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Public interest litigation and co-participative judicial enforcement of public policies

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Abstract: This article discusses a proposal to redevelop the judicial enforcement stage of processes, mainly in regards to public interest litigation. That is to say whenever the judiciary finds itself with the responsibility to provide an answer for the cases involving the execution of public policies, it must focus on ensuring the adversarial as much as a co-participative result. The constitutional proceedings require a new approach from the judiciary with regards to dealing with old and new types of litigation. In the case of public interest litigation it is necessary to rebuild the foundation of mainstream judicial process theory so that it can go beyond the debate between the liberal and socializing stances, and thus enable a discursive formation of the decision and of its enforcement. Based on paragraph 5 of article 461 of the Brazilian Civil Procedures Code (CPC), this article argues that a procedure should be created in the judicial execution step whereby the parties (and others) may deliberate about its form, timing and scheduling, while being supported by an expert mediator, the role of whom would

be to technically assist the parties' settlement efforts. In this way, the enforcement of public interest litigation, in acquiring a "soft character", becomes more effective since it allows that its form will not come from a monocratic organ, but from the deliberation of the very people affected by the public policy in question and, thus the execution thereof, being more likely to succeed.

Keywords: co-participative judicial enforcement; public interest litigation; public policies; judiciary, mediation.

> "There are no panaceas, only promissing paths to explore. And there is so much that we do not know..." Frank A. Sander[1]

Initial considerations

The Constitution of 1988 is a guide for the national legal system to effectively present the importance of fundamental rights to a democratic concept of procedural law, but with a complex practical effect of allowing the input into the system of new profiles of litigation.

It is only from this Greater Work, that the so called "constitutionalization" of branches, including procedural law, of the law in Brazil was developed, and thanks to this that we finally come to speak of "constitutional process",[2] with the strengthening of procedural principles and

[1] Excerpt from the conclusion of the historical lecture given by Frank A. Sander, at the second Pound Conference, in 1976, which greatly strengthened the movement for alternative dispute resolution (ADR – *alternative dispute resolution*). SANDER, Frank. A. Varieties of dispute processing. LEVEN, A. Leo, WHEELER, Russell R. The Pound Conference: perspectives on justice in the future. Minnesota: West Publishing Co. 1979. p. 86.

[2] Cf. NUNES, Dierle; BAHIA, Alexandre. Processo Constitucional: uma Abordagem a Partir dos Desafios do Estado Democrático de Direito. E-article of procedural law, UERJ, v.4, p. 224-250, 2009. Available at: <http://www.redp.com.br/arquivos/redp_4a_edicao.pdf>. From 26/05/2013.

the fundamental rights of citizens (access to justice,[3] due legal process, adversarial, legal defense, scientific rationale, among others), but also foreseeing a lavish range of other rights and constitutional actions.

Moreover, it is the constitution that provided for the compulsory establishment of Public Defenders and Special Courts, and of legislation more beneficial to the consumer. All this makes the 1988 Constitution a milestone unmatched in Brazilian legal-political-social history as a whole, and procedural law in particular. This has enabled an 'emancipatory' and 'counter-hegemonic' use of a law traditionally thought only to serve those (already) integrated in social, economic or even legal systems[4].

Unfortunately, the perception of this new procedural reality took time to be taken seriously and, in addition to a legislative approach (with its associated reforms), did not concern itself with the multidimensional approach to the system, which we have been defending for a number of years through *democratic constitutional processualism*.[5]

[3] For a critical view of access to justice in a democratic dimension cf: NUNES, Dierle; TEIXEIRA, Ludmila. Acesso à justiça democrático. Brasília: Gazeta Jurídica. 2013.

[4] This can be observed, for example, in the experiences of popular legal advice and the fight to implement public policies via the judiciary (or not) in respect of such diverse laws as health, education, the environment, (etc.), combined. See: FRIGO, Darci (*et. al*.) (orgs.). Justiça e Direitos Humanos: experiências de assessoria jurídica popular. Curitiba: Terra de Direitos, 2010. According to Gorsdorf – who introduces the work –, with the opening of the political system after the era of the dictatorship, progressive social movements have added new tools to the old methods of revindication, such as the use of international organisations and legal counsel to the court, and also the use of legal counsel to make the case for the implementation of rights and public policy through the courts. The typical profile of this counsel for human rights is differentiated from the "standard" legal professional to the extent that he draws on the tools of the law to use them in a counter-hegemonic fashion, seeking to repair the traditional state of inequality and exclusion (GORSDORF, Leandro Franklin. Introdução. In: FRIGO, Darci (*et. al*.) (orgs.). Justiça e Direitos Humanos. cit. p. 7-16).

[5] We have defended, for a long time, a panoramic approach to the problems of our procedural system, which should have foundations in the State, and extensive modification of infrastructure, management etc. "[...] As a democratic constitutional processualism with a theoretical conception that seeks civil procedural democracy by questioning the conceptions of liberalism, socialization and procedural pseudo-socialization (procedural neoliberalism) and awareness of the need to rescue the constitutional role of the process and structure training decisions when necessary from the co-participative and polycentric aspect of the structures formed by decisions. Such scientific processualism, invigorated by the constitutional procedural design, shall be concerned with a more panoramic bias of law enforcement, in order to overcome the mere analysis of procedural laws and investing in understanding the state and paradigmatic foundations of problems involving the concept of the jurisdiction and procedure, but also the democratic state of litigiousness and reading of fundamental rights. We must not forget that there is also the problem of the ongoing Brazilian crisis and the possible solutions to the misdirection. This therefore promotes an examination of the procedural system that surpasses mere technical and dogmatic

Such a concept seeks to support a concept of the processualisation of rights not from the perspective of the judge, but of the interdependent discussion of all stakeholders in the decision, within their roles, including having the potential of calling government agencies with appropriate expertise to participate (directly or as *amicus curiae*) to enable a more appropriate framework around the potential effects of decisions. In addition to a focus on the role of the judiciary or of decision-making standards of the higher courts for the dimensioning of repetitive litigation (in particular, of public interest) the process is counted on (with appropriate collectivization), and with a dynamic and focussed adversary for the support of better and more efficient decisions.[6]

We must realize that our constitutional project imposed on the "Powers" the ability to implement a series of inclusive public policies with the purpose of facilitating the fundamental rights set forth therein. The current Constitution falls within a tradition of constitutions of leadership, having an emphasis which, from early on, is to make sure that it will not be a repository of "promises", but which will became effective - the constitutionalism of effectiveness.[7] Regarding the consequences of the rise in the number of topics in the Constitution, Boaventura Santos argues that

it is true that the constitutionalization of such an extensive set of laws without the backing of consolidated public and social policy, makes its effectiveness more difficult to achieve, but it is no less true that this broad catalogue of laws leaves room for further judicial intervention from the control the constitutionality of ordinary law.[8]

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interpretation to verify the good features and latent issues in Brazilian procedural law, suffering from peculiarities in the context of its application" (NUNES, Dierle; BAHIA, Alexandre. Processo, jurisdição e processualismo constitucional democrático na América Latina: alguns apontamentos. Revista Brasileira de Estudos Políticos, v. 101, jul/dez. 2010, p. 83-84).

[6] NUNES, Dierle. Fundamentos e dilemas para o sistema processual - Uma abordagem da litigância de interesse público a partir do Processualismo Constitucional democrático. FIGUEIREDO, Eduardo H.L et al (coord.). Constitucionalismo e democracia. Rio de Janeiro, Elsevier, 2012. p. 171-172.

[7] Cf. SARMENTO, Daniel. O Neoconstitucionalismo no Brasil: riscos e possibilidades. In: LEITE, George S.; SARLET, Ingo W. Direitos Fundamentais e Estado Constitucional: estudos em homenagem a j. j. gomes canotilho. SP: RT; Coimbra: Coimbra Ed., 2009, p. 24 *et. seq.;* e: BARROSO, Luís Roberto. El Neoconstitucionalismo y la Constitucionalización del Derecho: el triunfo tardío del derecho constitucional en brasil. México: UNAM, 2008.

[8] SANTOS, Boaventura de Sousa. Para uma Revolução Democrática da Justiça. SP: Cortez, 2007, p. 20.

However, given the operational shortcomings of the executive and legislative powers (urged to become more effective after the recent popular movements) which is inherently linked to the current disenchantment with politics, typical of states that have passed through a period of dictatorship, in addition to a series of other factors that confirm this phenomenon in our country,[9] we began to experience the phenomenon of the judicialization of innumerable issues as a result, to some extent, of the ensuring of broad access to justice provided by the previously mentioned Greater Work (art. 5º, XXXV and LIV, CR/88).

So, this whole new situation induces the need for changing the role of the process by which the jurisdiction is called upon to address the weaknesses of the other powers in the institutional competencies to which they belong; and it is because of this, and the openness that the 1988 Constitution made possible, that the entry of a number of concepts in the Brazilian theoretical debate has been fostered (such as Habermas,[10] Luhmann,[11] Gunther,[12] Alexy,[13] Dworkin,[14] Waldron,[15] Hart,[16] Posner,[17] Garapon,[18] among others), nurtured and

[9] THEODORO JR., Humberto, NUNES, Dierle e BAHIA Alexandre. A brief discussion of the politicization of the judiciary and the view of tis application in Brazilian law. Verfassung und Recht in Übersee. Law and Politics in Africa/Asia/Latin America. Nomos, vol. 3, p. 381-408, 2011. See also: BAHIA, Alexandre. Fundamentos de Teoria da Constituição: a dinâmica constitucional no Estado Democrático de Direito brasileiro In: FIGUEIREDO, Eduardo H.L et al (coord.). Constitucionalismo e democracia. Rio de Janeiro, Elsevier, 2012. p. 101-126; and: GORSDORF, Leandro Franklin. Introdução. *cit*,. p. 14.

[10] HABERMAS, Jürgen. Faktzität und Geltung: beiträge zur Diskurstheorie des Rechts und des Democratischen Rechtsstaats. Frankfurt: Suhrkamp, 1994. HABERMAS, Jürgen. Reply to simposium participants, Benjamin N. Cardozo school of law. Cardozo law Review, *p*. 1477-1557, 1996. HABERMAS, Jürgen. Verdad y justificación. Madrid: Trotta, 2002.

[11] LUHMANN, N. El derecho de la sociedad. México: Universidad Autônoma de México, 2007. LUHMANN, Niklas Luhmann: do sistema social à sociologia jurídica. Rio de Janeiro: Lumen Júris, 2004. LUHMANN, Niklas. Sociologia do Direito – vol. I e II. Rio de Janeiro: Tempo Brasileiro, 1983. SIMIONI, Rafael. Poder e autopoiese da política em Niklas Luhmann. Revista da Faculdade de Direito do Sul de Minas. Pouso Alegre, v. 27, p. 119-129, jul/dec. 2008.

[12] GÜNTHER, Klaus. The sense of appropriateness: application discourses. Morality and Law. New York: State University of New York, 1993. GÜNTHER, Klaus. Justification et application universalistes de la norme en droit et en morale. Trad. Hervé Pourtois. Archives de Philosophie du Droit. Sirey, t. 37. a. 1992.

[13] ALEXY, Robert. Balancing, constitutional review, and representation. International Journal of constitutional Law. Oxford University Press e New York University School of Law, 2005. v. 3. n. 4. ALEXY, Robert. Teoria da Argumentação Jurídica: a Teoria do Discurso Racional como Teoria da Justificação Jurídica. São Paulo: Landy, 2001. ALEXY, Robert. Derecho y Razón Práctica. México: Fontamara, 1998.

[14] DWORKIN, Ronald. Taking rights seriously. Cambridge: Harvard University press, 1978. DWORKIN, Ronald. O império do direito. São Paulo: Martins Fontes, 1999.

[15] WALDRON, Jeremy. A dignidade da legislação. São Paulo: Martins Fontes, 2003.

[16] HART, Herbert L A. Conceito de Direito. Lisboa: Fundação Calouste Gulbenkian, 1994.

[17] POSNER, Richard A. Problemas de filosofia do direito. São Paulo: Martins Fontes, 2007.

developed after the second war in other countries, and which in our legal discourse had full visibility only after 1988, allowing a debate around the adoption by the paternal judiciary of an activist profile, for some, or minimalist (self restraint), to others.[19]

This situation gradually allowed the breaking of a positivist (or even exegete) view of the law[20] and had the effect of putting on the agenda a number of 'new' paradoxes for the 'new' functions performed by the paternalistic judiciary.

Note that a large part of the processualistic remains rooted to the traditional classical concept of jurisdiction, as a power/duty to resolve conflict - that is, the "guardianship" type of court, as if the people were incapable and in need of State supervision - and the application of law was limited to bipolar patrimonial conflicts.

However, the procedural science fostered from 1868 until the 1940s - which initially sought to consolidate its own institutes and supplant the design of procedural liberalism (legal process dominated by the parties), in search of a safeguard, since Klein and Menger, procedural socialization (with emphasis on the role of the judiciary)[21] - was not shown to be sufficient for the qualitative and quantitative change of the functions of a jurisdiction that was it constitutionalizing, *pari passu*, post WWII.

Since the 1950s, the reinforcement of the control of the constitutionality of laws and administrative acts allowed the judiciary to assume the role of the guarantor of fundamental rights, including the advent of the almost normative possibility, by means of a counter-majority role in favor of minorities.[22]

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[18] GARAPON, Antoine. O juiz e a democracia. Rio de Janeiro: Revan, 2001.

[19] Despite that, of all the options, we consider that such a choice need not be permanent and not even necessary - we can think of an intermediate position that considers the two extremes in a constant ratio that is (re) configured each time according with the legal-political-social situation in which the decision must be taken.

[20] THEODORO JR., Humberto, NUNES, Dierle e BAHIA Alexandre. A brief discussion of the politicization of the judiciary and the view of tis application in Brazilian law. *cit*.

[21] NUNES, Dierle. Processo jurisdictional democrático. Curitiba: Juruá, 2008.

[22] After the 1988 Constitution, the control of constitutional adjudication in Brazil assumes a new position in the legal setting. With the new actions of concentrated control and new techniques of decision making - given the great Germanic influence on the understanding of that among us - the Supreme Court will have at its disposal an arsenal that will enable it to influence directly issues which are highly political, moral, economic, social, and in decisions about stem cell research, abortion of anencephalic embryos, quotas in universities, same sex stable

If we extract, in this way, the important finding that the outdated view of jurisdiction as an activity only to be used in conflict resolution, we see it pushed to assume a fundamental rights guarantor role of the constitutional process, and implementer of counter-majority spaces for minorities who did not win a voice in the institutionalized policy arenas.[23] The emblematic precedent of this era being *Brown v. Board of Education of Topeka of 1954/55, in the U.S. Supreme Court,*[24] in the overruling of the precedent that crystallized the doctrine of "separate but equal" in the relationship between whites and blacks, and prohibited the existence of segregated schools in the country.[25]

union arrangements, delimitation of land, construction of hydroelectric plants, forfeiture of parliamentary seats, party loyalty, etc. On this theme, cf.: CATTONI, Marcelo. Processo Constitucional. 2ª ed., rev., atual. e ampl. H: Pergamum, 2013; ABBOUD, Georges. Jurisdição Constitucional e Direitos Fundamentais. SP: RT, 2011; BAHIA, Alexandre. Fundamentos de Teoria da Constituição: a dinâmica constitucional no Estado Democrático de Direito brasileiro. *cit.*; e: SILVA, Diogo Bacha e. Ativismo no controle de constitucionalidade: a transcendência dos motivos determinantes e a ilegítima apropriação do discurso de justificação. Dissertação (Mestrado em Constitucionalismo e Democracia) – Faculdade de Direito do Sul de Minas, Pouso Alegre, 2013.

[23] "[...]courts are less capable than any of the branches of government of producing social change with their decisions, due to the lack of all the necessary tools to do it (expertise), and by the demonstration that in fractious issues the decisions of the judiciary have symbolic power, but do not change social behavior. The judiciary works with the consequences of non-fulfillment of rights, but hardly with the causes for which in large part would be the need for more reputable public policies promoted by the executive. However it is undeniable that this use of the judiciary and the court system has been increasingly present in the world. In countries like Brazil, in which exist a great disrespect for fundamental rights and reputable public policies do not exist to assure the public fully (think health and education, for example) an induction occurs with the use of public interest litigation, a source of a huge number of repetitive and serial demands". NUNES, Dierle. Processualismo constitucional democrático e o dimensionamento de técnicas para a litigiosidade repetitiva. A litigância de interesse público e as tendências "não compreendidas" de padronização decisória. Revista de Processo, vol. 199, p. 38, São Paulo: Ed. RT, set. 2011. It is worth remembering, with GORSDORF, the "judicialization of the demands of social movements raises some important questions in the rethinking of the law. The new demands from the social movements have a very different character because they question the foundation of modern law, in which the demands are restricted to a liberal individualist character. Due to this, in many moments the original practice of law reaches limits due to failing to fit the understanding of collective demands of social movements" (GORSDORF, Leandro Franklin. Introdução. In: FRIGO, Darci (*et. al*.) (orgs.). Justiça e Direitos Humanos. *cit*. p. 14).

[24] As Rosenberg ponders, based on the story of Michael Klarman: "constitutional lawyers and historians generally deem Brown v. Board of Education to be the most important U.S. Supreme Court decision of the twentieth century, and possibly of all time." ROSENBERG, Gerald N. The Hollow Hope: Can Courts Generate Social Change? in *Courts, Judges, and Politics: An Introduction to the Judicial Process*. Coord. MURPHY, Walter F.; PRITCHETT, C. Herman; EPSTEIN, Lee. New York: McGraw Hill. 2002. p. 714.

[25] For more on this see, *e.g.*: THEODORO JR., Humberto, NUNES, Dierle e BAHIA Alexandre. A brief discussion of the politicization of the judiciary and the view of tis application in Brazilian law. *cit*.

From the 1960s, the perception of meta-individual rights gained prominence, which forced the courts to act on molecular demands, through collective procedural techniques (largely inspired by the American model of *class-actions*).[26]

From the 1970s, the role of the court began to encompass the pursuit of implementing fundamental, and especially social, rights through public interest litigation.

The term "Public Interest" finds ample support in American legal literature.[27] In the United States the terms "Public Interest Law" and "Public Interest Litigation" are used when the law is related to the interests of the community as opposed to individual interest and also to indicate the practice of law in defense of minority needs in society.

The principal idea in this type of litigation is to require the enforcement of public policies of normative application, both expressed in law and resulting from constitutionally enshrined principles through the courts.

Public Interest Litigation, as it has developed in recent years in the U.S., marks a significant departure from the traditional procedural methods, especially the transition from a protagonist model of law enforcement to a co-participative model. Public interest litigation was

[26] This perception still needs development in Brazil despite the fact that, for example, Celso Campilongo, shortly after the epistemological shift caused by the new Constitution, was already aware that "collective rights, understood as not amenable to individual and exclusive enjoyment, behave as protection strategies that also escape the logic of individualism" (CAMPILONGO, Celso F. Assistência Jurídica e realidade social: apontamentos para uma tipologia dos serviços legais. In: CAMPILONGO, Celso F.; PRESSBURGUER, Miguel. Discutindo a Assessoria Popular (Coleção "Seminários" n. 15), Rio de Janeiro: AJUP/FASE, June 1991. p. 10). In case no new forms are thought of (judicial or non-judicial) to deal with disputes involving social rights - as suggested below with the multi-door system - we still continue to fall into the same trap indicated by Campilongo, i.e.: "(A) the social conflicts are transformed into legal disputes and, from this, (B) individualized, trivialized and made banal by legal routines which have (C) their political impact controlled by an apparently technician (the letter of the law) and institutionalized (the litigation) discussion, (...) The collective needs, rather than forge the necessary identities for the construction of a new citizenship, are fragmented into countless unique situations, seemingly unrelated to each other" (*idem*. p. 18-20, our highlight).

[27] TRUBEK, Louise G.; TRUBEK, David M. Civic Justice through Civil Justice: A New Approach to Public Interest Advocacy in the United States. In: CAPPELLETTI, Mauro. Access to Justice and Welfare State. Available at: <http://www.law.wisc.edu/facstaff/trubek/pub_civjustice_1981.pdf> Access in: 29 feb. 2012. Ver também: GOMES, Renata Nascimento. Direito americano. Uma breve abordagem da litigância de interesse público. Monografia Final de Curso apresentada à Faculdade de Direito do Sul de Minas, FDSM. Orientador: Dierle Nunes, 2012.

neither a sudden nor a linear phenomenon. Its development can be followed through different theories that seek to trace the role of jurisdiction. The '80s were the hallmark of its growth.

In its study and application, however, is absolutely necessary for us to realize that overcoming the first stage in its procedural use, with the seal and solipsistic and protagonistic statement of the magistrate, as if he (the magistrate) alone could predict the impact of his decisions in matters of "public interest"[28], given their background in different fields (law, sociology, politics, economics) and from the open criteria (reserve for contingencies, proportionality, etc.), as certain Brazilian dogmatic lines, linked to procedural socialization[29], still advocate.[30]

The participation of interested parties in a renewed concept of an adversary as a guarantee of influence, which would induce the co-participation of all those potentially affected, within a collective process, could facilitate an experimentalist stance, which would mitigate the effects of a judicial decision in fractious issues.

As Bergallo notes, judicial control over public administration has traditionally been justified by the failure of administrative agencies to meet performance standards, and by the violation of the procedural and substantive rights of citizens by state agents and agencies. In public law litigation, the classic justification of judicial review of administrative agencies' performance is supplemented with arguments highlighting the inexistence of democratic mechanisms to access the administrative bureaucracy, or by the blocking of avenues of redress for disadvantaged groups in the political game of reaching the government. It is this justification that has been controversial for those who question the legitimacy of judicial interference in the spaces reserved for politics and the majoritarian game. The experimentalist model of structural

[28] BAHIA, Alexandre. Recursos Extraordinários no STF e no STJ: conflito entre interesses público e privado. Curitiba: Juruá, 2009.

[29] Dierle José Coelho. Processo jurisdicional democrático: uma análise critica das reformas processuais. *cit*.

[30] Cf. DINAMARCO, Cândido Rangel. A instrumentalidade do processo. São Paulo: Malheiros, 2001. p. 294. Para o grupo coordenado por Luiz Werneck Vianna, o Supremo Tribunal Federal teria a missão *ético-pedagógica* de *sinalizar como e por que a sociedade deve se transformar*, para isso *impondo, de cima para baixo os Direitos Fundamentais*. VIANNA, Luiz Werneck *et al*. A judicialização da política e das relações no Brasil. Rio de Janeiro: Revan, 1999, p. 146. Em sentido semelhante FARIA, José Eduardo. As transformações do judiciário em face de suas responsabilidades. In: FARIA, José Eduardo (Org.). Direitos Humanos, Direitos Sociais e Justiça. 1ª ed., 2ª tiragem, São Paulo: Malheiros, 1998, p. 62.

orders responds to these objections by proposing a deliberative model in which the plaintiffs and public administrative officials negotiate the best possible solution under conditions of provisionality and transparency, and under the arbitration of a judge or her official appointees. This way, judges do not need to have the last word in the design of remedies. In exchange, parties and government officers have the opportunity to shape the remedies and participate with voice and vote, reinforcing the democratic legitimacy of judicial intervention in suits against the administration that originated within the framework of public law litigation. To the extent that this deliberation is possible, the experimentalist model also recognizes the complex interactions between the powers and the limits of their legitimacy, characteristics that the objectors to the legitimacy of judicial interference tend to avoid. On the other hand, as Sabel & Simon note about the U.S. case, the transparency promoted by the experimentalist remedies model paves the way for the generation of mechanisms that hold accountable plaintiffs, defendants and their lawyers, other representatives of affected individuals involved in the judicial process, and the judges themselves.82 In this way, a crucial component of the democratic legitimacy of other governmental branches that not usually present in the work of courts or litigants is incorporated into the sphere of litigation: the phenomenon of settling accounts with the public or, at the very least, the potential of such a settlement. At the same time, the model rejects the simplified, formalist vision that presumes that the public administrative bureaucracy operates at all of its organizational levels with the same degrees of public accountability and, therefore, the same legitimacy enjoyed by political officials and by the President. […]it is also probable that the dialogue generated between the parties and public officials in a remedial process in the style of the experimentalist model will prompt a participative process that will strengthen the relations between civic organizations and public officials, which in turn could eventually result in stronger political support and more social mobilization for the causes that public law litigation tries to promote.[31]

[31] BERGALLO, Paola. Justice and Experimentalism: Judicial Remedies in Public Law Litigation in Argentina. SELA 2005 Panel 4: The Lawyer's Role, p. 24-25 and 27. Avaiable at: <www.law.yale.edu/documents/pdf/Justice_and_experimentalism.pdf>.

Accordingly, the junction of the co-participative and polycentric proposal within the proceduralist axis of the Constitution, with this renewed movement of public interest litigation by the suitable use of collective processes, enables a new technical option for dealing with the numerical abundance of repetitive demands without diluting procedural debate, and results in the search for an efficient and legitimate solution.

However, for such a system of repetitive litigation of public interest to reach its full potential, we should not forget that which has already been pointed out in other works:

The big question that deserves to be addressed here surrounds the fact that the system of collective processes in Brazil, as a differentiated technique, has not resulted in all possible results of a quantitative or even qualitative efficiency. [...] The coexistence of collective processes and individual actions, dealing with the same subject (especially in the case of homogeneous individual interests), being judged by the same courts, with the same technical and infrastructure support, generates numerous practical problems. It is not possible, even logical, that a collective process is treated jointly with the same judgment as that of an individual process. As Castro Mendes rightly says: 'The collective processes cannot remain lost and mixed with the other hundreds or thousands of individual processes, effectively enjoying treatment of equal value and being assigned the same human and material resources. One should understand that the human resources, material and time spent for collective processes represent investment resources for the benefit of the health of the Judiciary itself, which can only give vent to mass conflicts that reach it, if faced and processed collectively, and jointly molecularized rather than in a dispersed and counterproductive way.' Castro Mendes also points to the need to create specialized bodies in collective processes with infrastructure and technically adequate staff (with directed training and preparation) to deal with these kinds of litigation. The need to redefine the application of the principle of contradiction as a guarantee of influence and of 'no surprises' in our country, as we have been advocating, is still yet to be realized. A concept that gains huge importance when dealing with the tract of collective processes. In this procedural requirement if the judge, in sentencing, brings factual or legal grounds that innovate on procedural discussion, beyond the problematic elements between the

parties, which may represent a collectivity, surprising them, there will be clear invalidity of *decisum*. In addition to the reasons already outlined at other opportunities, a collective process debate and cognition should be of a more "participatory" nature, otherwise you will not get the most appropriate (and legitimate) decision and allow the formation of inefficient outcomes for the collective. Whereas when the judgment is delivered with debate (with respect to the constitutional process) either use of resources is reduced, or the chance of success is quite lessened. That's because the first debate at the trial court, properly conducted, ensures adequate participation and influence of the procedural arguments of all subjects and prevents the formation of decisions by surprise. This is a point on which we must dwell: unlike the way they have been interpreted by much of the Brazilian doctrine, the constitutional guarantees of adversarial legal defense do not constitute an obstacle to achieving greater speed (and/or lower costs); since, an ill-educated process, in which there is no clear presentation (and debate) of controversial points is source of the use of countless resources (starting with a Amendment of Judgement, which are successive and sometimes useless), which certainly does not assist in obtaining a reasonable length of proceedings. [32]

Added to these considerations the need to expand the limits of application of the adversarial process, which technically would induce the participation of interested parties within the government in establishing public policy, in order to support decision-making elements to which the judge would not have access singly and in relation to which deter the knowledge to undertake a cooperative and deliberative judgment, without forgetting that this posture much reduces the risk of a court decision.[33]

It is already not uncommon to use this practice in pre trial,[34] in some Brazilian federal courts, the calling up of all those involved in public policy in order to seek to enable the

[32] NUNES, Dierle. Novo enfoque para as tutelas diferenciadas no Brasil? Diferenciação procedimental a partir da diversidade de litigiosidades. In: THEODORO JUNIOR, Humberto. Tutelas diferenciadas. Rio de Janeiro: GZ Editora, 2010. p. 230.

[33] NUNES, Dierle. Fundamentos e dilemas para o sistema processual - Uma abordagem da litigância de interesse público a partir do Processualismo Constitucional democrático. *cit*., p. 187-188.

[34] As José Eduardo Costa da Fonseca says: "It is possible, moreover, to identify three ways of setting deadlines for the execution of a public policy judgment: 1) *a priori* (in which the judge abstractly decided a period from his reason and judgment), 2) *empirical* (where the judge uses his previous experience in similar cases to intuitively set

possibility of fixation and enforcement of a judgment in matters of public interest (called by Costa "Negotiated Execution"[35]).

And these contributions must be taken into consideration in enabling a co-participative execution of public interests.

The debate around public interest litigation in Brazil - jurisprudential notes.

The change of perspective from the Judiciary in face of public interest litigation has occurred gradually over the 1990s and 2000s. Ester Rizzi and Salomão Ximenes, for example, show how TJSP (Tribunal de Justiça de São Paulo - Sao Paulo Court of Justice) had firm case law in the sense of the impossibility of imposing obligations upon the Government to implement immediate public policies regarding early childhood education. That only changed when the Supreme Court, ruling on these cases from 2005, recognized the "immediate legal enforceability of the right to early childhood education," that is:

In such decisions the Supreme Court expressly states that it is for the judiciary to determine that spaces are guaranteed to all who demand them, where the omission of the other branches of power is proven. Moreover, in these decisions the Court interpreted quite

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a deadline); 3) *scientific* (in which the judge arrives inductively at a term only after understanding the particularities of the defendant). Needless to say, in the majority of cases, judges are limited to (1) and (2). However, in the judicial implementation of public policy, we need an ethic of efficiency and best consequences, which is only feasible for (3). Judges do not dominate the underlying technical web of these cases, which is why it is foolhardy for them to put too much trust in sensations and scholastic reasoning. Rather, it is necessary to give them the aid of positive data. I.e., to change reality, the judge has to unravel it and reflect on it. Therefore, when § 4 of article 461 of the Code states that the court shall fix a *reasonable* time for fulfilling the provision, he is referring not to an abstract reasonableness (derived from hunches and intuitions) , but *concrete* (a path raised in methodologically) data. Such data can be obtained in a preliminary hearing [pretrial conference] between plaintiff and defendant. The judge will hardly obtain sufficient data, however, for setting the period and the beginning of *forced* execution: the defendant will never satisfactorily cooperate, content for the coercive actions to be perpetrated against himself. However, the hearing could be fruitful if the data used for the construction of a *negotiated* "execution." After the defendant exposes their real and concrete ability to implement public policy to the judiciary, the judge will have better information for the parties to propose an agreement on the voluntary compliance of the injunction decision or sentence within a schedule. The use of timelines in judicial implementation of public policies is not, in fact, unknown to the doctrine and jurisprudence". FONSECA, Eduardo José da Costa. A "Execução Negociada" de políticas Públicas em Juízo. Revista de Processo, v. 212, October 2012, p. 25-56.

[35] Idem.

narrowly the so called "contingency reserve" (...), recognizing as the only possibility for postponement of the implementation of the right to early childhood education the objective confirmation of the hypothesis, on the part of the the authorizing public manager, that all initiatives have been taken at their availability, with the application of the maximum available resources. (...) [The] municipal government cannot shirk the obligation to offer early childhood education based on allegations of discretionary behaviour, as this would not apply to "public policy priorities as defined by the Constitution itself," as is the case of kindergartens and preschools.[36]

The balance, which the authors make use of in actions of organized social movements to obtain court decisions that would ensure public education is paradoxical: if, on one hand, the jurisprudential shift in favor of these demands was noticed or, on the other, it is also noticed there has been little practical progress (if not going backwards) in offering vacancies - or the quality of the service offered. The conclusion is that one cannot ignore the judiciary (and,

[36] RIZZI, Ester; XIMENES, Salomão. Litigância Estratégica para a Promoção de Políticas Públicas: as ações em defesa do direito à educação infantil em são Paulo. In: FRIGO, Darci (*et. al*.) (orgs.). Justiça e Direitos Humanos. *cit*. p. 110. The authors cite as a "leading case" the judgement by STF of Ag.Reg. in RE. n. 410.715, which reads: "SPECIAL REMEDY - CHILDREN OF UP TO SIX YEARS OF AGE TO - ATTENDANCE IN NURSERY AND PRE-SCHOOL - EARLY CHILDHOOD EDUCATION - RIGHT ASSURED BY THE CONSTITUTIONAL TEXT (CF, ART 208, IV.) - NATIONWIDE UNDERSTANDING OF THE CONSTITUTIONAL RIGHT TO EDUCATION - LEGAL DUTY WHOSE IMPLEMENTATION IF IMPOSED ON THE PUBLIC BODY, NOTABLY THE MUNICIPALITY (CF, ART 211, § 2.) - Early childhood education is an unavailable constitutional prerogative, which, granted to children, shall have, for purposes of their integral development, and as the first stage of the education process, attendance at daycare and access to pre-school (CF, art. 208, IV). - This legal prerogative, as a result, imposes on the state, due to the high social significance which relates to child education, the constitutional obligation to create conditions enabling objective, concretely, in favor of 'children from zero to six years of age '(CF, art. 208, IV), effective access to daycare and preschool units, with government unacceptable premises full adherence, the Government imposed the actual text of the Constitution. - Early childhood education, by qualifying as a fundamental right of every child, is not exposed, in its process of development, to merely discretionary reviews of the public administration, or subordinated to government for reasons of pure pragmatism. - Municipalities (...) can not resign the legally binding constitutional mandate that was given to them by art. 208, IV, of the Basic Law of the Republic, and that represents a limiting factor of the political-administrative discretion of municipal entities, whose options, with regard to the care of children in daycare (CF, art. 208, IV), cannot be carried to such a degree, supported in court by simple convenience or mere chance, the effectiveness of this basic right to social considerations - Although there resides, primarily in the legislative and executive branches, the prerogative to formulate and implement public policies, it appears possible, however, for the courts to determine, even on an exceptional basis, especially in cases of public policies defined by the very Constitution, whether implemented by the defaulting state agencies, whose omission - by failure to apply to the political-legal charges on them that relate to mandatory character - is shown to be able to compromise the efficacy and integrity of impregnated social and cultural rights of a constitutional stature. The pertinent question to the 'reserve for contingencies'. doctrine" (BRASIL. Supremo Tribunal Federal. 2ª session, Ag.Reg. in RE. n. 410.715/SP, Rel. Min. Celso de Mello, j. 22/11/2005 (grifos nossos).

accordingly, indicate strategies that should be adopted so that one tries to obtain the best performance of such decisions), but at the same time, is necessary to add other strategies to the judicialization.[37]

On the other hand, also on the subject of access to early childhood education as a right to which corresponds a direct obligation of the State, this is noted from the STJ:

> ADMINISTRATIVE. CONSTITUTIONAL. ART. 127 THE CF/88. ART. 7. LAW No. 8.069/90. (...) DEFINITIVE STANDARD OF NON-PROGRAMMABLE RIGHTS. CHARGEABLE IN COURT. TRANS-INDIVIDUAL INTEREST PURSUANT TO CHILDREN OF THIS AGE. ORIGIN AND SUITABILITY. 1. The right to education, which is engraved in the Constitution and the Statute of Children and Adolescents, is an inalienable right, in function of the common good, the greater protection, derived from the imposing strength of the precepts of public policy governing the matter itself. (...) 5. Stresses the note that a Federal Constitution is the result of national political will, achieved by consulting the expectations and possibilities of that will be consecrated, it is because of this that its promises, which are cogent and effective, would otherwise remain empty and cold as dead letters on paper. (...) The State promises the right to childcare, and fulfills it, inasmuch as the constitutional and political will, (...) was in the sense of the eradication of intellectual poverty that plagued the country. The right is enshrined in the daycare rule with more than enough normativity, because it defines the duty, indicating the passive subject, *in casu*, the State. 6. Consecrated on one hand is the duty of the State, on the other hand, is the subjective right of the child. Consequentially, according to the principle of the inalienability of the jurisdiction, constitutionally enshrined, every right corresponds to an action that ensures that all children under the conditions stipulated by the law, fit within the sphere of this right and can claim it in court. (...). 7. The judicial determination of this duty of the State, does not terminate the alleged interference of the judiciary in the administrative sphere. Indeed, there is no discretion of the administrator against established rights, constitutionally. Activity in this field is bound without admission of any exegesis aimed at the removal of the warranty. (...) 9. The misplaced thesis is removed from the discretion, the only question that could be raised would fail on the nature of the standard now in focus, or that which is defining rights. The matter is, only in this fashion, constitutional, however, being unimportant proves this categorization, in view of the explicitness of the ECA, unequivocally proves sufficient to be a constitutional promise, to entail the enforceability of the right enshrined in the education provision. 10. The guidelines set by public

[37] RIZZI, Ester; XIMENES, Salomão. *cit*. p. 123-125.

> policy are not rights but promises of un-approved laws, fitting into the un-sindicated sphere by the judiciary, with the opportunity for its implementation 11. Diverse is the assumption that the Federal Constitution provides a right and explicit constitutional standard, requiring the judiciary to make it a reality, resulting in an obligation, with repercussions in the budgetry sphere...[38]

This was a public civil action filed by the prosecutor of Mato Grosso do Sul for the state to guarantee enrollment of all children under six years of age in the local and state school systems such that their capacity had been proven. The request was upheld in the 1st and 2nd degree and confirmed by the STJ.

Shown the decision, it is worth seeing some of the questions raised by the State of Mato Grosso do Sul. Beyond formal complaint issues and the "invasion of competence" of the judiciary over the State executive/legislative bodies, there are issues that relate precisely to what we are discussing here - that is, how the judiciary handles applications for recognition of rights, and compliance with them by the Government. Against the decision of the 2nd degree it was alleged that:

in the expansion of the scope of the legal rule we have generated a precedent that will create "chaos in public education, as in many municipalities there are no vacancies in schools" and stressing that the public "does not offer classrooms with the physical capability to accomodate a 5 year old child." It further states that "there is danger to the health of children covered by the measure, because we have forgotten the need for pedagogical work and the need to assess the mental capacity of the children" of the same. Further it notes that "children of a young age would have to be subject to regular reviews to measure their ability to accomplish tasks, thereby limiting the time available for recreation, and that by having such responsibility so early, this would reflect negatively in their behavior" this damage, in his view would be irreparable. Finally, it sustains serious injury to the public purse "because the state

[38] BRASIL. Superior Tribunal de Justiça. 1ª Turma, REsp n. 753.565/MS, Rel. Min. Luiz Fux, j. 27/03/2007 (sem grifos no original). No mesmo sentido, no STJ: REsp. n. 511.645, 2ª T., Rel. Min. Herman Benjamin, j. 18/08/2009; Ag.Reg. in REsp. n. 1198737/RS, 2ª session, Rel. Min. Herman Benjamin, j. 04/11/2010; REsp 1189082/SP, 2ª Turma, Rel. Min. Herman Benjamin, j. 02/12/2010.

will have to allocate resources consistent with the increase of students, due to the inflow of children of five years of age in elementary school, which will require specialized treatment".[39]

These reasons were not the object of the vote of the reporter (together, without other considerations, with the other members of the session). That is, the response of the judiciary is actually correct, in that there is the right to education, however, at least at this stage, pragmatic issues such as physical space and human resources have not been taken into account, nor the related budget issues, but when the Minister says

> "12. It resonates that all judicial enforcement of the State implies spending and action, without this infringing the harmony of the powers, because through the democratic system and the rule of law the sovereign state submits itself to the justice which it has instituted. Thus distanced, the interference between the powers, the judiciary, the alleged malpractice of the law, no single power did more that the fulfulling of the determination of the practical realization of the constitutional promise.[40]

Note that the budget issue was mentioned but not addressed by the judge, who, while recognizing the complications that such a decision will lead to, passes it by and now claims that this understanding *does not* cause interference between the powers.

Another tormenting question, the legalization of health, also results in *hard cases* that defy the traditional canons of case solving. Health being a fundamental right guaranteed by the Constitution (art. 6), the duty of the State (art. 196) - and that, seeing as it has immediate application (Art. 5, § 1) - in any of the spheres of the Federation[41], lawsuits are piling up in which said right is sought.

[39] BRASIL. Superior Tribunal de Justiça. 1ª Turma, REsp n. 753.565/MS, Rel. Min. Luiz Fux, j. 27/03/2007.
[40] BRASIL. Superior Tribunal de Justiça. 1ª Turma, REsp n. 753.565/MS, Rel. Min. Luiz Fux, j. 27/03/2007.
[41] The Supreme Court has an understanding seated in the sense that the responsibility between members of the Federation is supportive, so that actions aiming at the provision of financial health may have the Union States or Municipalities as a defendant,. See, e.g.: BRAZIL. Superior Court of Justice, 1st. session REsp. n. 325.337/RJ, Rel. Min. José Delgado, j. 21/06/2001. No STF: BRASIL. Supremo Tribunal Federal. Ag.Reg. no RE. n. 607.381/SC. 1ª T. Rel. Min. Luiz Fux, j. 31/05/2011.

These actions have caused great discussion in the legal environment in the face, for example, of the impacts that decisions made in these individual actions can have on the public budget and thus on the overall delivery of health (aside from the abuse and corruption), in addition there is a big discussion about the limits of performance of the judiciary as "director of public policy"[42].

Thus, the Supreme Court had the chance to deal with the matter in a monocratic decision in STAs 178 and 244: using data brought by a public hearing held before the Court in March 2009, the Minister Gilmar Mendes sought to establish parameters for the question: "The first fact to be considered is the existence or not of state policy that covers the provision of health as pleaded by the party." According to the Minister it appears that, in most cases submitted to the judiciary, the health services (SUS) already has policies relating to what is claimed, and that the question would be the failure or poor performance of already established protocols (and not judicial interference as to the use of discretion of the public administration) in the face of a clear legal right. Another is the situation when "the provision of health care which is pleaded is not found in SUS policies", since from there, the judiciary must evaluate whether such a fact "stems from a legislative or administrative omission, from an administrative decision not to provide it, or from a legal ringfence at their disposal"[43] (which can happen, e.g., when a certain claimed medicine is not recognized by ANVISA, which in exceptional cases, the State cannot be compelled to provide). Thus, the "second factor to be considered is the existence of motivation for not providing certain health action by SUS"[44].

The decision exceeds the limits imposed in a previous statement of the Supreme Court in ADPF 45, in which the Minister Celso de Mello put as parameters for the analysis of judicial intervention "possible reserves", the "existential minimum" and the "principle of

[42] This issue is closely linked to the issue of collective and repetitive (serial) litigation, is calling for the construction of a dogma of its own. Cf. CUNHA, Sérgio Sérvulo da. Ainda o Efeito Vinculante. Revista Trimestral de Direito Público, São Paulo, n. 18, p. 124-164, 1997; e NUNES, Dierle. Novos rumos para as tutelas diferenciadas no Brasil? *cit*.
[43] BRASIL, Supremo Tribunal Federal, STA 244, Rel. Min. Gilmar Mendes, DJE. 24/09/09.
[44] BRASIL, Supremo Tribunal Federal, STA 244, Rel. Min. Gilmar Mendes, DJE. 24/09/09.

proportionality"[45]. The predecessor to minister Gilmar began to realize the need to "processualize" health, since it requires a discussion of the nuances of the case in a procedural and constitutional structure:

> Therefore, regardless of the circumstances brought to the attention of the Judiciary, the assumptions discussed make clear the need for the education of users in relation to health demands in order to avoid the standardized production of initiations of cases, challenges and judgments, pleadings that often do not include the specifics of the concrete case being examined, preventing the judgment in the reconciliation of the subjective dimension (individual and collective) with the objective dimension of the right to health.[46]

In addition to the difficulties in regard to budget measures or public policy choices (since the demands are always higher than the ability of the government to provide them), the issue becomes even more complex when the judiciary takes decisions without taking into account the arguments of both parties, as if the right of one was an absolute and therefore would cause any other matter to be undeserving of acceptance (and even to be refuted).

In REsp. n. 325 337 the State of Rio de Janeiro objected to the judgement that it was to fund drugs (to treat HIV patients) that were not provided by federal law (and its regulation) - and claimed, therefore, the breach the literal provisions of the law. The Court, in deciding, said:

> ADMINISTRATIVE. DRUGS FOR THE TREATMENT OF AIDS. STATE SUPPLY. MANDATORY. REMOVAL OF LIMITATION CONSTANT IN LAW N ° 9.313/96. CONSTITUTIONAL DUTY. PRECEDENT. (...) 4. By the peculiarity of each case in view of its urgency, we must rule out the delimitation in the supply of drugs listed in Law No. 9.313/96.5. The decision, ordering the Public Administration to provide patients with the drugs required to fight the disease that are indicated by prescription, not vitiated by illegality. 6. Losses would be awarded to claimants where the medicines were not provided, considering that are being denied the constitutional right to health, with the complicity of the judiciary. The search for the delivery of judicial services should be treated with prestige by the magistrate, so that citizens are allowed to have, increasingly facilitated by the contribution of

[45] BRASIL, Supremo Tribunal Federal, ADPF 45, Min. Rel. Celso de Mello, DJU 04/05/04.
[46] BRASIL, Supremo Tribunal Federal. STA 244, Rel. Min. Gilmar Mendes, DJE. 24/09/09.

> the Judiciary, their role in society, whether in the legal relations of private law, or in public law.[47]

Now, how to make compatible, legally, the assertion that "The decision, ordering the Public Administration to provide patients with the drugs required to fight the disease that are indicated by prescription, not vitiated by illegality"? Plus, as transcribed: "The search for the delivery of judicial services should be treated with prestige by the magistrate, so that citizens are allowed to have, increasingly facilitated by the contribution of the Judiciary, their role in society, whether in the legal relations of private law, or in public law."[48]

In a similar sense, the Supreme Court held that:

> "Receipt of medicines from the state is a fundamental right, when the applicant requests them from any federal agency, provided that their necessity, and impossibility of affording them with their own resources, is demonstrated. This is because, once such requirements are satisfied, the federal entity should be guided in the spirit of solidarity to give effectiveness to the right guaranteed by the Constitution, and not create legal barriers to postpone the due adjudication.[49]

It is true that it is not forgotten that we are entitled to health. However, more than ever, we must build between us, clearly, a doctrine that establishes a difference between being a holder of a right and the obligations that come with it, because as Canotilho shows, when it comes to available rights, of the affirmation of a right, a direct duty of the State does not necessarily arise. When it comes to Economic, Social and Cultural Rights it is necessary to pay attention to the particularity of its constitution in order to avoid what Canotilho perceives as a confusion between "social and political rights" and "public policy of social rights." When the

[47] BRASIL. Superior Tribunal de Justiça, 1ª. Turma, REsp. n. 325.337/RJ, Rel. Min. José Delgado, j. 21/06/2001.

[48] Or as the TJMG said: "... the judiciary can not, since actioned, fail to force the executive branch, in any of its spheres, to fulfill its constitutional duty to provide for the needy and sick the proper treatment for their disease . (...) The material must be analyzed from the standpoint of Article 196 of the Constitution, which determines the universal citizen access to health, assigning said charge to all members of the Federation" (BRASIL. Tribunal de Justiça de Minas Gerais. Apel. Cív. n. 1.0384.12.002474-8/002, 6ª Câm. Cível, Rel. Des. Edilson Fernandes. DJ. 01/02/2013).

[49] STF: BRASIL. Supremo Tribunal Federal. Ag.Reg. no RE. n. 607.381/SC. 1ª T. Rel. Min. Luiz Fux, j. 31/05/2011.

judiciary tries to make "real" social rights by promoting public policies, it plunges into "normative nebulae", since, as noted, these rights, unlike individual rights, do not always imply a correlative provision by the State.[50]

It is understood, in these terms, that a traditional review by the judiciary, limited to the analysis of the issues by a single judge (especially of public policies) without a more dynamic and panoramic adversary, does not have the power to examine with lower risks the imposition of commands that many times will have little ability to generate effective impacts on the measurement of fundamental rights.

Co-participative implementation of public interest

An extremely important chapter in the judicial imposition of public policy, we have discussed above, shows respect to how it should proceed with its legal compliance.

As already stated, the executive technique, like other procedural techniques, should be sized and interpreted from its constitutional foundations.

In particular, the execution looks for its constitutional foundations in pursuit of regulatory effectiveness, as a corollary of inseparability (Article 5, XXXV), in the manner in which the technique is directed to the full satisfaction of the obligations contained in the executive titles by the lender - and in *reasonable* time (art. 5, LXXVIII - CR/88) - but with full respect for other constitutional procedural safeguards, because there is always a need to think of ways to permit a process capable of respecting the tension between the need for legal decisions/actions (facticity) and the claim that they are correct (valid)[51].

However, the conventional ways of analyzing the execution as a form of state sanction, used in the protagonist mode by the magistrate, undergo profound change when one perceives the changing profiles of litigation and the phenomenon of the judicialization of public policy

[50] Ver CANOTILHO, J. J. Estudos sobre Direitos Fundamentais. Coimbra: Coimbra Ed.; SP: RT, 2008, p. 97 *et. seq*.
[51] BAHIA, Alexandre; SIMIONI, Rafael. Como os juízes decidem? Proximidades e divergências entre as teorias da decisão de Jürgen Habermas e Niklas Luhmann. Sequência (UFSC), v. 30, December 2009. p. 69. Avaiable at: <https://periodicos.ufsc.br/index.php/sequencia/article/view/2177-7055.2009v30n59p61/13590>.

seated in the above issues, which leads to the conclusion: if, in the traditional mold of individual litigation, the execution already (or still) proves problematic, without having obtained, in Brazil, a formulation that makes it efficient and fast - despite the many reforms made to this particular area -, the more problematic it is when it comes to different guardianships, of the litigation of public interest.

The execution-sanction has proved completely ineffective and illegitimate in these areas. Thus, the civil execution suffers the impact of this transition of roles that the procedural system will take.

The realization dawns that democratic civil execution, for the fulfillment of the obligations arising from these new forms of litigation, must assume a dialogical and co-participative procedural role so as to promote a planned compliance with the calling up of all those involved in public policy.[52] This is because the constitutional framework, to which reference was made early in this work, determines a new concept of what constitutes "public and private interests." Thus, the judicial treatment of the State's obligations to ensure the fundamental, or, more generally, to "provide" public policies, since it cannot move by typical conceptions of the classical "State of Wellbeing", according to which this embodies itself as "the public interest" which should always prevail over private interest.

On the contrary, in the rule of law, "the public" no longer belongs only to the state (but may be detained precisely for that which it litigates against it) and, at any rate, no longer can it be said that the public interest prevails over private "*a priori*", under threat of offending equally valid fundamental rights.

Only in the concrete case it may be that, from the claims of the litigants and the reconstruction of the features of the case and the legal order itself, you can figure out which of those claims are legitimate and which show abuse[53].

[52] MILLER, Chris H. The adaptive American judiciary: from classical adjudication to class action litigation. Albany Law Review. v. 72 n. 1, 2009. Avaiable at: <http://www.albanylawreview.org/articles/Miller.pdf >.
[53] BAHIA, Alexandre. *Recursos Extraordinários no STF e no STJ*: conflito entre interesses público e privado. *cit*.

If this is so, one now cannot accept, without reservation, procedural privileges that the Government has in mind, nor admit that public acts which violate rights deserve to be included in the generic reference to "public interest". If the state has the power to perform acts to create public policies, such power is also a necessity, and both their actions and omissions are subject to justice.

Considering that the judicial body - in the case and observing those requirements above - has defined the obligation of the government to perform, there will still be the Herculean task of executive compliance with the decision.

In this sense, Eduardo José da Fonseca Costa[54] shows, in the referred work, a proposal for the replacement of the model of *execution as a sanction* with a model of *negotiated execution*, in terms of making moves involving public policy.

The author starts by stating the ineffectiveness of the traditional coercive model, of implementing decisions which require the Government to fulfill public policy. This not only because in a number of cases the defendant refuses to comply "*tout court*" with the decision - the author will not focus on such cases - but rather, in cases in which he *wants* to (or *could*) fulfill the decision, this being limited by bureaucratic, technical, or financial barriers. As Eduardo Costa shows, in his professional experience:

In forensic routine it is common to encounter situations in which the defendant recognizes the need to make the object of the alleged claim of substantive law in court, but resists the achievement of this object in the time desired by the author. (...) [The] various budget constraints and inflexible internal and external bureaucratic controls often prevent the Administration from discharging its important tasks at the desired time (...). This is why, in these actions, the demarcation of the cause (...) is in knowing what sort of time is *reasonable* for the public entity to meet its obligation (emphasis in original).

[54] FONSECA, Eduardo José da Costa. A "Execução Negociada" de políticas Públicas em Juízo. *cit.*

The legal response, even after changes to the execution regime in Brazil, has the sense of "coercing" the defendant to comply with the decision, in the manner and time set by the magistrate.[55] The drawback, proposed by Eduardo Costa, is that using the opening provided by clause § 5 of article. 461 - CPC (which opens up the possibility of using alternative means), the judge may rely on establishing schedules negotiated by the parties as a way to enforce the decision.

According to Costa, nowadays, the Law has learned that the most effective standard is not that which relies on coercion to impose, but the "soft law", i.e. one that promotes non-authoritative "legal direction of authorities" (the quote is from Chevalier).

In fact, we know that the efficiency of law is directly related to the higher level of moral development of a society (Kohlberg), so that at the post-conventional level once the normative principles underlying the legal texts are internalized there is more obedience, because the

[55] This solution provided for in article 461, of the reformed CPC, will be maintained in the projected CPC: "Art 550. In compliance with the judgment that recognizes the enforceability of obligations to do or not to do, the court may, *ex officio* or upon request, for the enforcement of specific performance or to obtain protection for the equivalent practical result, determine the measures necessary to meet the satisfaction of the creditor. § 1 To meet the provisions of the ruling, the judge may determine, among other measures , the imposition of fines for any delay period, the search and seizure, removal of persons and things, the undoing of works, judicial intervention in business activity or similar and preventing malicious activity and can, if necessary, request the assistance of the police force. § 2 The permission for judicial intervention in business activity will only be given if there is no other effective means for effecting notice of the decision and, where applicable, the provisions of articles. 102-111 of Law No. 12,529 , of November 30, 2011. § 3 The execution will focus on the sentences of litigation in bad faith when the defendant unreasonably fails to comply with the court order, without prejudice to his responsibility for the crime of disobedience. § 4 In compliance with the judgment that recognizes the enforceability of an obligation to do or not do, apply Art. 539, as applicable. § 5 The provisions of this Article shall apply, where applicable, compliance with judgment that recognizes things which must and must not be done, of an obligatory nature. Article 551. The periodic penalty does not depend on the application by a party and may be granted in the discovery phase, early relief, judgment, or in the execution phase, provided it is sufficient and compatible with the obligation and it the time to comply with the rule is determined reasonable. § 1 The judge may, *ex officio* or upon request, modify the value or the periodicity of the maturity of the fine, or even cancel it, without retroactive effect, if he finds that: I - It was insufficient or excessive II - The obliged party demonstrated supervening partial fulfillment of the obligation or just cause for noncompliance. § 2 The amount of the fine will be due to the adjudged creditor. § 3 The definitive fulfillment of the fine depends on the final judgment of a decision favorable to the party, the penalty shall be payable from the day on which is the decision was breached and. The provisional implementation of the decision to fix the penalty, if applicable is allowable. § 4 The implementation of periodic penalty covers the value for the period of noncompliance which has occurred until the time of its application, as well as the supervening, and up until it is satisfied by the decision. § 5 The provisions of this Article shall apply, where applicable, to the compliance with the judgment to recognize duties of an obligatory nature." Excerpt from the Substitutive CPC adopted on 07.16.2013 in the House of Representatives Special Committee (Teixeira Report).

members of this community of principles (Dworkin) understand the meaning of the law and do not just act for fear of sanction[56].

The execution, however, still remains attached to the idea of State coercion, since it is part of the life of the debtor to fulfill his obligation spontaneously. Even with the changes introduced by the CPC which brought execution into the process of gaining knowledge on the subject, the coercive character has not diminished, on the contrary the emphasis has been placed on the enforcement powers of the Magistrate to require the forced execution of the judgment - all with a view to ensuring the effectiveness/utility/speed of the execution phase.

As stated above, one of the difficulties in achieving compliance with a decision that deals with public policy is in questions outside the field of expertise of the magistrate. As much as the magistrate may try, there are technical, financial and bureaucratic issues that only the public administration dominates and which should be considered when defining "how" and "when" policies should be implemented. This is even more serious because, given the exponential increase in the judicialization of public policy, the rule tends to remain in a "functional inertia", i.e. it "only works if pressed by the judiciary."

Even then, the unilateral fixing of the time limit for implementation of a decision (as provided by Article 461 - revised CPC, Arts 550 and 551 of the Projected CPC in the writing of Teixeira of 16/07/13), if made without parameters, many often may not be fulfilled by the public administration, which generates fines which are also not met and just pile up, aside from the fact that they are a burden whose payment will only increase the deficiency in the provision of other services.

Thus, Costa explains that coercive measures of a pecuniary or even criminal nature (to the public administration), aside from being ineffective, border on illegality and further, the magistrate often turns out to be primarily responsible for decisions to be unfulfilled by giving a timeframe without having data to support it. He suggests that the magistrate could convene a

[56] We here move on from the theories of Dworkin and Kohlberg. On the application of them to the court decision, see Marcelo Cattoni. Direito Constitucional. Belo Horizonte: Mandamentos, 2002, p. 179ss.; e: CARVALHO NETTO, Menelick de. Racionalização do Ordenamento Jurídico e Democracia. Revista Brasileira de Estudos Políticos, Belo Horizonte, n. 88, p. 81-146, dezembro, 2003.

preliminary hearing in which the defendant has the opportunity to show (taking data) his actual ability to implement the public policy - in these terms, the defendant is not being pressed to say "how he wants to suffer coercive acts" which would be useless, but rather opening the debate such that a schedule for implementing the decision by the parties is proposed. Having the data provided in the hearing, the judge would be better able to establish a timeframe and a method consistent with the reality of the case.

The proposal of the author is, therefore, that the judicial execution of public policies move away from the traditional perspective of it as a penalty, towards a "soft" enforcement, based on negotiation, mediation and dialogue, so that, after hearing the parties, the path to compliance with the decision can be better defined[57]. For this, Eduardo Costa works with the *modus operandi* of the art of negotiation: private meetings with each party; rounds of negotiations not only with the presence of the parties (and their lawyers), but also those that will directly fulfill the schedule, and, where appropriate, third parties (experts), appointed by the court to contribute technically; but, more than this, aside from other formal requirements, the author emphasizes the importance of the discussion breaking away from the narrow limits of the subjects of the process to also achieve, as appropriate, the involvement of sectors of society, somehow, in the implementation of public policy, so that the procedural relationship takes a *polyphonic structure* and the solution gains a democratic legitimacy.

With respect to the latter aspect, which we consider essential, there are some considerations to make. It is a long time that we have been defending a change of attitude as to how decisions should be taken. The establishment of an adversarial co-participation[58] is essential for processes that develop in the procedural paradigm of the democratic rule of law: this assumes that the legitimacy of decisions is not (only) in the formal observance of rules, or

[57] We recall here the timely, now classic, defining of mediation of Warat as "an ecological way of solving the social and legal conflicts, a form in which the purpose of satisfaction of desire replaces the coercive and outsourced application of a legal sanction. Mediation is an alternative way (alongside others) for resolving legal disputes, with no fear of breaking the law or to adjust according to the provisions of positive law" (WARAT, Luis Alberto. Em nome do acordo: a mediação no direito. Buenos Aires: Angra Impresiones, 1998, p. 5).

[58] NUNES, Dierle. Processo Jurisdicional Democrático. *cit.*; NUNES, Dierle. Fundamentos e dilemas para o sistema processual - Uma abordagem da litigância de interesse público a partir do Processualismo Constitucional democrático. *cit*.

subsumption of the law to the concrete case; hence moving from a situation where the parties are merely given the opportunity to "say and contradict", and where the magistrate merely states his decision[59] is not enough.[60]

More than ever the discussion of participatory implementation leads us, as a dogmatic assumption, to the doctrine of Fazzalari (1958), properly introduced in Brazil by Aroldo Plinio Gonçalves when he stated that "there have always been processes in which there was procedure realised in adversarial process between stakeholders, and the essence of this is in the 'symmetric parity' of the participation, in the acts which prepare the proof, of those who are interested in it because, as its recipients, they will suffer its effects"[61].

However, we argue that a co-participation that induces a procedure backed by all fundamental rights, with the adversary as the guarantee of influence and of no surprise[62], which leads to a debate between all procedural subjects, especially the viability of public interest litigation.

When Costa defends the pluralization of the debate such that the judge sets the schedule of compliance, once again we need to emphasize the revision of the concept of

[59] Even more so if one considers the dominant understanding in our courts whereby the judge is not obliged to answer all questions/theses posed by the parties or that he has "discretion" to decide "according to his conscience." About this: STRECK, Lenio Luiz. O que é isso - Decido conforme minha consciência? 2ª ed. Porto Alegre: Livraria do Advogado, 2010.

[60] Sobre isso ver: NUNES, Dierle José Coelho. Processo jurisdicional democrático. *cit.;* NUNES, Dierle; BAHIA, Alexandre. Processo Constitucional: uma Abordagem a Partir dos Desafios do Estado Democrático de Direito. *cit*.; BAHIA, Alexandre; NUNES, Dierle. Processo, jurisdição e processualismo constitucional democrático na América Latina: alguns apontamenos. Revista Brasileira de Estudos Políticos, v. 101, p. 61-96, 2010; BAHIA, Alexandre. Avançamos ou Retrocedemos com as reformas? Um estudo sobre a crença no poder transformador da legislação e sua (in)adequação face o Estado Democrático de Direito. In: Felipe Machado; Marcelo Andrade Cattoni de Oliveira. (Org.). Constituição e Processo: uma análise hermenêutica da (re)construção dos códigos. Belo Horizonte: Fórum, 2012, p. 15-37; BAHIA, Alexandre; BALESTERO, Gabriela Soares. A Necessidade da Quebra do Protagonismo Judicial: a comparticipação na construção do provimento jurisdicional, uma abordagem habermasiana e fazzalariana. Revista IOB de Direito Civil e Processual Civil, v. 65, p. 134-148, 2010.

[61] GONÇALVES, Aroldo Plínio. Técnica Processual e Teoria do Processo. Rio de Janeiro: Aide, 1992. p. 115.

[62] NUNES, Dierle. *O recurso como possibilidade jurídica discursiva do contraditório e ampla defesa*. Puc-Minas, 2003, dissertação de mestrado; NUNES, Dierle. *O princípio do contraditório*, Rev. Síntese de Dir. Civ. e Proc. Civil, v. 5. n. 29. p. 73-85, Mai-Jun/2004; NUNES, Dierle José Coelho, THEODORO JR, Humberto. Princípio do contraditório: tendências de mudança de sua aplicação. Revista da Faculdade de Direito do Sul de Minas, v. 28, p. 177-206, 2009. NUNES, Dierle José Coelho. *Processo jurisdicional democrático. cit*., Curitiba: Juruá, 2008.

process as a constitutionalized procedure entails[63]. If we deal with the execution of public policies, then the "public" that will be affected by the same should have been given the opportunity to participate not only in the execution phase, but also in cognition - as will be mentioned below, being an essential requirement for the understanding of the implications of a constitutionally adequate concept of process.

For Costa, for such a procedure to occur it is necessary that the magistrate is someone "truly skilled in the art of mediation" and that he has "personal inclination for dialogue, active listening, the ability to interrupt, patience, curiosity, improvision skills, commitment, judgment, the ability to articulate, apprehension towards non-externalized interests, the breaking of deadlocks, etc ".

Already we have had the opportunity to discuss the issue of "exceptional training of the judge as a condition for good resolution of conflicts." [64] On occasion, which we still maintain, it was argued that better training of a judge is a positive thing, this, however, doesn't mean that the correction of the decision is dependent upon it - or even that, necessarily, highly trained judges come to correct decisions.

From this, although agreeing with the proposal of Costa, we disagree on this last requirement as it puts another burden on the shoulders of the magistrate. The idea of opening a negotiation procedure at the stage of execution of the judgment, of an obligation to comply with public policy, is very welcome for all the reasons above. However, we understand that the same thing could take place without the magistrate being, once again, burdened by it. This function could be delegated to a professional mediator or conciliator to act as an auxiliary organ of the judgment (and under strict monitoring) who, possessing those professional qualities which the author requires of the judge-mediator, better exert the function of obtaining the data needed to formulate the timing of the performance of the resulting obligation.

[63] GONÇALVES, Aroldo Plínio. A Coisa Julgada no Código de Defesa do Consumidor e o Conceito de Parte. Revista Forense, Rio de Janeiro, vol. 331, 1995, p. 65-73.
[64] NUNES, Dierle; BAHIA, Alexandre. Por um Paradigma Democrático de Processo. In: DIDIER, Fredie. Teoria do Processo - Panorama Doutrinário Mundial - 2a série. Salvador: JusPodivm, 2010, p. 159-180.

For the implementation of a unique *multi-door* system

As we know, since the 1970s there has been a huge trend in favor of ADR (*Alternative Dispute Resolution*) as an option to the traditional court system.

This inclination was started as a trend of allowing conflicts of lower complexity, which did not require legal knowledge, to be tackled by these techniques.

In a seminal lecture of 1976, Frank Sander, presented some criteria to be considered in determining the appropriate dispute resolution mechanism.[65]

At that time, without even using the current ordinary nomenclature (Multi-door Courthouse), Sander laid the foundations for the Global Justice Center to provide access to a variety of facilities of ADR (mediation, arbitration, ombudsman, fact finding, small claims, etc.)[66], in order to seek the most appropriate technical solution and reduce the demands on the judicial system. It would create a place where eclectic methods of dispute resolution would be, in a concentrated fashion, available to citizens.

Such a multi-door model comes despite several setbacks in its implementation, obtaining good results in the U.S.[67] and serving as a model for many other countries (e.g. Nigeria, Singapore).

This foreign experience showed that in preliminary negotiations (pre-trial negotiations), the initial stage of the procedure, it would be convenient in any kind of dispute for the "judge"

[65] Sander said that the criteria should be: 1. The nature of the dispute. 2. The relationship between the parties. 3. Costs, taken as a reference for both the amount of credit, as the cost of pursuing. 4. Speed, being a reference to the desire for the quick resolution and the need for urgent action. Cf. SANDER, Frank. Varieties of dispute processing. *cit*.

[66] SANDER, Frank. Varieties of dispute processing. *cit*. p. 84.

[67] Pilot projects were implemented in the United States in Tulsa, Houston and Washington-DC, in 1985, with the support of the *American Bar Association Standing Committee on Dispute Resolution*. Similarly, other pilot programs were created in New Jersey and Cambridge, Massachusetts, since 1980.

who presided over the hearing to not be the same as that which would hear the case in the judgment phase. [68]

Moreover, one sees that the magistrate is not always the most qualified person to conduct the initial hearing by using techniques of professional mediation or arbitration, as professionals who possess this expertise do so as a result of specific preparation and training, which often is not (or was not) the area of study required to train as a judge. The fact that someone finds himself in the position of exercising judicial functions, does not necessarily mean that the person is skilled in mediation or other ADR mechanisms.

Such practices in the litigation of public interest, whether in cognition, and, especially in execution, have huge potential via the adversarial dynamic to enable much higher chances of balancing the demands.

The innovation that is advocated here, would not be the use of "appropriate" techniques to the detriment of traditional court proposals, but the perception that opting for them would no longer be suitable to be recommended for demands of lesser complexity, as customarily still stands, but that its use would be sought precisely in cases of high complexity, such as the execution of public policies.

However, if it is not feasible to "negotiate", it would go on to a case management conference, chaired by the judge, but the establishment of a management procedure in contradiction of the potential stages of the execution of public policy.

Final Considerations

The judicial efforts directed at actions that deal with the implementation of public policies in the context of inalienability (and, in fact, increase) of public interest litigation involves a comprehensive review of the old liberal and/or socializing concepts of processes. The

[68] FRENCH, Robert. Perspectives on Court Annexed Alternative Dispute Resolution. Law Council of Australia — Multi-Door Symposium, 27 July 2009, p. 9. Avaiable at: <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj27july09.pdf>.

Constitution, in the year in which it turns 25, if on the one hand, it was able to change the way the law in general is conceived (and the process in particular), on the other it contains major challenges for the public powers.

The use of the courts by social movements, or isolated individuals seeking the implementation of fundamental rights, is a reality in which there is no room for questioning whether or not something should be defended: judicialization is a worldwide phenomenon and, in Brazil, has allowed that, as mentioned above for example, groups pressure the State through "popular legal aid" in which counter-hegemonic interests of excluded groups find an access route in face of the omission of the legislature and omission/inefficiency of the public administration.

One of the first lessons is, therefore, to understand that there are new forms of litigation, beyond that individualized and designed by patrimonialist codes. Not only do the subjects and the effects of decisions multiply, the content of their actions dilates to include issues with political, budgetary and fiscal implications, which previously were forbidden territory for judicial assessment because they are "political questions", *interna corporis* issues of "administrative discretion". Today the judiciary has been called to implement concrete policies (and/or abstractly provided laws) not realized in their entirety or at least satisfactorily.

To deal with the implementation of public policies (such as the examples cited in health and education) involves a profound reflection on the role of the subject in the process. To realize this, it is not necessary to have a magistrate with a differentiated knowledge or wide training in extra-legal disciplines. It is necessary, however, that the process occurs in a form which preserves the adversarial role within the co-participative and polycentric proposal.

When the judiciary, in an attempt to "concretize" fundamental rights, makes decisions without regard to the (wide) contribution of those who are affected by this provision, this can lead to bleak conclusions such as those that Rizzi and Ximenes arrived at above: litigation underwent a change in the sense that the judiciary was to receive the demands, however, the precise execution of these decisions left much to be desired.

And then we arrive at precisely the proposal of Eduardo Costa regarding the co-participative implementation of public interest: if the whole constitutional process must be moved from the adversarial dynamic, execution should also be affected by this renewed concept of the process, leaving aside (especially regarding the implementation involving public interest litigation) a bias towards the privative that only considers sanctions and coercion in the phase of "forced" fulfillment of the sentence, i.e. from an *execution as a sanction* view to a *"soft" execution* that favors, also in the executive phase, dialogue not only among the subjects of the process in a "strict sense", but also with contributions from experts and of others who will be affected by the provision.

Adding to the privileges that the existing powers still have in court, even in the execution, we move on the proposal of Eduardo Costa: taking advantage of the features that the 5th paragraph of art. 461 of the CPC, a space for negotiated execution could be created in which the parties are given the opportunity to participate in the formulation of how the decision will be complied with, that is, how and when (the timing and establishment phases).

Nevertheless, within the above theoretical framework, we believe that, if the proposal of establishing a mediation space is a huge advance which we have made in the current execution parameters, this should not, however, result in the magistrate having to be the mediator, given that he himself does not have - and nor should the requirement be imposed - the knowledge needed to promote negotiation in accordance with the stringent requirements it entails. A professional mediator (or conciliator) can make the changes in the execution of the decision so as to achieve the desired goal: get the data for the formulation of the timing and/or the establishment of stages of compliance. In this sense we have learned from the experience of the "multi-door system" implemented in several countries, which defends, even when the chosen route is judicial, that mediation and conciliation procedures are not made by the magistrate. This potentiates the adversarial and the formation of a provision in close relation with the demanding dictates of the process in the democratic rule of law.

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