MERRYMAN, John Henry, PÉREZ-PERDOMO, Rogelio. *A tradição da civil Law – uma introdução aos sistemas jurídicos da Europa e da América Latina* / Traduction de Cássio Casagrande. Porto Alegre: Sérgio Antonio Fabris Editor, 2009, pp. 63-68.

En effet, comme nous l'avons déjà réitéré plusieurs fois, le fait de ne pas avoir un concept fini sur ce qu'est la courtoisie par le juge permet d'englober les situations non pensées prima facie, mais dont l'importance se révèle inéliminable.

Les plus attachés aux textes du chapitre VII du Code Modèle de la CIEJ pourraient alléguer que le devoir de la courtoisie du juge envers le jugé est quelque chose de secondaire une fois qu'il n'a pas mérité un article exclusif. Cette conclusion est simpliste et oublie les observations ci-dessus que le pouvoir exercé par le juge n'est pas le sien, mais du titulaire du *pouvoir politique* : le peuple. Étant ainsi, le magistrat rend hommages à ceux qui ont confiance en lui.

Cappelletti[27], une fois de plus dans ses études sur l'accès à la justice, a dédié une attention spéciale au thème. Il a alerté à propos de la nécessité d'analyser l'accès à la justice sous la perspective des consommateurs. En cet aspect, les juges, législateurs et administrateurs sont vus à partir du nouveau contexte: de la demande des consommateurs. Enfin, il achève que : "le droit et l'État doivent, finalement, être vus comme ils sont: comme simples instruments au service des citoyens et de leurs nécessités, et non vice-versa"[28].

De ce qui précède, de tous ceux qui sont engagés dans la confrontation du procès, le jugé est justement celui qui mérite le meilleur traitement. Dédaigner ceci c'est méconnaître le réel contenu du pouvoir judiciaire bien comme son caractère presque transcendantal en vertu de son importance.

Un juge non courtois envers les avocats ou huissiers de justice est un juge désengagé avec sa mission et inhabile de ses plus profonds devoirs. Un juge non courtois envers le jugé est un traître car il a utilisé le pouvoir contre le peuple. La non courtoisie dans le premier cas est lamentable, dans le second impardonnable.

Enfin, il est important de noter que quand nous parlons du jugé, nous nous referons non seulement aux parties du procès, mais au propre peuple.

Le titulaire du pouvoir exercé par le juge est le peuple. Le juge en réalisant ses fonctions, lui doit satisfaction et courtoisie immédiate, ensuite, aux avocats et huissiers.

8. ÉPILOGUE: L'ENSEIGENMENT DE LA COURTOISIE

Cadiet, Normand et Mekki, en observation agaçante, affirment que "la théorie générale du droit est plus étroite que la théorie générale du procès"[29]. En développant l'idée, il défend la nécessité de l'ouverture du procès à d'autres sphères de connaissance

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27. CAPPELLETTI, Mauro. *Processo, ideologias e sociedade:* Volume I / Traduction de Elício de Cresci Sobrinho. Porto Alegre: Sergio Antonio Fabris Ed., 2008, p. 393.
28. CAPPELLETTI, Mauro. *Processo, ideologias e sociedade:* Volume I / Traduction de Elício de Cresci Sobrinho. Porto Alegre: Sergio Antonio Fabris Ed., 2008, p. 393.
29. CADIET, Loïc; NORMAND, Jacques; MEKKI, Soraya Amrani. *Théorie générale du procès*. Paris: Presses Universitaires de France, 2010, p. 4.

que juridique : économie, sociologie et philosophie de la justice sont quelques exemples. Si le procès se préoccupe de l'effectivation, il doit chercher plusieurs réponses pour l'accès à la justice en dehors de la sphère éminemment "technico-judiciaire".

Dans cette même voie est l'avertissement de Atienza et Vigo lors de la présentation du Code Ibéro-Americain de l'Étique Judiciaire:

> Nous sommes conscients que, dans la culture juridique formaliste dominante dans nos pays, le Droit s'est conçu, fréquemment, de manière « insulaire », de façon qu'il y ait une tendance d'opérer en lui-même, sans tenir compte des dimensions qui se considéraient simplement étrangères au monde du Droit, comme celles de la politique, de l'éthique ou de l'économie.[30]

Après une recherche sur la nécessité, le contenue et la configuration de la courtoisie par le juge, on s'aperçoit que, dans plusieurs mesures, il ne s'enseigne ni dans l'académie, ni dans les écoles des magistratures, l'importance d'un agissement courtois. Ceci peut arriver à cause de deux raisons.

La première est la compréhension équivoquée du fait qu'il s'agit d'un sujet étranger à l'entité juridique. Les affirmations de Cadiet, Atienza et Vigo sont lucides une fois qu'elles alertent sur l'impossibilité du droit traditionnellement enseigné dans les académies de résoudre les injustices qui empêchent l'accès à la justice. Des études sur la courtoisie c'est juste une partie insignifiante du complexe des sujets indispensables à la justice et sont oubliés dans les cours judiciaires. Si le juriste ne se préoccupent pas de ses questions, certainement d'autres entités ne le feront pas.

La seconde raison pour ne pas enseigner la courtoisie est parce que, dans certaine mesure, elle est apprise instinctivement par le juriste. Cette affirmation semble contradictoire avec le paragraphe antérieur, mais ce n'est pas le cas. Le juge apprend à être courtois non seulement à partir des discussions académiques et doctrinaires. Dans son activité de juger, il rencontre journalièrement les questions les plus colorées. La forme de les traiter trouve, parfois, la réponse non seulement dans les livres juridiques ou dans la jurisprudence, mais dans la musique, la peinture, la littérature, enfin dans l'art et dans l'observation attentive de la vie. Une partie de la courtoisie ne s'apprend pas, mais se saisit de l'extérieur d'une forme inconsciente comme l'action vitale et irréfléchi de respirer. Il y a besoin d'améliorer la sensibilité pour cette réalité.

9. CONSIDERATIONS FINALES

Les principales conclusions de cette recherche ont été traitées à la fin de chaque chapitre et seront listées ci-dessous:

30. ATIENZA, Manuel; VIGO, Rodolfo Luís. *Código ibero-americano de ética judicial.* Brasília: CJF, 2008, p. 24.

1. La courtoisie englobe plus que la politesse. Bien qu'elle ne puisse être millimétriquement considérée, elle comprend les notions telles que la respectabilité et la considération. Pendant que la politesse peut être vide de sens la courtoisie trouve son fondement dans la morale qui lui confère le contenu et la robustesse.
2. La courtoisie que doit pratiquer le juge n'a pas des limites précises. Elle a ses fondements dans la morale et recouvre des thèmes importants tels que le respect et la considération que le juge doit rendre à ceux qui l'entourent. La courtoisie est un pilier important d'un judiciaire éthique et contribue à la consolidation et légitimation de cette institution avec les titulaires du pouvoir politique : le peuple.
3. La coopération est une norme et détermine les conduites aux sujets processuels, y compris au juge. Entre ses conduites, se met en évidence les devoirs d'éclaircissement, prévention et consultation. La courtoisie, malgré qu'elle puisse être prévue dans la loi, elle n'est pas identifiable facilement, car le magistrat peut être en train d'agir de manière polie, mais feinte.
4. Le magistrat doit être courtois envers l'avocat indépendamment du traitement de celui-ci envers celui-là. La coopération dans le procès par le juge peut arriver sans courtoisie, mais ce n'est pas la situation idéale.
5. Toutes les autres personnes qui gravitent d'une façon plus proche autour du magistrat l'aidant dans sa mission d'appliquer la justice comme huissiers, procureurs, défenseurs doivent aussi être traités avec courtoisie.
6. Le titulaire du pouvoir exercé par le juge est le peuple. Le juge, en réalisant sa fonction, lui doit une satisfaction immédiate et ensuite, aux avocats et huissiers.

De tout l'exposé il en ressort trois propositions pour l'affinement d'un judiciaire plus courtois: deux destinées aux magistrats (ou à celui qui prétend le devenir) une destinée à l'académie et au judiciaire comme institution.

La première se réfère à la vocation nécessaire pour la magistrature. Ceci parce que se comporter de manière courtoise dans les moules listés ci-dessus paraît une tâche presque divine. Il convient donc de rappeler le Juge Hercules de Dworkin dans sa tâche surhumaine de résoudre les cas difficiles. Si le Juge Hercules doit être présent juste dans ces *hard cases*, le Juge Courtois doit être toujours présent. Peut-être agir comme Hercules et avec courtoisie dans sa pleinittude soit une tâche impossible. Ceci, cependant, n'empêche pas au magistrat de tenter. Pour cela, il est nécessaire que ne prétendent devenir (ou se maintenir) magistrat, seuls ceux qui ont la vocation sincère pour la tâche. La tentative par le magistrat de vocation est toujours plus apte à produire les meilleurs fruits.

Une fois magistrat (et par vocation), le juge doit s'ouvrir aux diverses autres branches de la culture humaine. La doctrine judiciaire et la jurisprudence ne réussissent pas seules à traiter de la justice et ses infinies nuances. Dans la grande mesure il ne

s'apprend pas la courtoisie avec un Code Modèle ou un manuel. Psychologie, sociologie, anthropologie, philosophie, économie, administration, art etc. peuvent contribuer dans la formation d'un magistrat plus créatif et courtois.

Enfin, conscients de la limitation du champs judiciaire, les académies et les écoles de magistratures doivent assurer une éducation interdisciplinaire. Les thèmes apparemment non rapportés au droit peuvent être de grande valeur. Prenons à titre d'exemple la pratique d'un art. Elle n'amènera pas certainement une réponse immédiate sur un cas difficile, mais elle est apte à stimuler la sérénité nécessaire pour que le magistrat continue agissant avec courtoisie même dans les situations les plus difficiles.

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6

AN OVERVIEW OF CIVIL PROCEDURE IN ARGENTINA[1]

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ABSTRACT: The paper presents an overview of Federal Civil Procedure in Argentina, analyzing its historical and cultural influences as well as current trends. Firstly, it describes how the Spanish conquest influenced Argentine civil procedure and the main reforms that took place during 1968, 1981 and 2001. Then, it describes Argentine civil procedure main features, such as the "attenuated party-driven procedure", the "contradiction principle", and the "mixed written-oral system", among others. Particularly, it focuses on two procedural devices developed along the last twenty-five years: mandatory mediation before accessing to courts and class actions litigation. Finally, the report states that, despite Argentina´s reform efforts, the Federal Civil Procedure structure still works with an outdated model

1. O autor deste artigo foi convidado a escrever neste número da Revista e, por isso, seu texto não passou pelo processo de dupla avaliação cega.

based in a written scheme, with low levels of transparency and publicity, no close contact between parties and judges and lacks of new technologies, among other structural problems.

KEYWORDS: Civil procedure – Latin American civil procedure - Principles of civil procedure in Argentina - Civil procedure reforms in Argentina - Mediation in Argentina - Class actions in Argentina.

I. INTRODUCTION

The aim of this report is to present an overview of the main characteristics of Argentine civil procedure. To do that, I will briefly explain its roots, historical evolution and distinctive features, and then present some discussions about specific institutions that have recently marked relevant changes in this field of law: mandatory pre-judicial mediation and class actions.[2]

Considering that Argentina is a federal country where the Provinces have power to enact their own rules on civil procedure, as well as the rules on courts' system and organization, the focus of this report will be on the federal level. Nonetheless, most of the issues and discussions presented herein can be translated -with certain adaptations and precautions- to what happens in those local States.

II. ARGENTINE CIVIL PROCEDURE ROOTS. THE SPANISH HERITAGE AND THE STRONG INFLUENCE OF CIVIL LAW TRADITION

As Oteiza clearly explains, to find the roots of Argentine civil procedure we must look back to the 12th and 13th centuries. In that historical moment we can find "the ideas that still dominate civil procedure in Argentina and in most Latin American countries".[3] Particularly in our country, the canonical Roman law arrived from Spain. Its direct influence during the three centuries that followed the conquest of America, and indirect up to the present, is more than evident.[4]

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2. This short paper reflects the conference delivered by the author at the "III Siberian Legal Forum", Tyumen University, November 2018. It works on materials already published by the author, mainly in Berizonce, Roberto O. & Verbic, Francisco, *Las reformas procesales en la República Argentina*, in Oteiza, Eduardo (Director) *Sendas de la reforma de la justicia en el siglo XXI*, 61-94 (ed. Marcial Pons, 2018) and Verbic, Francisco, *An overview of class actions in Argentina,* Global Class Actions Exchange, Stanford Law School, [http://globalclassactions.stanford.edu/].
3. Oteiza, Eduardo, *El fracaso de la oralidad en el proceso civil argentino*, in Carpi, Federico & Ortells, M. (Directors), *Oralidad y escritura en un proceso civil eficiente*, 413-439 (ed. Universidad de Valencia, 2009).
4. See generally Berizonce Roberto O. & Ferrand Frédérique, *Lois modèles et traditions nationales = Model laws and national traditions,* XIVeme Congres mondial de l'AIDP, Heidelberg 2011(ed. Bielefeld: Gieseking-Verlag, 2014).

National authors and researchers agree on the fact that the incontrovertible source of our first comprehensive modern rules (both Act N° 50 of "Procedure before National Courts", passed in 1863, and its complementary "Code of Procedures", adopted in 1880), was the Spanish Law of Civil Procedure of 1855, which core, in turn, can be traced to the "Partidas" of Alfonso el Sabio (circa 1251).

After those first procedural legal bodies, the most relevant reform in this field came in 1968 during the military government of Juan Carlos Onganía. Then, almost exactly fifty years ago, the Act N° 17.454 approved the first "National Civil and Commercial Procedural Code" (NCCPC). It was a system eminently written and with plenty of incentives towards delegation, even though during the 60's there were intense debates all along the country about the need to give greater relevance to orality in civil procedure.

The NCCPC had its first relevant reform in 1981 through Act N° 22.434, and then another one -more specific- in 1995 through Act N° 24.573. The 1981 reform had two fundamental goals: (i) to empower the judge to delegate certain tasks to facilitate her immediate and effective participation in evidence hearings; and (ii) to expressly establish the nullity of the hearing where confession evidence is taken in case the judge was not present there. Oteiza points out that delegation was effectively implemented but not the sanction of nullity, even though judges continued -in their great majority- without personally managing that hearing. The 1995 reform, in turn, introduced a preliminary hearing and ratified the requirement of the Judge presence therein under pain of nullity (as Act. N° 22.434 has done before regarding the confession evidence hearing). Although the chosen path can be considered correct, once again its implementation failed.

It should be noted that all the trends and projects that were developed in this field of law in Argentina after the 1981 reform of the NCCPC had been strongly influenced by Italian professor Mauro Cappelletti. He visited the country at the beginning of that decade and provoked, as Berizonce always like to say, a "true revolution in the way of thinking and studying procedural law".

Another relevant influence in this path was the Model Code of Civil Procedure for Latin America, drafted by the Ibero-American Institute of Procedural Law and approved in Rio de Janeiro in 1988. This initiative was also shaped under the light of the fundamental principles advanced by Cappelletti: access to justice, strong judges with powers and duties on evidence and case management, immediacy, orality, legal aid for the poor, declaration of part (instead of confession), cross-examination and duty of collaboration.[5]

5. See generally 1 Morello, Augusto M. & Sosa, Gualberto L. & Berizonce Roberto O., *Códigos Procesales en lo Civil y Comercial de la Provincia de Buenos Aires y la Nación, Comentados y Anotados* (4th ed. Abeledo Perrot, 2016).

Among the subsequent reforms, the most relevant was that operated through Act 24.588 in 2001. Among other issues, arts. 34 and 36 of the NCCPC were modified to determine that different tasks that were previously recognized as "faculties" of the judge had to be considered as "duties". In addition, the reform maintained the preliminary hearing, but eliminated the sanction of nullity in the event of absence of the Judge. Another relevant (and regressive) modification was the elimination of summary proceedings, reshaping the structure of the NCCPC to allow only two alternatives: an ordinary procedure, with great place for debate and evidence, and a super summary procedure, only enabled for exceptional circumstances and with a limited margin for discussion and evidence.

Almost nothing changed with these reforms, showing clearly that it is not possible to modify deeply rooted cultural practices by simply modifying the text of the law.

III. SOME OF THE BASIC FEATURES THAT TYPIFY ARGENTINE CIVIL PROCEDURAL SYSTEM

In great measure because of its historical roots and evolution, as well as to the main doctrinal source of influence described above, Argentine civil procedure is characterized by some basic features that can easily be identified.[6] To facilitate the comparative analysis, I will not present them in detail but in a plain way.

(i) Attenuated party-driven procedure

Parties have the burden to stimulate the Judiciary through the proposal of the action, which must contain a precise definition of facts and claims, as well as a precise adducing of evidence regarding those facts.

On the other hand, the case management goes with the judge. This includes the duty to urge the procedure *ex officio*, notwithstanding the burden of the parties to do the same, as well as the recognition of powers of certain scope to complete or integrate the evidence provided by the parties.

(ii) Principle of contradiction

The right to have enough and reasonable opportunity to be heard and to contradict the opponent arguments and evidence (as well as the evidence produced ex officio by the judge) derives from conventional and constitutional clauses that consecrate the inviolability of due process of law in Argentina (art. 18 CN, arts. 8 and 25 of the American Convention on Human Rights).

(iii) Mixed written-oral system

The almost unaltered survival of the structural features of civil law tradition has been one of the main reasons that has prevented in Argentina the adoption of a predominantly oral system.

6. Berizonce, *supra*, at. 4.

An old scriptwriting scheme structured in a frame of strict preclusive phases, with all the shortcomings that are consequence of the lack of immediacy, the practice of delegation, very little publicity, and its inevitable sequels in terms of delay, are trying to be replaced. But, as we all know, old habits die hard.

(iv) Publicity

Civil procedure is a way of public adjudication that deserves, in turn and because of that public profile, according measures of publicity. Despite of that, the features we have already presented in this report had make of publicity in this field an insufficient and very undeveloped phenomenon.

The legal provisions on the public nature of the ordinary hearings have no significance and had been systematically overwhelmed by the weight of tradition and bad practices. The exception to his state of things is the special regulation on public hearings implemented by the Argentine Supreme Court of Justice ("ASCJ") for cases of "institutional relevance" (Acordada N° 30/2007).

(v) Burden of proof

The general criterion for the burden of proof is entrusted it to the part that sustain certain facts have happened in the real world. Besides that, there is an increasing use of the doctrine of "dynamic burden of proof" as well as a recently new approach to the issue in terms of "principle of collaboration".

This last doctrine has been formally regulated in Act. 24.240, a specific statute for consumers protection. Furthermore, as we have already seen, the judge has a duty (since the 2001 reform) to order the production of evidence in case it is necessary to clarify the truth of the disputed facts (principle of primacy of reality).

(vi) Ordinary and extraordinary appeals system

The Spanish tradition left deep traces in the intricate ordinary appeal proceedings historically in force in Argentina.[7] The system operates in a framework of double instance. A double instance that is not a conventional nor a constitutional right (as it does in criminal procedures), unless it is effectively regulated for the specific issue in discussion.

The ordinary appeal subsumed the nullity appeal, so you can challenge both in *iudicando* and in *procedendo* mistakes from the first instance court. New evidence is allowed only exceptionally. Regarding its immediate effect over the judgment, as a rule the filing of the appeal suspends its execution until decided.

On the field of extraordinary appeals, Argentina has replicated the US federal system. We have a Supreme Court at the summit of the Judiciary almost identical (in

7. See generally Oteiza Eduardo, *Disfuncionalidad del modelo de proceso civil en América Latina*, (ed. University of Medellín, 2010).

theory, though not in practice) to the scheme created by the US Judiciary Act of 1787. Following this path, the extraordinary federal appeal before the ASCJ was established in 1863 and promptly adopted the "Marbury vs. Madison" doctrine with the aim of becoming the guardian of the Constitution and to ensure its supremacy through the ultimate stage for judicial review (without prejudice to the diffuse power of judicial review vested to all judges).

The Argentine system was also influenced by the US writ of certiorari. In 1990 a surgical reform incorporated art. 280 bis to the NCCPC, creating a quite peculiar "negative certiorari" that allows the ASCJ to discretionally reject any extraordinary appeal, just by citing art. 280 bis, on the basis of "lack of sufficient federal grievance or when the issues raised are irrelevant or".[8]

(vii) Procedure and new technologies

The degree of modernization of civil procedure of Argentina is far from acceptable at these times. We can access and check the electronic file online, but we couldn't abandon the paper file. Electronic notice has been implemented successfully, maybe the most relevant advance in this field. There is a lot to do in this field to catch up with jurisdictions like Brazil.

IV. MANDATORY MEDIATION BEFORE GOING TO THE COURT

Argentina was a pioneer and still is a regional reference when it comes to deal with regulation and implementation of a mandatory pre-judicial mediation stage in Latin-America.[9]

Act N° 24.573 (the same reform that introduced the preliminary hearing in the NCCPC), regulated a regime applicable to all civil and commercial procedures that were to be commenced in the national justice system. The enactment of this regime was not surprising since by then a pilot test had been carried out as part of the National Mediation Plan set forth in 1991.[10] Its development had a strong economic support of international cooperation funds, particularly the World Bank.

Fifteen years later the system was reformed by Act of Mediation and Conciliation N° 26.589. The new regulation ratified the mandatory character prior to the judicial case, expressly states the power of the judge to bring the parties together to try a self-resolving solution of the litigation (in the preliminary hearing regulated in art. 360 of the NCCPC), and the possibility of referring the parties to a mediation.

8. See generally Morello Augusto M, *Admisibilidad del recurso extraordinario (el certiorari según la jurisprudencia)*, (ed. Librería Editorial Platense S.R.L., 1997).
9. See generally Giannini, Leandro J., *La mediación en Argentina* (ed. Rubinzal Culzoni, 2015).
10. See generally Oteiza, Eduardo, *Punto de vista: MARC/ADR y diversidad de culturas: el ejemplo latinoamericano*, 8 Revista Iberoamericana de Derecho Procesal (2005).

One last comment on this topic: the mandatory mediation regime was established in Argentina with the stated purpose of alleviating the workload of courts. So, instead of dealing with the serious problems of efficiency and effectiveness that our civil procedural system suffers, the legislator just sought to establish palliatives.

V. CLASS ACTIONS

As an unexpected result of the 1994 constitutional reform, collective standing to sue acquired constitutional status in Argentina. This happened due to the introduction of a new art. 43, which vested certain kind of NGOs, the ombudsman and the individual "affected", with the right to file representative lawsuits to protect groups of people.[11]

Since then, legislative developments in the fields of consumers and environmental protection have established some collective procedural rules regarding these matters. First through the Consumer Protection Act N° 24.240, specially as reformed in 2008 by Act N° 26.361, and then through the General Environmental Act N° 25.675, enacted in 2002.

But it was not until the leading case "Halabi" that class actions (specially class actions for damages) were fully recognized as a plausible means to litigate collective grievances. In that opinion, a tight 4-3 decision, the majority recognized the existence of constitutional "homogeneous individual rights" and held that in Argentina is "perfectly acceptable" to file lawsuits "with analogous characteristics and effects as US class actions" to vindicate them. Before "Halabi" the ASCJ has systematically dismissed cases where NGOs, individuals or the ombudsman were litigating collective cases involving patrimonial rights.

Four years and a half after "Halabi", the ASCJ delivered another relevant opinion in this field of law. That happened when deciding "PADEC v. Swiss Medical". The differences between the cases show the importance of this last opinion. First, this was a class action filed by an NGO seeking declaratory and economic relief for insurance consumers, while "Halabi" was filed by an individual "affected" and has only involved declaratory relief.

Even more important, the ASCJ opinion in "PADEC" applied the "Halabi" doctrine in full (including long quotations) and confirmed the fundamental features of what can be described as a hybrid model of class actions in Argentina: a system which merges a catalogue of collective substantive rights, taken from the Brazilian Code of Consumer Protection, with specific procedural rules and safeguards designed to protect due process rights of absent class members, taken from the class actions regulated in the US Federal Rule of Civil Procedure 23 (FRCP 23). These procedural safeguards include

11. See generally Verbic, Francisco, *Tutela colectiva de derechos en Argentina. Evolución histórica, legitimación activa, ámbito de aplicación y tres cuestiones prácticas fundamentales para su efectiva vigencia*, (special ed. Rubinzal Culzoni, 2012).

the essential basis of US class actions: adequacy of representation, notice and opt out rights.

Both in "Halabi" and "PADEC", as well as in several opinions delivered since then, the ASCJ has sustained that the admissibility of class actions to vindicate homogeneous individual rights demands the fulfillment of four requirements:

(i) A relevant number of individuals affected (like the impracticability of joinder prerequisite of FRCP 23(a)(1)).

(ii) A common origin of the injury, which was explained by the ASCJ as requiring the existence of a single or complex fact causing the grievances suffered by the class (similar to the commonality prerequisite of FRCP 23(a)(2)).

(iii) A pleading and a cause of action focused on the issues common to the class (somewhat like the typicality prerequisite of FRCP 23(a)(3)); and

(iv) Individual interests at stake should not be of such importance to justify individual lawsuits "so that access to justice could be compromised".

Along with those admissibility requirements, as we have mentioned, the ASCJ has established several procedural safeguards which she considered as "essential" to protect absentees' constitutional due process rights: the burden to provide a precise definition of the represented group, adequacy of representation (which must be "supervised" by the court), notice to absent members, class members' opt out and intervention rights, and publicity of proceedings in order to avoid parallel and overlapping litigation.

Finally, there are two administrative regulations from the ASCJ that must be particularly considered, because they translated the "Halabi" and "PADEC c. Swiss Medical" doctrine and standards into positive law:

(i) Acordada N° 32/2014, creating the Collective Proceedings Public Registry and establishing in its art. 3 a sort of "certification stage" that demands Federal Judges to deliver an opinion on admissibility requirements, notice and adequacy of representation before communicating to the Registry the existence of the case.

(ii) Acordada N° 12/2016, in effect since October 2016 and enacting a "Regulation of Collective Proceedings" which contains provisions on jurisdiction, appeals, case management powers of the judge, registration, lis pendens and pleading requirements, among others.

It is difficult to sustain the constitutionality of these last two regulations, because they plainly provide for procedural rules that, in Argentina, should only be enacted by Congress. However, it is hard to believe that the ASCJ would review its own administrative acts in such a way.

On top of that, it also should be mention that these regulations came to occupy a statutory empty space which poses huge problems of legal uncertainty, as well as

severe difficulties of coordination between overlapping and parallel litigation (just to mention a couple of critical issues).

VI. CLOSING REMARKS

Closing this short report, we share Oteiza's opinion regarding the fact that "Argentina remains attached to a civil procedure characterized by lack of immediacy between the judge and the parties, delegation of functions, absence of concentration of its different phases, little publicity and predominance of writing as habitual practice for motions and other procedural issues. These characteristics influence its low level of efficiency, measured in terms of reasonable length, sustainable cost and ability to produce fair decisions".[12]

But winds of change are blowing. Nowadays, there is a special commission of the Executive Power discussing and working on a draft to enact a new NCCPC. The same happens with class actions and several other areas of civil procedure. It seems that we are going to have deep changes in our system quite soon.

12. See generally Oteiza, Eduardo, *¿Debemos reformar la justicia civil? Los procesos colectivos como una pieza clave de una reforma imprescindible*, in Salgado, José M. (Director), *Procesos Colectivos y Acciones de Clase*, (ed. Cathedra Jurídica, 2014).

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