GAIOSKI PAGANI, Lucas Augusto; SMOLAREK DIAS, Bruno; REAL FERRER, Gabriel. Procedure, structural process and legal activism. **Revista Eletrônica Direito e Política**, Programa de Pós-Graduação Stricto Sensu em Ciência Jurídica da UNIVALI, vº 17, nº 3, 3º quadrimestre de 2022. Disponível em: https://periodicos.univali.br/index.php/rdp - ISSN 1980-7791. DOI: https://doi.org/10.14210/rdp.v17n3.p581-607

PROCEDURE, STRUCTURAL PROCESS AND LEGAL ACTIVISM

PROCEDIMENTO, PROCESSO ESTRUTURAL E ATIVISMO JUDICIAL

PROCEDIMIENTO, PROCESO ESTRUCTURAL Y ACTIVIDAD JUDICIAL

Lucas Augusto Gaioski Pagani[1]
https://orcid.org/0000-0001-9396-9133
http://lattes.cnpq.br/8926371164820496

Bruno Smolarek Dias[2]
https://orcid.org/0000-0001-9998-7025
http://lattes.cnpq.br/6666118800770855

Gabriel Real Ferrer[3]
https://orcid.org/0000-0002-6993-3373
http://lattes.cnpq.br/3327378112714104

Recebido em: 03/01/2022
Aprovado em: 09/09/2022

ABSTRACT

Subject Contextualization: It examines the procedural formalism from a logical-formal structure. Furthermore, it analyzes the possibility of judicial creativity regarding procedure in structural processes. It also permeates the process as a guarantee against discretion and its maintenance as a delimited discursive field.

[1] Master in Procedural Law and Citizenship (UNIPAR). Graduated in Law from Universidade Paranaense (UNIPAR). PIT/UNIPAR Scholarship. Mises Alumni. Acton Alumni. Professor of lato sensu postgraduate studies in Law, Political Science and Liberalism at the Mises Academy (UniÍtalo). Professor of Undergraduate and Postgraduate Studies in Law at Universidade Paranaense (UNIPAR), Umuarama campus. Judge Adviser (TJPR). E-mail: lucas.pagani@prof.unipar.br

[2] Possui graduação em Direito pelo Centro Universitário Positivo (2004) e mestrado em Direito pela Pontifícia Universidade Católica do Paraná (2008). Doutor em Ciência Jurídica da Universidade do Vale do Itajaí - SC (2014), ex-bolsista CAPES para Doutorado Sanduíche na Universidade do Minho - Portugal (2012). Doutorado em co-tutela com a Universitá degli Studi di Perugia - Itália. Atuou como Coordenador do Curso de Direito da Universidade Paranaense - Unipar Campus Francisco Beltrão (2010-2014), professor titular ´a´ da Universidade Paranaense. Leciona na graduação, pós-graduação e no Mestrado em Direito Processual e Cidadania da Universidade Paranaense UNIPAR. Tem experiência na área de Direito, com ênfase em Direitos Humanos e Fundamentais, Direito Internacional Público, Constitucional e Processual, atuando principalmente nos seguintes temas: direitos humanos, direito socioambiental, normas fundamentais do processo, direito constitucional processual, direito ambiental, direito público, sociologia política e ciência política.

[3] Doctorate in Law from the University of Alicante (1992). Titular Professor of Environmental and Administrative Law and Deputy Director of the University Institute for Water and the Environment at the same University. Consultant for the United Nations (UN) Environment Program - UNEP.

Objectives: The main purpose of this article is to analyze process flexibility in cases of structural disputes, based on the proposal of the process as a guarantee institution, from which proceduralism derives.
Methodology: For that, it uses a bibliographic-documentary analysis, using the deductive method, to infer the conclusions.
Results: It is concluded that the legal and discretionary review of process and procedure intitutions is not valid, even in conflicts otherwise classified as structural.

Keywords: Lawsuit; Procedure; Structural procedure; Legal activism.

RESUMO

Contextualização do Tema: Examina, assim, o formalismo processual a partir de uma estrutura lógico-formal. De mais a mais, analisa a possibilidade de criatividade judicial em termos de procedimento nos processos estruturais. Outrossim, perpassa pelo processo enquanto garantia contra o arbítrio e sua manutenção enquanto campo discursivo delimitado.
Objetivo: O objetivo do presente artigo é analisar a flexibilização procedimental nos casos de litígios de natureza estrutural, a partir da proposta do processo enquanto instituição de garantia, do qual decorre o procedimentalismo.
Metodologia: Para tanto, se vale de análise bibliográfico-documental, a partir do método dedutivo, para inferir as conclusões.
Resultados: Conclui-se que não é válida a revisão juristocrática e discricionária de institutos do processo e do procedimento, ainda que nos conflitos classificados como estruturais.

Palavras-chave: Processo; Procedimento; Processo Estrutural; Ativismo Judicial

RESUMEN

Contextualización del Tema: Así, examina el formalismo procedimental desde una estructura lógico-formal. Además, analiza la posibilidad de creatividad judicial en materia procesal en los procesos estructurales. Además, permea el proceso como garantía frente a la voluntad y su mantenimiento como campo discursivo delimitado.
Objetivos: El presente artículo tiene por objeto analizar la flexibilidad procesal en casos de controversias estructurales, a partir de la propuesta del proceso como institución de garantía, de la que deriva el procesalismo.
Metodología: Para ello, utiliza un análisis bibliográfico-documental, empleando el método deductivo, para inferir las conclusiones.
Resultados: Se concluye que la revisión legal y discrecional de los institutos procesales y procesales no es válida, aún en los conflictos catalogados como estructurales.

Palabras clave: Proceso; Procedimiento; Procesos estructurales; Activismo legal;

INTRODUCTION

The dawn of Judiciary in the typological plan of conflict resolution matters in a scenario in which the judicial activity internalizes alternative models to the traditional procedural logic, instrumentalizing actions and conducts that, in principle, in the Constitutional and political diagram, are essentially attributed to the Legislative and Executive. To this end, the defense of the Judiciary's proactive stance relies on arguments, to a certain extent, fanciful of the realization of fundamental rights, including through the management of public policies, since *the problem is not effectively solved*, but, rather, *circumstantially*, without the due political and regulatory digressions on any public policies *and social rights* that one *wants to implement* (or not to implement, in light of reserve of the possible).

The Civil Procedure, in its nature, effectively, a technical figure structured as a phenomenon that ensures a threatened right or reaffirms a right in a situation of danger. This concretization takes place through jurisdictional cognition, whose necessary configuration permeates the proceduralized procedure, in which the acts of intelligence and interference over legal instances pass through a structured managerial stage, so that the State's tutelage can act about the object in question, through a legitimate monopoly of force.

However, despite instrumentalist dogmatics, procedural ordinariness, as an occurrence of the spectrum of the process, ensures a wide range of procedural and *trans-procedural* guarantees that maintain control of the judge's acts within the democratic logic. Therefore, the assignment of discritionary power and wide action criteria misses the procedure while *counter-jurisdictional* guarantee, in which the procedure assures the building of decision basis from the due process of law.

It is not a matter of denying the cultural and problematic character of Law. It happens that the deformation of the procedure, to the argument of procedural adaptation to the needs of substantive law and that the ordinary procedure creates an obstacle to effective judicial provision, breaks with the logic of the process as a *guarantee institution*.

It is necessary to defend a structure that maintains, in favor of the parts and society in general, a process conducted by independent judges and devoid of discretionary and directive powers.

In this sense, it is up to the present work to develop ideals in which the democratic understanding of the process permeates the proportional increase of the guarantees of independence of the parts and committed to the delimitation of the creative scope of the magistrate.

To do so, it is necessary to start from procedural rules that submit the court in the construction of the judicial decision that will produce effects especially in the instance of the rights of the parts, but will also reflect on the whole society.

Furthermore, it is necessary to draw guidelines about the procedural binding of the judgment to the democratically established by the Constitution and the Law dictates, in the regime of separation of powers. Indeed, even in irradiated and trans-individual conflicts, such as structural ones, the solution is not to make the procedure more flexible and assign discretionary and creative powers to the judge. It is an opportunity to reaffirm the process as a guarantee, in terms of legal certainty, a founding principle of the social and legal order.

In this frame, the appropriate technique for the proposed problem and objectives, the incursion into bibliographic and documentary sources guide the understanding of the researched phenomena, as well as the interpretative and descriptive comprehension of the thematic advances. In this way, the logic of the conclusions will be built from the prepositions delimited in the understanding of the procedural, procedimental, structural and activist phenomena and, therefore, in a deductive way.

2. OF THE PROCEDURE AND THE GUARANTEE

The historical appropriation of the process by public law, with the argument of emancipating it from substantive law, with argumentatively scientific bases[4], led it to a logical-formal structure in which, ina broad sense, procedural formalism is

[4] OLIVEIRA, Carlos Alberto Alvaro de. **Do formalismo no processo civil**. 2. ed. São Paulo: Saraiva, 2009.

supplanted by the functional boundaries of jurisdiction. It leads to the publicization of the process going through the institutionalization of the figure of the State-judge in the process, to the argument of the good of justice and the overthrow of injustice.

So much that Bülow's work is besieged as a landmark of the birth of the process as an autonomous methodology. The mark of procedural autonomy in Oskar Bülow is concentrated on procedural assumptions. However, it is important that in the proposed logical structure, the legal relationship is not bilateral subject-subject, breaking with the subjective duality of the legal relationship[5], but rather dictated by the State-judge, which, finally, gives it public character.

Bûlow adopted the socializing vision of the process, which, due to his philosophical-political conceptions, had repercussions on the structuring of the proposed model.[6] It so happens that the author's systematization takes place in a context permeated by the ordering of law by the State, in which the claim of the process's own existence is understood under the needs of the State. That is why in Bülow (1964) the process comes exists based on assumptions.

Nevertheless, *"[e]el proceso es una creación de la inteligencia, una maquinaria hecha con sutileza y construída según las leyes severas de la lógica, cuya esencia resulta de la determinación de su fin material"*.[7] This domain, although in the State environment, the influence of freedom as a fundamental value, leads to the logical-formal structuring of the process from what the parts had for the litigation and the impartial judge, with an elementary profile in conflict resolution.

That is, even if the public legal nature of the procedural legal relationship is stated, as it permeates the State, the state administration of justice takes place within the limits of justice and the claims and conflicts launched in the demand.[8] In this step, the contradictory is structured. From the antagonistic structuring of the subjects'

[5] VILANOVA, Lourival. **Causalidade e relação no direito**. 4. ed. São Paulo: Revista dos Tribunais, 2000.
[6] NUNES, Dierle José Coelho. **Processo jurisdicional democrático**. Curitiba: Juruá, 2008.
[7] WACH, Adolf. **Conferencias sobre la ordenanza procesal civil alemana**. Bueno Aires: EJEA, 1958.
[8] WACH, Adolf. **Manual de derecho procesal civil**. Bueno Aires: EJEA, 1977. v. 1.

claims, the agglutinating denominator is justice, whose commitment starts based on the logic of the contradictory.[9]

The process and state participation cannot be summarized, in fact, as a state assistance for private interests. It appears that the notion of process, inseparable from jurisdiction, comprises purposes that transcend the exclusive interest of the parts. It is important that the authority and enforceability of state decision-making acts are included in the purposes of authority, certainly provided for in the legal system in an imperative way, whose binding takes place vertically and horizontally.

However, despite the bad experiences of procedural privatism, dissociated from a publicist model, the independent and deprived from discretionary and direct powers must be carried out, in which the judge's powers exists only because of the subjective right of the parts, which guide the process as anti authoritarian institution without interfering on judiciary freedom and autonomy, binding jurisdiction and imparcial creation of the law.

It follows that "[...] the characteristic core of a procedural system resides fundamentally in the relationship between the roles assigned to the judge and the parts, in themselves or as represented by their lawyers".[10] Although influenced by ideologies and philosophical-political perspectives, understanding the balance between the powers and duties of the parts and the judge represents the core of the process conceived in a given system.

So much so that, designed by Alfredo Buzaid, the Civil Procedure Code of 1973 renewed the ideal of the process as an instrument of the State, which can be seen in the clear and express absorption of concepts and models proposed by Chiovenda and Liebman. The subscriber is categorical in stating that he built "[...] an imperishable monument of glory to Liebman, representing the fruit of his wise teaching in terms of legislative policy".[11]

[9] BRÊTAS, Ronaldo de Carvalho Dias. **Processo constitucional e Estado Democrático de Direito**. 3. ed. Belo Horizonte: Del Rey, 2015.
[10] MOREIRA, José Carlos Barbosa. O processo civil brasileiro entre dois mundos. *In*: MOREIRA, José Carlos Barbosa. **Temas de direito processual**: oitava série. São Paulo: Saraiva, 2004.
[11] BUZAID, Alfredo. A influência de Liebman no direito processual civil. **Revista da Faculdade de Direito, Universidade de São Paulo**, São Paulo, v. 72, n. 1, p. 131-152, january 1977.

In this system, the procedural system is not at the service of the jurisdictioned, but is built and conceived from its public function. However, the attention to the jurisdiction is prescribed and constitutionally disciplined, so that it is effectively implemented. So much so that the fair decision is inextricably linked to the due process of law, in which the righteous is in judges who make decisions under the rule of law and strict observance of due process.

The Civil Procedure Code of 2015, despite respecting the competence and ability of the parts, intended to establish a regime in which the subjects of the proceedings structurally collaborate with the final decision. However, under the depreciation of building an adequate system of attributions and functions of the parts in the process, to implement the precept of cooperation, negatively, it has increased the structure of powers of the judge and other elements of the court.[12]

It is important that the democratic understanding of the process involves the proportional increase in the guarantees of independence of the parts, whose conflict is naturally at the heart of the disputed issue. Independence is also an indispensable element in favor of judgment, but its implementation takes place in different dimensions. The submission of the parts to values that transcend them, by limiting freedoms, must be taxed by unofficial premises that bind the judge.

It so happens that advances in the understanding of law under axiological and cultural genesis, whose origins unfold with the socially considered human reality, the result of positive culture, it is not possible to finalize the rationalist paradigm, underlying modernity. In this sense, the problematic character assumed by law is unavoidable, understanding the process as a dialogic space[13], in which the substantial contradictory informs the other elements and institutes of the process.

In other words, establishing the process as public and instrumental in achieving the common good cannot be a subterfuge to distance the effective and fair process from the strict interests of the parts. Furthermore, the linking of procedural technique with matters of justice follows the requirement of forms and objectives

[12] RAATZ, Igor. Revisitando a "colaboração processual": ou uma autocrítica tardia, porém necessária. **Revista de Processo**, São Paulo, v. 45, n. 309, p. 41-71, november 2020.

[13] MITIDIERO, Daniel. **Colaboração no processo civil**: do modelo ao princípio. 4. ed. São Paulo: Thomson Reuters Brasil, 2019.

for the realization of substantive law. Indeed, due process of law is an inseparable element of due process, whose commitment is mainly to guarantee.

In this case, the process is not a mere instrument of the State, for purposes that transcend the interests of the parts directly involved, as foreseen in Dinamarco (2001). The process and formalism assume the role of ensuring the preponderance of freedom over authority.[14] In other words, affirming the public nature of the process, it represents this fundamental right of protection, whose commitment is marked by proceduralism.

The procedure is presented as an indistinct element for the fair construction of the jurisdictional solution, as the legitimacy is given by the observance of communicative assumptions, which is a condition for the democratic formation of the opinion and will of the participants.[15] Is in this fabric that the due process of law ensures the contours in which the State's action on legal situations and rights will take place, which assumes a supervisory function and not just a construction one.

So much so that the logical and methodological operation of the judge when issuing the decision only has reason to exist, as a judgment of legality and value, on procedural issues and matters of merit in a space that authorizes him to implement the law. This space must be organized in such a way that the judge's reasoning and intelligence about facts and evidence must be free from adverse facts, which, ultimately, effectively helps in the apprehension of a fair decision.[16]

Indeed, the process, as an institution, is incorporated by institutive principles, such as contradictory, isonomy and wide defense, which theorize and structure it in nature. Moreover, they are elements that unite the entire legal-procedural discourse[17], whose commitment is to be a reference in the dialectical and logical discourse of the procedure and rests on the participation of the addressees in the

[14] RAATZ, Igor; Anchieta, Natascha. **Uma teoria do processo sem processo**: a formação da "teoria geral do processo" sob a ótica do garantismo processual. Belo Horizonte: Casa do Direito, 2021.
[15] HABERMAS, Jürgen. **Facticidade e validade**: contribuições para uma teoria discursiva do direito e da democracia. Tradução de Felipe Gonçalves Silva e Rúrion Melo. São Paulo: Editora Unesp, 2020.
[16] MADEIRA, Dhenis Cruz. **Processo de conhecimento e cognição**: uma inserção no Estado Democrático de Direito. Curitiba: Juruá, 2008.
[17] LEAL, Rosemiro Pereira. **Teoria geral do processo**: primeiros estudos. 12. ed. Rio de Janeiro: Forense, 2014.

construction of the effects of the provision of jurisdiction, which must be informed by the technique.

3. FROM PROCEDURE AND STRUCTURAL PROCESS

The understanding of the process is currently assimilated in the perspective of contradictory between the interested subjects, who, in the judicial process, are the parts. In the procedural scope, the elementary conformation to the fair judicial provision acts in the field of technique, directing the procedural adequacy to the interests included in the process. In this development, there is the construction of techniques for summarizing the procedure and summarizing cognition, which took place predominantly in the legislative domain.

It turns out that "[the] procedure is a preparatory activity for a given state act, an activity regulated by a normative structure, composed of a sequence of norms, acts and subjective positions that develop in a very specific dynamic [...] ", whose commitment is to prepare a state provision, of an imperative nature, produced within the scope of its competences.[18]

Therefore "[...] [I]t is a fact that the provision issued, validly and effectively, must be preceded by a preparatory activity, disciplined in the legal system". This is because, in the Democratic State of Law, "[...] the power is exercised within the limits of the law and the State fulfills its functions within the legal framework that disciplines its activities".[19]

In this sense, the procedure materializes and systematizes the concept of legal security and freedom, in which the structural demarcation validates the judicial act practiced.

However, to the argument of the immediate effectiveness of the constitutional right of action, which comprises a complex of procedural legal situations and

[18] GONÇALVES, Aroldo Plínio. **Técnica processual e teoria do processo**. Rio de Janeiro: Aide, 1992, page 102.
[19] GONÇALVES, Aroldo Plínio. **Técnica processual e teoria do processo**. Rio de Janeiro: Aide, 1992, page 102.

positions that lead to a fair, timely and effective decision[20], it started to admit the flexibilization of the procedure, in which, the little procedural availability, started to give space for the use of techniques, by the parts and the judge, procedurally atypical.

Procedural simplification was a major concern of the creators of the 2015 Civil Procedure Code, in an attempt to make the process more accessible and effective in its purpose. However, it is important to note that "[...] the technique of flexibility brings a different dynamism to the conduct of procedural subjects [...]"[21], as well as an embarrassment in the domain of the legitimacy of the decision judicial process, as it acts on fundamental rights and guarantees, as the process itself is.

The main argument in favor of procedural flexibility is given by its characterization as "[...] a phenomenon resulting from constitutional and procedural parameters, aiming at the true scope of contemporary procedural law".[22] Therefore, it assumes that "[the] institute appears as an alternative to the pre-established procedures that are not compatible with the particularities of the legal relationship presented".[23]

In the context of particular situations that the previously established legal procedures, in principle, are not sufficient to manage. In this environment, structural disputes emerge. In the lesson of Vitorelli[24], "[s]tructural disputes are collective disputes arising from the way in which a bureaucratic structure, usually of a public nature, operates". Furthermore, "[t]he functioning of the structure is what causes, allows or perpetuates the violation that gives rise to collective litigation".

[20] MARINONI, Luiz Guilherme; ARENHART, Sérgio Cruz; MITIDIERO, Daniel. **Novo curso de processo civil**: teoria do processo civil. 2. ed. São Paulo: Revista dos Tribunais, 2016. v. 1.
[21] CABRAL, Trícia Navarro Xavier. Reflexos das convenções em matéria processual nos atos judiciais. *In*: CABRAL, Antonio do Passo (Org.); NOGUEIRA, Pedro Henrique (Org.). **Negócios processuais**. 4. ed. Salvador: JusPodivm, 2019, v. 1, cap. 16, p. 347-376, page 348.
[22] CABRAL, Trícia Navarro Xavier. Convenções em matéria processual. **Revista de Processo**, São Paulo, v. 40, n. 241, p. 489-516, march 2015.
[23] CABRAL, Trícia Navarro Xavier. Convenções em matéria processual. **Revista de Processo**, São Paulo, v. 40, n. 241, p. 489-516, march 2015.
[24] VITORELLI, Edilson. Processo estrutural e processo de interesse público: esclarecimentos conceituais. **Revista Iberoamericana de Derecho Procesal**. Curitiba, v. 4, n. 7, p. 147-177, january/june 2018.

However, although structural litigation generally covers public structures, it is important to understand that it also aims at changes in the behavior of private structures in the public interest. In addition, they can also comprise disputes verified in entirely private structures, but which, due to their essence and performance in the market and society, cannot simply be eliminated or replaced by others that are the same or similar.[25]

Faced with litigation with these characteristics, it is argued that, due to its complexity, in the face of the traditional procedural repertoire, the classic scheme of claims management, it is essential "[...] new vectors for judiciary activity that allow a bettler forwarding of such complex issues". In other words, "[it is] necessary, therefore, to offer decision-making bodies new standards of action and greater capacity to manage the effectiveness of judicial decisions with more flexible parameters than those constructed under the idea of restricting the deferred to what is requested".[26]

It is adduced in defense of structural processes the similar reason to the one that conveys collective actions in the broad sense, that the filing of individual lawsuits on a given problem causes damage to legal certainty and the quality and efficiency of judicial provision. In this case, the incursion into the reasons for being of the circumstances that repeatedly cause the illicit behavior would be more reasonable, which, in turn, allows for the effective protection of performance rights.[27]

The procedural flexibility in favor of irradiated litigation of a structural nature permeates the formation of a structural process that requires caution and has allowed a certain dose of creativity. In order for the substantial modification proposed by the structural process to take place, several revisions of essential institutions of the process are carried out, whose variations reach operative

[25] VITORELLI, Edilson. Processo estrutural e processo de interesse público: esclarecimentos conceituais. **Revista Iberoamericana de Derecho Procesal**. Curitiba, v. 4, n. 7, p. 147-177, january/june 2018.
[26] MEIRELES, Edilton; SALAZAR, Rodrigo Andres Jopia. Decisões estruturais e acesso à justiça. **Revista Cidadania e Acesso à Justiça**, Maranhão, v. 3, n. 2, p. 21-38, july/december. 2017, página 32.
[27] CAMBI, Eduardo; WRUBEL, Virgínia Telles Schiavo. Litígios complexos e processo estrutural. **Revista de Processo**, São Paulo, v. 44, n. 295, p. 55-84, september 2019.

elements of the procedure. An example of this is the reinterpretation of the congruence of the jurisdictional provision with the formulated.[28]

So much is the review that even the res judicata has been re-reading so that it converges with the purposes of a structural process. It so happens that, as Couture[29] predicts,

> una Constitución puede ser substituida por outra Constitución; una ley puede ser derrogada por outra ley; um acto administrativo puede ser revocado por outro acto administrativo; um acto jurídico privado puede ser modificado y reemplazado por outro acto jurídico", mas "[...] uma sentencia pasada en autoridad de cosa juzgada, no puede ser substituida, derogada, ni revocada por outra sentencia

What we want to emphasize is that the doctrinal and jurisprudential reinterpretation of fundamental and essential institutes of the *prêt-à-porter* process and procedure is not valid, with the exclusive purpose of reconciling them with the purposes of building a process that achieves disputes that came to be classified as structural. This is because it entails the opportunistic restructuring, by punctual measures, about the procedure, for the achievement of the abstract ideal of justice.

"*Typical issues of structural litigation involve broad values of society, in the sense not only that there are several competing interests at stake, but also that the legal instances of various third parts can be affected by the judicial decision"*.[30] And a supposedly intricate representative structure cannot be presented as democratically acceptable, as it is long, difficult and demands an effort not ordered by the legal system.

It happens that, "*in institutional reform litigation particularly, the rule of decision is of secondary importance; it is the decisionmaking process itself that furnishes the medium for its political impact"*.[31] In effect, anarchism in form, informed by

[28] JOBIM, Marco Felix; ARENHART Sergio Cruz; OSNA, Gustavo. **Curso de processo estrutural**. São Paulo: Revista dos Tribunais, 2021.
[29] COUTURE, Eduardo. **Fundamentos del derecho procesal civil**. 3. ed. Bueno Aires: Depalma. 1958. Page 39.

[30] MEIRELES, Edilton; SALAZAR, Rodrigo Andres Jopia. Decisões estruturais e acesso à justiça. **Revista Cidadania e Acesso à Justiça**, Maranhão, v. 3, n. 2, p. 21-38, july/december. 2017.
[31] DIVER, Colin S. The judge as political powerbroker: superintending structural change in public institutions. **Virginia Law Review**, Virginia, v. 65, n. 1, p. 43-106, 1979. Page 65.

the freedom and adaptability of the procedure, does not guarantee prior knowledge of the rules that will stipulate the positions and situations that arise from before the process and perpetuate after, like res judicata itself.

In other words, the structural process, due to the specific absence of procedure and concrete rules that delimit the magistrate's scope of creativity, which is effectively *contra legem* and unconstitutional, since the procedural laws in fact establish the ties that subject the court in the construction of the judicial solution and the judicial decision itself, leverages a Judiciary with interventionist characteristics, which breaks with the procedural logic of the process. [32]

The procedure is relevant since, as an element of the due process of law, it goes back to the control of excesses and promises protection of the court in the face of the State-judge. It is not to deny the substantial aspect of due process of law, but to reaffirm the essence of the form, not only, but mainly in relation to the parts, in the due process. The procedure is not just a means of reaching the appropriate judicial decision, but a background inseparable from the fair process, whose commitment is mainly to guarantee. [33]

4. OF FORMALISM AND JUDICIARY ACTIVISM

Proceduralism and the typological definition of rites act in defense of legal certainty, predictability, legitimate expectations, isonomy and publicity. *"Only through the stipulation of prior, general, clear, isonomic and public rules is that surprise to the parts is avoided, conferring democratic legitimacy to the procedure".* [34]

[32] For further discussions, consult: DIAS, Bruno Smolarek; PAULA, Jônatas Luiz Moreira de. Construção de uma máxima proteção jurisdicional do meio ambiente. **Novos Estudos Jurídicos.** [S.I.] v. 24. n. 2. p. 373-399, 2019. DOI: 10.14210/nej.v24n2.p373-399.
[33] For further discussions, consult: DIAS, Bruno Smolarek; MARDEGAN, Herick. Sustentabilidade como fundamento da cidadania transnacional. **Revista Eletrônica Direito e Política**, Programa de Pós-Graduação Stricto Sensu em Ciência Jurídica da UNIVALI, Itajaí, v.6, n.2, 2º quadrimestre de 2011. Available in: www.univali.br/direitoepolitica - ISSN 1980-7791
[34] REDONDO, Bruno Garcia. **Adequação do procedimento pelo juiz**. Salvador: JusPodivm, 2017. Page 31.

The rationalism around formalism makes up a logical and efficient order regarding the jurisdictional provision, whose main commitment is to the Democratic State of Law.

The modern State, in view of the tensions and procedural degenerations, increased the rationalization of the Judiciary from a bureaucratically organized power, informed by procedure, with a sequence of acts preordained to the judge's decision. The legal protection of the public interest that permeates the process began to protect the jurisdictional function of the State by obligations imposed on the judge in the procedural sequence.[35] The abstraction of the procedural case in relation to persons concretely ensures the functions of the jurisdiction.

The structuring of a formal process model does not lead to the univocal development of the process in ordinariness of cognition. It is opportune to define more than one treatment model, which emphasizes the plurality of procedures independent of each other, *"[...] with a multiplicity of modes of treatment of the cause within a single procedural sequence".*[36]

Even the option for the treatment model between one or the other can be entrusted to the judge, who will adopt where appropriate and possible, mainly with the participation of the parts and related interested parts. However, without any embarrassment, the judge must return to his duties of formal direction of the process. *"This choice takes into account the more or less complex nature of the controversy, which results after the exchange of the author's introductory acts and the defendant's defense"*.[37]

However, the pending on the possibility, or not, of the judge to proceed with the procedural adequacy, changing the procedure expressly provided for by law and creating new specific rules for the specific case, on the grounds of giving greater

[35] CAPONI, Remo. Rigidez e flexibilidade do processo ordinário de cognição. **Revista Eletrônica de Direito Processual**. Rio de Janeiro, n. 17, n. 2, p. 531-549, july/december. 2016. Page 542.
[36] CAPONI, Remo. Rigidez e flexibilidade do processo ordinário de cognição. **Revista Eletrônica de Direito Processual**. Rio de Janeiro, n. 17, n. 2, p. 531-549, july/december. 2016. Page 542.
[37] CAPONI, Remo. Rigidez e flexibilidade do processo ordinário de cognição. **Revista Eletrônica de Direito Processual**. Rio de Janeiro, n. 17, n. 2, p. 531-549, july/december. 2016. Page 542.

effectiveness to the process and the substantive law of the parts, bypasses the option provided for the management model provided for by the legal system. This is because proceduralism ensures a rite based on a broad and articulated system of guarantees for the related subjects.

This does not mean that the process should not fulfill its institutional mission, in the context of *protecting rights from direct threats*, of *determining the right* and exercising functions that transcend the interests of the parts involved in the process, which would imply a pure and simplistic procedural privatization. *"However, in order to achieve this legitimate objective, other constitutionally guaranteed values cannot be violated, such as the principles of legal certainty, legal discordance, broad defense and due process of law"*.[38]

Due process of law must be relevant in a procedural system in which everyone can act in the inspection, application, modification and extinction of rights through the procedural route. The process, as a public sector of debate, must comprise a dialogic space, which allows the participation of interested parts in taking the judicial decision.[39] Therefore, it is essential that this field of discourse transcends the pieces of the previously recorded discourse.

The founding elements of the procedural structures cannot be understood with dogmatic eyes, immune to self-critical elements. However, *"it is a theoretical framework that, introduced by the language of legal discourse with a logical-deductive, generic and fruitful (branchable) referent, is a guide to the concepts that refer to it"*.[40] So much so that the founding elements of the process, as contradictory, are conveyed in the legal discourse not only in the face of the actors of the process, parts and the judge, but even the legislative and executive powers.

It does not consist in worshiping a rigid and insensitive procedural model with the advantages of efficiency that differentiated techniques, such as summary

[38] SOUZA, Natasha Brasileiro de; SOARES, Marcos Antonio Striquer. O Formalismo Processual e o Princípio da Adaptabilidade do Procedimento. **Scientia Iuris**, Londrina, v. 16, n. 2, p. 83-106, dez. 2012. Page 85.
[39] HABERMAS, Jürgen. **Facticidade e validade**: contribuições para uma teoria discursiva do direito e da democracia. Tradução de Felipe Gonçalves Silva e Rúrion Melo. São Paulo: Editora Unesp, 2020.
[40] LEAL, Rosemiro Pereira. **Teoria geral do processo**: primeiros estudos. 12. ed. Rio de Janeiro: Forense, 2014. Page 98.

cognition, implement in the realization of fundamental rights, but the effective procedural efficiency is only achieved when it meets the procedural guarantees. It is not possible, for example, in the name of the reasonable duration of the process, to violate the content of other norms and more outstanding procedural guarantees, such as the adversary system.[41]

Despite this, the argument that *"[...] the lack of governability and the structural incapacity of majoritarian politics erode the authority of the Legislative and Executive Powers"* leads to a situation in which the alternative is to resort to an apparently non-political power, the Judiciary.[42] In this case, there would be an orderly movement of transference of powers and prerogatives to the Judiciary, which is constitutionally responsible for protecting the Constitution.[43]

In this case, the active construction of the procedure by the judge in the so-called structural disputes, on the grounds of adapting it to the needs of substantive law and the insufficiency of the procedures provided for by law, is characterized as authentic judicial activism. As Abboud and Mendes (2019) recall, it is characterized whenever the judicial act *"[...] is based on personal convictions or the interpreter's sense of justice, in defiance of the current legality, understood here as the legitimacy of the legal system"*.

It happens that, by establishing, contrary to the law, the appropriate procedure for the structural litigation presented, the Judiciary usurps a legitimate power without *sufficient legal reason*. The magistrate must *"[...] obey the limitations of the law, as well as the guidelines designed by the procedural framework and material provided by the legal system, since they are bound by the laws"*.[44] The legitimacy of the act, under the rule of law, staggers, due to the absence of constitutional competence.

---

[41] SCHENK, Leonardo Faria. Contraditório e cognição sumária. **Revista Eletrônica de Direito Processual**. Rio de Janeiro, v. 13, n. 13, p. 552-582, january/june 2014.
[42] PEDUZZI, Maria Cristina Irigoyen. Entre a consciência e a lei: ativismo judicial do século XXI. **Revista LTr**: legislação do trabalho. v. 79, n. 7, p. 800-808, july 2015. Page 803.
[43] HIRSCHL, Ran. **Towars Juristocracy**: The Origins and Consequences of the New Constitutionalism. **Harvard University Press**: Cambridge, 2007.
[44] MAGNUSSON, Leonardo Peteno; PAGANI, Lucas Augusto Gaioski; PAULA, Jônatas Luiz Moreira de. Supremo Tribunal Federal e a Função Iluminista dos Tribunais: A questão dos desacordos morais razoáveis na arena política. **Revista Eletrônica Direito e Política**. v. 17, n. 1, p. 267-295. january/april 2022.

It does not mean that the structural process cannot exist or that its entire foundation *is* activist*, but care must be taken when establishing premises outside the stipulated in the process as a whole, under penalty of, without sufficient legal reason, incurring true usurpation. of a legitimate power that is charged with resolving the issue.*

It is not possible here to raise the argument of the *slowness* of the *legislative* power or even of the executive as a way of intervening in the spheres of these two powers, *without having a convincing legal reason,* that is, the *need for intervention* that breaks with the notion of competence of each power, under penalty of rendering all other powers unusable.

Lenio Streck narrates that *"what is the use of advancing in terms of legislative production if, in terms of application, we continue to depend on the will of the interpreter?"*[45]

What good is the separation of powers, the checks and balances of powers, if *we depend so and entirely on a concept as the existence of a legislative/executive delay that must be decided by the judiciary?*

If it is the Judiciary that decides what *a social/structural* problem is, when the legislature/executive is in arrears, why not simply hand over the keys to the public coffers and the legislative process so that the Judiciary, within these certain arguments, solve all the problems of Brazilian society?

It takes maturity and prudence to decide *when not to decide*, since *the problem is so diffuse that its intervention would only bring more problems, in the political aspect.* Democracy is created not by force, but by reason, *never by pen*.

It must be understood that the *structural problem* must be conceived by the political community, through its representatives, so that they bring, in a frank debate, to the existence of a given problem, its faces and what will become a first-

[45] NERY, Carmen Lígia. **Decisão Judicial e Discricionariedade.** São Paulo: Editora Revista dos Tribunais, 2014. Page 12.

rate protection or not. The legislative choice of the people must be respected to understand that there *is a problem or not*, first of all.

The structural process cannot be left in the hands of an ideological stronghold that manages to manipulate politics according to the will of a minority, in a true guise of a *countermajoritarian function*, thus circumventing the true function of democracy: the consensus among the people and not among organized minorities.

It cannot be forgotten that the Judiciary is an institution of state power. As such, it is subject to the separation of powers, as well as accountability, whose commitment as an institution is to observe the separation and division of constitutionally organized attributions and powers. In other words, it is the role of the Constitution to delimit the scope of institutions and order the scope of action, including the realization of fundamental rights, not to mention political issues, such as public policies themselves.

In this sense, Lucas Augusto Gaioski Pagani[46] explains, in the field of powers, in the relevant area of the Judiciary, that *"[W]ithout delimitation, guided by the Constitution, of Fundamental Rights and the delegation of Powers, the legal system and, consequently, the entire political community, is at the mercy of a power that grants what it wants"*. This, due to its characteristics, causes legal uncertainty and violation of the democratic pact, as the Judiciary begins to manage the very procedure that regulates its performance.

Nevertheless, Martin Loughlin[47], when commenting on the growth of neoconstitutionalism and its functionality worldwide, described that:

> But the jurisdictional reach of courts extends far beyond individual rights protection; the judiciary is now bidden to adjudicate a broad range of disputes touching on fundamental aspects of collective identity and national character. The constitutional court has now emerged in many parts of the world as the key institution for resolving many of their most contentious political controversies.

[46] PAGANI, Lucas Augusto Gaioski. **Os limites da atuação do Supremo Tribunal Federal**: controle de constitucionalidade, ativismo judicial e divisão de poderes. Orientador: Bruno Smolarek Dias, 2022. 133 f. Dissertação (Mestrado) - Mestrado em Direito Processual e Cidadania, Universidade Paranaense, Umuarama, 2022. Page 93.
[47] LOUGHLIN, Martin. Against Constitutionalism. Cambridge: Harvard University Press, 2022. Page 17.

It is worrying that the Judiciary wants to solve problems that only the political community can do, such as, for example, cultural identity and the national characterization of the identification relationship between individuals. The Judiciary cannot (and is not) become the protagonist of any and all aspects of human life, as it has been, in recent decades, on a global scale.

It is also comprehensible to understand that the judiciary does not have the legitimacy, in the sense of the term, to understand constitutional or not (or, oblige, via a judicial decision) the act of secession of a people that no longer understands itself as such; nor does it have the legitimacy to say what someone should feel in relation to the other, or even recognize rights that the political community, in the last instance, did not deliberate or only deliberated due to the unnecessary existence of such a right.

It is not meant here that the judge should only be the mouth of the law, but rather of its creative limits, since the judge does not create the rights, but rather apply them, differing from the interpretation carried out with judicial activism, that is, acting in a contra legem way, embedding, in the judicial decision, their particular worldviews. [48]

It is a basic understanding that the founding principle of every Democratic State of Law is the principle that no one is obliged to do or fail to do something by virtue of the law (Art. 5, II of the CF) that is, only the law can limit human behavior and not a judicial decision, properly, without legal grounds or any form covered by law, as we have seen happen in the COVID-19 pandemic period. [49]

Jobim, Arenhart and Osna's (2021) concern with complex issues is understandable, such as the measure on racial segregation, US jurisprudential identification of creative and prospective action by the Judiciary for material realization. However, it is not to be admitted that this is due to the jurisprudence rearrangement of the

[48] PAGANI, Lucas Augusto Gaioski; DIAS, Bruno Smolarek; PAGANI, Vitor Augusto Gaioski. Os limites entre a aplicação e a criação do Direito: Interpretação ou ativismo judicial? In: DIAS, Jean Carlos; ROCHA, Leonel Severo; BEÇAK, Rubens. **Filosofia do Direito, Hermenêutica jurídica e Cátedra Luís Alberto Warat [Recurso eletrônico on-line].** Florianópolis: CONPEDI, 2021.

[49] More in: PAGANI, Lucas Augusto Gaioski; DIAS, Bruno Smolarek. A pandemia do covid-19 e o principio da vedação ao retrocesso: direitos fundamentais no brasil em risco?. **Revista Eletrônica Direito e Política**, Programa de Pós-Graduação Stricto Sensu em Ciência Jurídica da UNIVALI, Itajaí, v.16, n.2, 2º quadrimestre de 2021. Available in: www.univali.br/direitoepolitica - ISSN 1980-7791.

procedure to the needs and challenges of the case presented. Indeed, exceeding the limits of the consolidated civil procedure is not justifiable, even on utilitarian grounds. The ends do not justify the means.

It is not admissible to "[...] surpass the demarcation lines of the jurisdictional function, mainly to the detriment of the legislative function, but also of the administrative function and even the government function" (RAMOS, 2010, p. 117). In the case of structural disputes, the incursions of the Judiciary take place in the legislative and government spaces, since they act within the scope of the legally established formal procedure, as well as, sometimes, in the domain of public policies.

The instrumentalist perspective of the process, after all, feeds and encourages judicial activism in this field, in a perspective of process that acts in the domain of superior interests of the State, at the cost of the freedom of the parts and the decline of their procedural guarantees. Procedural effectiveness spurred several procedural reforms in the Brazilian regime, but, as Aragão[50] reports, the constant reforms overlooked effectively experienced data that indicated the need and effectiveness.

The conception arising from neoconstitutionalism of rupture between right and law and approximation between law and politics also contributes. The distance from those elements and the approximation of these institutions had repercussions on the conception of discretionary and linked action of judges and courts.[51] In other words, judges leverage themselves to exercise essential functions of other powers, on the grounds of realizing fundamental rights and effectively providing judicial protection, which depend, almost exclusively, on the moral and political will of the interpreter.

It is important that "[...] the process is a public thing for the parts (after all, it is a constitutional guarantee), who debate under a legal regulatory heteronomy, that is, within rigid frameworks set by law and guaranteed by the judge [a procedural

[50] ARAGÃO, Egas Dirceu Moniz. O processo civil no limiar de um novo século. **Revista dos Tribunais**, v 8, n. 781, p. 51-70, november 2000.
[51] TASSINARI, Clarissa. **Jurisdição e ativismo judicial**: limites da atuação do judiciário. Porto Alegre: Livraria do Advogado, 2013.

ne-laissez pas-faire]".[52] As the process is structured by law and for the parts, the judge's authority in conducting the process is necessarily linked to the constraints stipulated by the Legislative Power, the constitutionally assigned authority to regulate due process in these cases.

It is not a matter of submission of the Judiciary to the Legislature, because even "the infra-constitutional legislator can make the criterion of authority prevail over that of freedom".[53] That is, due process of law and process, as constitutional guarantees, ensure the process as an institution of maximum State sovereignty, but whose technical competence and impartiality in resolving disputes between private agents preserve the individual liberties of the subjects of law.

The establishment of limits effectively acts as a control of abuses by the Judiciary, which is not the exclusive owner of justice and fundamental rights. The very division of state authority is representative of this, which, in order to limit powers, splits and divides them among the various instances of state action. Therefore, the assumption of the Judiciary as the guardian of civilizing promises operates in a ground whose theoretical justification has only internal logic, which would be the crisis of democratic representation.

CONCLUSION

Instrumentalism led the modern process to be structured around the institutional functions of jurisdiction, attributing social and political scopes, to the detriment of the legal plan – protection of objective law – and the very nature of the process as a fundamental institution. It comprises the publicizing of the process from the expansion of the borders of jurisdiction, despite its unifying function, at the cost

[52] COSTA, Eduardo José da Fonseca. Garantismo, liberalismo e neoprivatismo. *In*: **Empório do Direito**. São Paulo, 16 jun. 2018. Available in: <https://emporiododireito.com.br/leitura/garantismo-liberalismo-e-neoprivatismo>. Access in: 24 june 2022.

[53] COSTA, Eduardo José da Fonseca. Liberdade e autoridade no direito processual: uma combinação legislativa em proporções discricionárias? (Ou ensaio sobre uma hermenêutica topológico-constitucional do processo). *In*: **Empório do Direito**. São Paulo, 15 january 2019. Available in: < https://emporiododireito.com.br/leitura/liberdade-e-autoridade-no-direito-processual-uma-combinacao-legislativa-em-proporcoes-discricionarias-ou-ensaio-sobre-uma-hermeneutica-topologico-constitucional-do-processo>. Accesses in: 24 june 2022.

of guarantees arising from due process of law and the democratic regime of decisions originating from state power.

However, the process as a guarantee, which involves the structural procedure for the formation of judicial decisions, must advance its premises in the midst of its institutionalization, in the direction of valuing the democratic regime of the process. In other words, despite the public nature of the process, the procedural environment must be influenced by individual freedom, as a fundamental value, in which the development of the institution takes place through the valorization of guarantees of independence.

On the other hand, in the context of structural conflicts, despite the expansion of constitutional jurisdiction, in which the Judiciary is deposed with an institution of positive realization of values, objectives and fundamental rights, the authorization of jurisdictional creativity in terms of procedure, based on in the dissatisfaction with the procedures provided by law to satisfy them, the Judiciary Power manifests itself in the domain of control instruments that act on its own function (decide).

The review and re-reading of essential institutes of the process, based on the realization of fundamental rights, actually entails the violation of other values, rights and constitutional guarantees. It is worth mentioning that the Judiciary Power managing the procedure that regulates its performance implies in a limping way in legal insecurity. The jurisprudence readjustment of the procedure according to the casuistic needs acts in a discretionary and disorderly way.

What is necessary to emphasize is that the doctrinal and jurisprudential reinterpretation of fundamental and essential institutes of the *prêt-à-porter* process and procedure is not valid, with the exclusive purpose of reconciling them with the purposes of building a process that achieves disputes that came to be classified as structural. This is because it entails the opportunistic restructuring, by punctual measures, about the procedure, for the achievement of the abstract ideal of justice.

The destabilization in the form in the structural processes, understood in the adaptability of the procedure according to the judge's abstract ideal of justice, violates legal certainty, especially in its face of legitimate trust, since it deforms

the jurisdiction-jurisdictioned relationship. It destabilizes this relationship as it clearly removes the rationality and transparency of acts of authority, as well as the predictability of citizens in relation to acts emanating from the public power.

It is in this frame that the process ideology itself operates. The process is visualized through the conjunction of procedural acts, ranging from the request for judicial protection to the affirmation and realization of the substantive right by the decision, arising from the manifestation of the jurisdictional power. This series of procedural acts that end the decision is understood as a procedural path, in which the subjects of the process (judge, parts and other agents) are subject to due process of law.

Effectively, the process acts as a guardianship against authoritarian authority, in which it protects individuals from any excess, arbitrariness and abuse. The privilege of procedural ordinariness is understood in this process as a guarantee. The social and political functions belong to the jurisdiction, and not to the process, so that the mitigation of constitutional rights and guarantees of this order is incomprehensible, from a jurisprudence disarray, to the argument of concretizing an abstract ideal of fair process.

REFERENCES

OLIVEIRA, Carlos Alberto Alvaro de. **Do formalismo no processo civil**. 2. ed. São Paulo: Saraiva, 2009.

VILANOVA, Lourival. **Causalidade e relação no direito**. 4. ed. São Paulo: Revista dos Tribunais, 2000.

BÜLOW, Oskar Von. **La Teoría de las Excepciones Procesales y los Presupeustos Procesales**. Translated by Miguel Angel Rosas Lightschein. Buenos Aires: EJEA, 1964.

NUNES, Dierle José Coelho. **Processo jurisdicional democrático**. Curitiba: Juruá, 2008.

WACH, Adolf. **Conferencias sobre la ordenanza procesal civil alemana**. Bueno Aires: EJEA, 1958.

WACH, Adolf. **Manual de derecho procesal civil**. Bueno Aires: EJEA, 1977. v. 1.

BRÊTAS, Ronaldo de Carvalho Dias. **Processo constitucional e Estado Democrático de Direito**. 3. ed. Belo Horizonte: Del Rey, 2015.

MOREIRA, José Carlos Barbosa. O processo civil brasileiro entre dois mundos. *In*: MOREIRA, José Carlos Barbosa. **Temas de direito processual**: oitava série. São Paulo: Saraiva, 2004.

BUZAID, Alfredo. A influência de Liebman no direito processual civil. **Revista da Faculdade de Direito, Universidade de São Paulo**, São Paulo, v. 72, n. 1, p. 131-152, january 1977.

RAATZ, Igor. Revisitando a "colaboração processual": ou uma autocrítica tardia, porém necessária. **Revista de Processo**, São Paulo, v. 45, n. 309, p. 41-71, november 2020.

CABRAL, Trícia Navarro Xavier. Convenções em matéria processual. **Revista de Processo**, São Paulo, v. 40, n. 241, p. 489-516, march 2015.

MADEIRA, Dhenis Cruz. **Processo de conhecimento e cognição**: uma inserção no Estado Democrático de Direito. Curitiba: Juruá, 2008.

HABERMAS, Jürgen. **Facticidade e validade**: contribuições para uma teoria discursiva do direito e da democracia. Tradução de Felipe Gonçalves Silva e Rúrion Melo. São Paulo: Editora Unesp, 2020.

RAATZ, Igor; Anchieta, Natascha. **Uma teoria do processo sem processo**: a formação da "teoria geral do processo" sob a ótica do garantismo processual. Belo Horizonte: Casa do Direito, 2021.

MITIDIERO, Daniel. **Colaboração no processo civil**: do modelo ao princípio. 4. ed. São Paulo: Thomson Reuters Brasil, 2019.

LEAL, Rosemiro Pereira. **Teoria geral do processo**: primeiros estudos. 12. ed. Rio de Janeiro: Forense, 2014.

GONÇALVES, Aroldo Plínio. **Técnica processual e teoria do processo**. Rio de Janeiro: Aide, 1992.

MARINONI, Luiz Guilherme; ARENHART, Sérgio Cruz; MITIDIERO, Daniel. **Novo curso de processo civil**: teoria do processo civil. 2. ed. São Paulo: Revista dos Tribunais, 2016. v. 1.

CABRAL, Trícia Navarro Xavier. Reflexos das convenções em matéria processual nos atos judiciais. *In*: CABRAL, Antonio do Passo (Org.); NOGUEIRA, Pedro Henrique (Org.). **Negócios processuais**. 4. ed. Salvador: JusPodivm, 2019, v. 1, cap. 16, p. 347-376

VITORELLI, Edilson. Processo estrutural e processo de interesse público: esclarecimentos conceituais. **Revista Iberoamericana de Derecho Procesal**. Curitiba, v. 4, n. 7, p. 147-177, january/june 2018.

MEIRELES, Edilton; SALAZAR, Rodrigo Andres Jopia. Decisões estruturais e acesso à justiça. **Revista Cidadania e Acesso à Justiça**, Maranhão, v. 3, n. 2, p. 21-38, july/december. 2017.

CAMBI, Eduardo; WRUBEL, Virgínia Telles Schiavo. Litígios complexos e processo estrutural. **Revista de Processo**, São Paulo, v. 44, n. 295, p. 55-84, september 2019.

COUTURE, Eduardo. **Fundamentos del derecho procesal civil**. 3. ed. Bueno Aires: Depalma. 1958.

DIVER, Colin S. The judge as political powerbroker: superintending structural change in public institutions. **Virginia Law Review**, Virginia, v. 65, n. 1, p. 43-106, 1979.

REDONDO, Bruno Garcia. **Adequação do procedimento pelo juiz**. Salvador: JusPodivm, 2017.

CAPONI, Remo. Rigidez e flexibilidade do processo ordinário de cognição. **Revista Eletrônica de Direito Processual**. Rio de Janeiro, n. 17, n. 2, p. 531-549, july/december. 2016.

SOUZA, Natasha Brasileiro de; SOARES, Marcos Antonio Striquer. O Formalismo Processual e o Princípio da Adaptabilidade do Procedimento. **Scientia Iuris**, Londrina, v. 16, n. 2, p. 83-106, dez. 2012.

SCHENK, Leonardo Faria. Contraditório e cognição sumária. **Revista Eletrônica de Direito Processual**. Rio de Janeiro, v. 13, n. 13, p. 552-582, january/june 2014.

PEDUZZI, Maria Cristina Irigoyen. Entre a consciência e a lei: ativismo judicial do século XXI. **Revista LTr**: legislação do trabalho. v. 79, n. 7, p. 800-808, july 2015.

HIRSCHL, Ran. **Towars Juristocracy**: The Origins and Consequences of the New Constitutionalism. Harvard University Press: Cambridge, 2007.

ABBOUD, Georges; MENDES, Gilmar Ferreira. Ativismo Judicial: Notas introdutórias a uma polêmica contemporânea. **Revista dos Tribunais**. v. 108, n. 1008, p. 43-54, october 2019.

MAGNUSSON, Leonardo Peteno; PAGANI, Lucas Augusto Gaioski; PAULA, Jônatas Luiz Moreira de. Supremo Tribunal Federal e a Função Iluminista dos Tribunais: A questão dos desacordos morais razoáveis na arena política. **Revista Eletrônica Direito e Política**. v. 17, n. 1, p. 267-295. january/april 2022.

PAGANI, Lucas Augusto Gaioski. **Os limites da atuação do Supremo Tribunal Federal**: controle de constitucionalidade, ativismo judicial e divisão de poderes. Orientador: Bruno Smolarek Dias, 2022. 133 f. Dissertação (Mestrado) - Mestrado em Direito Processual e Cidadania, Universidade Paranaense, Umuarama, 2022

JOBIM, Marco Felix; ARENHART Sergio Cruz; OSNA, Gustavo. **Curso de processo estrutural**. São Paulo: Revista dos Tribunais, 2021.

ARAGÃO, Egas Dirceu Moniz. O processo civil no limiar de um novo século. **Revista dos Tribunais**, v 8, n. 781, p. 51-70, november 2000.

TASSINARI, Clarissa. **Jurisdição e ativismo judicial**: limites da atuação do judiciário. Porto Alegre: Livraria do Advogado, 2013.

COSTA, Eduardo José da Fonseca. Garantismo, liberalismo e neoprivatismo. *In*: **Empório do Direito**. São Paulo, 16 jun. 2018. Available in: <https://emporiododireito.com.br/leitura/garantismo-liberalismo-e-neoprivatismo>. Access in: 24 june 2022.

COSTA, Eduardo José da Fonseca. Liberdade e autoridade no direito processual: uma combinação legislativa em proporções discricionárias? (Ou ensaio sobre uma hermenêutica topológico-constitucional do processo). *In*: **Empório do Direito**. São Paulo, 15 january 2019. Available in: < https://emporiododireito.com.br/leitura/liberdade-e-autoridade-no-direito-processual-uma-combinacao-legislativa-em-proporcoes-discricionarias-ou-ensaio-sobre-uma-hermeneutica-topologico-constitucional-do-processo>. Accesses in: 24 june 2022.

NERY, Carmen Lígia. **Decisão Judicial e Discricionariedade**. São Paulo: Editora Revista dos Tribunais, 2014.

LOUGHLIN, Martin. Against Constitutionalism. Cambridge: Harvard University Press, 2022.