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Notes on Bill n.º 166/2010, for a New Civil Procedural Code

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Abstract: The article provides some remarks on the Bill presented to the brazilian Senate for a new Civil Procedure Code, its general purposes and the new instruments proposed.

On October 14, 2009 the President of the Senate appointed me general reporter of a commission of jurists, for preparing the new Civil Procedure draft Code. The commission was formed by ten other members.

We worked hard for seven months and, on 8 June 2010, the Bill was delivered to the Senate at a solemn ceremony.

During these seven months there were twelve public hearings in several cities throughout the country, on which occasions the legal community (judges, lawyers, members of the Public Attorney's office, etc) was heard and was also informed about the commission's main ideas.

It is frequently asked whether the Bill delivered to the Senate on 8 June 2010, which henceforth became known as Bill n. 166/2010, actually represents a new code or a mere reform of the current Civil Procedural Code.

This question may be answered in different ways.

I would say that it is a *new code*. I say so because I believe that *innovation*, when it comes to changing law, cannot and must not cause *surprise*. In fact, there is no good reason for ignoring achievements and progress. On the contrary, they must be incorporated and improved.

Some could consider that a new code must necessarily mean a complete break with the existing code, corresponding to the adoption of a *new line of thought*. In that perspective there would be no new code, but just the reform of the one we have, as there is *nothing* in the Bill

that would amount to such break with the present or with the past.

As I see it, the Bill represents a *step forward*.

The underlying principle here is to clarify the influence the Federal Constitution has on procedure, as a result of the subordination of the latter to the former. We tried to create a new system, solving problems that the legal community complained of, simplifying procedures, and rendering each procedure efficient. We also intended to make Brazilian civil procedural rules more coherent, given the fact that they had undergone innumerable changes in the last twenty years, having lost their original systematic form. Consequently we were facing a host of unintended problems that caused unsatisfactory distraction for judges, complicating their task of adjudication. The current system does in fact frequently overcomplicate procedural issues, which undoubtedly constitutes a ***defect***: for civil procedure is practical framework. Methods, when rational, should facilitate adjudication rather than hinder or overcomplicate it. The lack of focus of the judge causes delays resulting in a waste of time. Coherence leads to simplification, which means that lawsuits can be judged in a reasonable time, and in compliance with the Federal Constitution.

That was the most important guideline: to *constitutionalize* procedure – to stress the subordination of *procedural rules* to the *Federal Constitution.*

This was achieved through two techniques:

1) the express enunciation of constitutional principles in their procedural *version*;

2) the creation of procedural institutions (forms, devices) and measures designed to *give practical force to principles*.

For instance: proceedings were created involving the right of both parties to be heard before any decision (interlocutory or final) and before the judge decides whether the disregard of legal entity doctrine is to be applied to the case at hand. Mention was also made of the possibility of applying the opposite of this doctrine.

These statutory provisions give life to the constitutional principles of due notice and *audi alteram partem*.

As mentioned, the unpredictability of case law is a pervasive feature of civil law jurisdictions in Latin America. In Brazil, the legislator is already conscious of the need for stability, predictability and uniformity. In fact, since 1998 there have been new devices aimed to satisfy this need.

Needless to say, normally in civil law countries judicial decisions are based mostly on

statutory law. There should be a constitutional amendment to permit the reference exclusively to binding precedent, as the basis of a judicial decision.

We had that amendment in 2004. Today Brazilian follows the binding precedent system, to a certain extent. There can be binding precedent concerning the decisions of the STF (our Supreme Court), provided they comply with certain requirements established by statutory law.

In fact, what we really have in Brazil now is not perfectly translated by the expression *binding precedent*, because it is not just one (the first) precedent which becomes mandatory to the following similar cases. It is instead a *Súmula* "or a line of cases", as Common Law jurisdictions say, or a predominant line of decisions.

One of the *highlights* of the Bill was the creation of *Incidente de Julgamento de Demandas Repetitivas*. This task has two objectives: the first, and foremost, is to implement fully the principles of legality and equality.

Excessive dispersion (= different decisions to similar facts) in case law, a typically Brazilian and Latin America phenomenon, undermines its stability and predictability.

The fact that Brazilian courts have interpreted the same legal principle or statutory law provision differently, reaching different decisions on very similar facts, discredits the Judiciary and causes, the undesirable feeling that people are the victims of an *injustice*.

Brazilian law has for some time been following a trend that creates rules in an attempt to avoid this type of situation.

The Bill introduces a device to simultaneously award proceedings in cases that revolve around the same legal issue. It applies to claims that have the potential to multiply themselves.

This *incidente de julgamento de demandas repetitivas* can be brought before the 2nd Instance by the parties, by the judge (1st Instance judge) or even by a third party, before any kind of appeal is filed. The 2nd Instance would solve the issue of law and all other judges would be bound by this decision.

In fact, this *incident* and many other statutory provisions which already exist would not be necessary if we had the culture or the custom of respecting the orientation of our highest Courts, which is not strictly mandatory in civil law countries, but is advisable. The primary role of Superior Courts is to create uniformity in law. Therefore, hierarchically inferior judges should normally pay respect for the orientation of the higher courts, as a principle, even if there is no

express rule saying it.

But it does not happen spontaneously and it is also unfortunately usual that the Superior Courts themselves often change their basic legal approach (as if it were, in the English terminology, an overruling). There is a clear tendency for a change in this field, maybe also supported by these changes in Statutory Law.

In order for a system based on the natural authority of precedents created by the STF or STJ to work, their guiding principles expressed in their decisions must obviously be stable. Changes of opinion should be rare and very closely reasoned. Courts must respect their own precedents, as a rule, without which these precedents will never be respected by lower courts. Another very important principle was therefore expressly included in the Bill. The general need for both stability and predictability should be taken into account before any significant changes of case law are made.

For the same reason, case law changes will lack retrospective effect, according to the terms of the Bill (*modulação*).

The *modulação* is a principle included in the Bill which is the opposite of retrospective effect: in case of overruling, Courts can declare that the new rule shall be applied from that moment onwards.

It will probably be strongly recommended by legal writers that Courts only rarely change their orientation and, when this occurs, that a prospective declaration should take effect.

One of the goals of this Bill is to speed up proceedings. In fact, if all these devices and principles are implemented, greater speediness will result. The volume of appeals would diminish for two reasons: firstly case law would be predominantly predictable, dissuading people from appealing; secondly occasionally there will be one appeal to solve 300 or 400 cases involving the same legal issue.

Thus, judges would have more time available for more complex litigation.

Naturally, the Court's workload would tend to decrease.

And this is certainly the second aim of the *incidente de julgamento de demandas repetitivas*. Once more the system of civil procedure will give effect to constitutional principle: in this instance, to the principle that litigation should be concluded within a reasonable time (*ragionevole durata del processo*).

There are many other novelties in the Bill. As previously mentioned in law, the future is

catered for in the present, with the exception of periods following dictatorships, disastrous regimes where the intention was to completely erase the past.

We did what was expected of us: we heard criticism of the existing system, mainly during several public hearings which took place throughout the country, while the Bill was being drafted. Many of the suggestions were already known, but fresh criticisms were also made and noted.

The questions of mediation and settlement also received attention during our hearings. We included in the Bill a special conciliation hearing at which a settlement could be reached. At this hearing, the defendant attends without a ready defence. Mediators are allowed to be present at this hearing.

According to the Bill, an *amicus curiae*, which was expressly introduced in our procedural system by the Constitutional Amendment of 2004, can intervene in any kind of lawsuit, as a result of a judicial order or on his own initiative. It is assumed that this intervention can enable the court to make a better informed decision, reflecting a wider and deeper understanding of social and other relevant factors.

The judge, according to the Bill, has case management powers. Decisions of this nature will not normally be reviewed by the courts of second instance. In exercise of case management powers, the judge will be expected to adapt the proceedins to the circumstances and peculiarities of the case at hand.

The Bill also contains provisions designed to ensure that every proceeding is more useful. For instance, the defendant may formulate a *petitum* against the claimant, the *causae petendi* and the *petitum* itself can be amended during the proceedings (the norm in the existing law is the *perpetuatio libelli*); the issues solved incidentally (*incidenter tantum*) get the *res judicata* force too (in the existing system, only the *decisum* becomes *res judicata*).

According to the Bill, to obtain an urgent provision, it will be both necessary and sufficient for a claimant to demonstrate *fumus boni iuris* and *periculum in mora* and that is enough. There was no preoccupation in legally qualifying specific facts (described by statutory law) considered sufficient to justify urgent measures (and this is the method used in the existing system).

Of course, one should not have unrealistically high expectations concerning the effects of the Bill, once it is enacted. This is because there are some problems besetting Brazilian civil

procedure which cannot be readily solved by rule changes.

Situations which give rise to litigation are outside the sphere of legal reform. But, to some extent, the problems that we have are the result of unresponsive norms. We can guarantee that the Bill has the potential to make things better.