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REVIEW ARTICLE

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THE FUNDAMENTAL PROCEDURAL RIGHTS IN BRAZILIAN CONSTITUTIONS

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ABSTRACT

The present article discusses, from the analysis of the constitutional text, how the fundamental procedural rights have been enshrined in Brazilian history. Throughout the evolutionary analysis of the constitutional text, the predominant political environment that served as a context for the changes on the subject is presented. With this, the study intends to awaken reflection on two aspects: 1º) the existence of an enshrined text in the constitution does not guarantee the application of the right stated; 2º) the attribution of meaning to a fundamental procedural right varies according to time, as well as to the political, social and legal context of a given space.

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INTRODUCTION

Law is a form of memory of society, whose oldest and most permanent function is to institute the past, certify the facts that have occurred, guarantee the origin of titles, rules, people and things. This mission of guardian of social memory has always been entrusted to jurists (OST, 1999). A historical reconstruction of a certain legal phenomenon may be carried out by taking several sources as the object of research. Thus, the sources that are usually consulted in legal research are the law (in a broad sense), doctrine and jurisprudence. The analysis of a certain object (or legal institute) in historical comparison (vertical comparison), based on one of the research sources, allows several important issues to be verified. Taking the regulation of a certain object of analysis in historical perspective, it is possible to perceive when the concern with a certain theme began to have enough repercussions to demand a general and abstract regulation in law. It is assumed, therefore, that in a physiological process of lawmaking, the social fact precedes the legal text, whose existence is demanded precisely to serve as a measure of behavior for the subjects of law in society. This circumstance makes it possible to identify when a society has come to recognize a certain theme as widely relevant to the point of assuring it in the Constitutional text. Therefore, the normative rules and changes over time of the legal text that regulates a certain legal phenomenon reveal, in a very explicit way, the evolution of thought about it.

Under this focus, it will now be addressed the fundamental procedural rights that have been established throughout the history of the Brazilian constitutions in order to identify, at the same time, their enshrining and the social context in which they came to light. Finally, it is warned that the pretensions of this article are limited to the presentation of a synthetic overview of the confirming of the fundamental procedural rights in the Brazilian constitutions and the punctual indication of events that influenced their understanding. Furthermore, it is beyond the scope of this article to demonstrate how the doctrine, the courts and the legislators (through research in their own sources) effectively interpreted, in each period of history, each one of the rights indicated in the constitution. Such an undertaking, if possible, would require an immensely more extensive work and, therefore, incompatible with what is expected of a scientific article.

MATERIALS AND METHODS

Independence Day, Empire and the Brazilian Constitution of 1824: The Brazilian Constitutions and, as a consequence, the rights linked to the process put into them over time were deeply and evidently influenced by historical, sociological and political factors (CINTRA; GRINOVER; DINAMARCO, 1998). Firstly, it is important to note that Brazil had a State before it had territory and before it had people (SOUZA JÚNIOR, 2002). In this step, Brazil,

still in the condition of colony of Portugal, saw in the beginning of the year 1821, the Portuguese of all classes pronouncing for a liberal constitution, something they did not understand; but it was freedom under the eyes of the Portuguese (D'ALBUQUERQUE, 1848). However, while the first Portuguese Constitution was being promulgated, on September 23rd, 1822, the first Brazilian Constitution would only come to exist on March 25th, 1824 – after the declaration of political independence from Portugal, which occurred on September 7th, 1822. The Constitutional text of 1824 turned out to be at once imperial and democratic. In other words, it had a French, philosophical and also Napoleonic inspiration; idealistic and realistic; which was to make definitive all the conquests, theoretical or concrete, of the liberal revolutionary spirit (LIMA, 1927), and in it the rights were expressly provided for: (a) to a natural judge (Art. 179, XI); (b) access to justice (Art. 179, XXX) and (c) equality (Art. 179, XIII). There was also a provision for courts to hear cases in the second instance, enshrining the right to a double degree of jurisdiction (Art. 158). Regarding the right to due process of law, the national doctrine is not unanimous about its provision in the Imperial Constitution of 1824. Paulo Fernando Silveira maintains that, "[...] there is no way to speak of guarantees of individual rights or, specifically, of the observance of the principle of due process of law, which was not even expressly mentioned" (SILVEIRA, 1997, p. 117). To the other hand, João Gualberto Garcez Ramos underlined that, "The Constitution of the Empire, of 1824, in its article one hundred and seventy-nine, section two, brought a substantial aspect of the principle" (RAMOS, 2004, p. 101). Although in the Political Letter of 1824 one could already see rights linked to the process, still present today in the Federal Constitution of 1988, current now, it is essential to mention that, at that time, the Executive not only arrogated to itself the right to discuss the justice of the Judiciary's decisions, but was also willing to punish all those who in its exclusive judgment acted in disagreement with its beliefs (NOGUEIRA, 1999). This was because of the power (Poder Moderador) granted to the Emperor by the 1824 Constitution itself (Art. 98) permitted the imposition of compulsory retirement or other suspensions (Art. 101), as well as the transfer of magistrates (Art. 153).

The First Brazilian Republic and the Constitution of 1891: The Empire's Constitution lasted 67 years, representing the longest period of duration of a Constitution in Brazilian history. This Constitution was replaced by the first Republican Constitution, dominated by the thoughts of Ruy Barbosa, main author of the 1891 Constitution project (PIMENTA, 2007). At once, Brazil, which was a monarchical, parliamentary, unitary and decentralized State, became a republican, presidential and federative State (SOUZA JÚNIOR, 2002). Although the Constitution of 1891 was the most disjunctive and decentralizing, in terms of federation in Brazilian history, a phenomenon that caused a significant set of attributions – among which was to legislate on procedural matters – to be constitutionally deferred to the State legislatures (CRUZ, 2004), the procedural rights contained in the Imperial Legal text were ratified and others of high relevance were incorporated into them. It is worth mentioning that, in the procedural sphere, the Constitution of 1891 represented a great reception of foreign law model in the Brazilian system: the reception of the constitutional model of the United States of America (SARLET; MARINONI; MITIDIERO, 2019). As for procedural rights, it is underlined the existence (a) of equality (Art. 72, § 2nd); (b) of access to justice (Art. 72, § 9th); and (c) of the natural judge (Art. 72 § 23rd) in the text of the 1891 Constitution. The right to a double degree of jurisdiction is implicit in the wording of paragraph 16th of Article 72, as well as in the provisions on the organization of the courts and on the applicable appeals (Arts. 59 and 60). The right to due process of law can also be seen implicitly in the Constitution of 1891, either in the final part of paragraph 15th of Article 72, or in the wording of paragraph 16th of the same provision, although it expressly mentions criminal procedure. As Adhemar Ferreira Maciel (2000) reminds, the Decree 848 of October 11th, 1890 (responsible for the creation of the Federal Supreme Court and the Federal Justice, modeled on the famous Judiciary Act of 1789, which, in its penultimate Article (386) stated the following: "The statutes of the learned peoples and especially those governing legal relations in the Republic of the United States of North America, the cases of Common Law and Equity, shall also be subsidiary to Federal Jurisprudence and process" (MACIEL, 2000, p. 229). Although linked to criminal procedure, the right to a broad defense appears textually in the Constitution of 1891, in its Article 72, § 16th: "The accused will be assured by law the fullest defense, with all the resources and means essential to it, from the note of guilt". Ratifying this understanding, Carolina Alves de Souza Lima refers that "the Constitution of 1891 safeguarded both the right to the Full Defense, explicitly, and the Double Degree of Jurisdiction, implicitly" (LIMA, 2004, p. 77).

The "Estado Novo" and the Constitutions of the 1930s: The second Constitution of the Republic was promulgated on July 16th, 1934, under the influence of the Weimar Constitution of 1919 and the Spanish Constitution of 1931, both constitutions arising from the post-First World War environment in Europe, which was the construction of the so-called *estado de bem-estar* or welfare state (CHUEIRI, 2008). In the 1934 Constitution, the technique of division of powers was used to alleviate the great decentralization that had occurred with the Constitution of 1891, when the Member States achieved such great autonomy that the Federal Unit was compromised. Thus, while the 1891 Constitution enumerated the powers of the Federal Unit and those that were not in the list were freely reserved to the Federated States, the 1934 Constitution introduced the technique of Federal Unit legislation and supplementary and complementary legislation of the Federated States. This technique intended that the States would meet local peculiarities, on condition that they did not dispense with the requirements of federal legislation (Art. 5th, § 3th, of the 1934 Constitution) (MELO, 2008). Then, with the Federal Unit's competence to legislate on process constitutionally dictated in 1934, it became necessary to prepare a new Code of Civil Procedure; the government organized jurist commissions in charge of that task (CINTRA; GRINOVER; DINAMARCO, 1998). In the area of procedural rights, the Constitution of 1934 retained in its text, with some changes in the wording, the rights to equality (Art. 113, I); to access justice (Art. 113, X); to a natural judge (Art. 113, XXV); and to a full defense (Art. 113, XXIV). It also maintained, implicitly, the right to due process of law (Art. 113, XXVI) and the double degree of jurisdiction (Art. 113, XXIV). It brought, however, for the first time to the constitutional text the right to due process within a reasonable time, although related, at the time, only to administrative procedure (Art. 113, XXXV).

Getúlio Vargas, then President of the Republic, experienced difficulties in adapting to democratic rules and the principle of alternation in power, enduring for only three years the obligations imposed by the existence of a Fundamental Constitution (SEITENFUS, 2003). On November 10th, 1937, Getúlio Vargas gathered the Ministry and, in front of the National Radio microphones, presented the country a new Constitution (FERREIRA, 2007). The *coup d'etat* was expected, considering – since the end of 1935 –, that the government had achieved, with the support or consent of the majority of Congress, an important concentration of powers, requested under the allegation that the threat of communist sedition hovered over the nation (PENNA, 2008). The so-called "Estado Novo" was created. Under the prism of procedural rights and other fundamental guarantees of the citizen, there was a clear setback in the Constitution of 1937 (FAUSTO, 2006). Although the "individual rights and guarantees" (named in the Legal text) were expressed in the Articles 122 and 123, Vargas governed the country based only on the transitional and final provisions of the Constitution of 1937, which gave the President of the Republic the full powers (Executive and Legislative), while the Parliament was not convened (Art. 180). The Parliament, however, would only be elected after a national plebiscite to ratify the Constitution (Art. 187) and would be convened only when and how the president wished (Art. 178), which never took place during that government (CARVALHO, 2008). The analysis of the Constitution of 1937 shows that many of the constitutional rights applicable to civil procedure contained in previous Constitutions were suppressed in the text of the new one. The access to justice and the natural judge are examples of this. Thus,

from the recapitulation of the facts that occurred at that time, one of the rights that remained present (equality – Art. 122, I) was, in practice, suspended indefinitely along with all other fundamental guarantees (COSTA, 2006). Under this dictatorial climate, the first Brazilian Code of Civil Procedure (Decree-Law No. 1.608/1939) came into being in 1939. According to the explanatory memorandum presented to the former President Getúlio Vargas on July 24th, 1939. The new procedural law was intended to "place the administration of justice under the care of the State, removing it from the discretion of interested parties". Despite Vargas' conviction that the authoritarian apparatus of the Estado Novo was necessary to achieve his nationalist goals, this policy of restrictions on individual liberties of citizens was resented by a large part of Brazilian society. However, the population did not rise up in opposition to the government in the first half of the 1940s because World War II had greatly stimulated the Brazilian economy, which had raised the standard of living of the population (LEVINE, 2001). With greater freedoms given to the press – precisely as a result of Brazil's engagement in the campaign against the Axis – and with the exaltation of the ideas of freedom brought by the winds of war, it became impossible for Vargas to maintain his dictatorial regime. By nightfall of October 29th, 1945, an army movement began in Rio de Janeiro, which culminated with the fall of Getúlio Vargas and the end of the Estado Novo (FAUSTO, 2006).

The 1946 Constitution: an interlude between the estado novo and the military Regime: With the promulgation of the 1946 Constitution, the Brazilian State rejoined the liberal-state constitutional system, affirming its aspirations as a country with a democratic tradition (RICCITELLI, 2007). Largely inspired by the text of the 1934 Constitution, the 1946 Constitutional text basic underpinnings were the consolidation of a political system founded on representative democracy, the institutionalization of federation and municipal autonomy, and progress in the constitutional treatment of fundamental rights and guarantees (PIMENTA, 2007). What contributed mostly to the approximation of the texts of the 1934 and 1946 constitutions was the coincidence of political factors that inspired the constitutional drafting, guided, at both moments, by the thought of a reaction against the exaggerations of the presidential model of the Old Republic, or against the dictatorial tendencies that shaped the Constitution of 1937 (BALEEIRO; SOBRINHO, 2001). Under the new aegis of democracy, the 1946 Constitution did not agree to give the Member States any competence in matters of civil procedural law (MIRANDA, 1960). This centralization was expressed in Article 5th, Subparagraph XV, line "a", and maintained the exclusive applicability of the 1939 Code of Civil Procedure throughout the country. In its Article 141, the 1946 Constitution vividly restored the procedural rights of equality (Art. 141, §1º) and access to justice (Art. 141, §4º). Regarding the latter, it's noted that the text of the Article in the 1946 Constitution is very similar to the text of the current 1988 Constitution (Article 5, XXXV). However, with the suppression of the term "individual", the current Constitution of 1988 broke with the individualistic paradigm of the protection of rights (DIDIER JUNIOR; ZANETI JUNIOR, 2007) and opened the doors to the protection of collective and diffuse rights in the Brazilian constitutional plan. The Constitution of 1946 also made provisions on the rights to a broad defense and a double degree of jurisdiction (Art. 141, § 25th); to a natural justice (Art. 141, § 26th); to due process of law (Art. 141, § 27th), no longer expressly linked to criminal procedure, as seen in the Constitution of 1934, but in a broad and unrestricted manner; and to due process within a reasonable time (Art. 141, § 36th, I), also linked, as occurred in the Constitution of 1934, directly to the administrative sphere. The 1946 text survived the resignation of a president (Jânio da Silva Quadros, on August 25th, 1961) and a brief period of parliamentarianism in Brazil (from September 1961 to January 1963), but could not resist the *coup d'etat* of April 1st, 1964, when the armed forces ended up taking over the running of the State. And, in order for this new regime to be feasible, it was essential to strike down the Constitution of the Republic.

The Military coup in 1964 and the 1967 constitution: The military could not have been any other path than centralizing and strengthening the Executive Power. Thus, between April 1964 and December 1966 there were no less than four institutional acts and fifteen constitutional amendments (BONAVIDES, 2006). The first of the Institutional Acts (IA-1), among other measures, instituted indirect elections for president of the Republic, and the suspension of political rights of all those who were identified with the socialistic ideas and/or were against the established military regime. Furthermore, it suspended the effectiveness of the current Constitution and, with it, all individual citizen guarantees. But the need to institutionalize the revolution was a constant in the thinking of the members of the 1964 movement, and that is why there was so much concern with the issue of a new Constitution (BONAVIDES, 2006). On December 7th, 1966, Institutional Act Number Four (IA-4) summoned the National Congress to vote and promulgate the new Constitution. On January 24th, 1967, Brazil's sixth Political Letter came into effect, and with it, hopes were renewed that the end of the infamous Institutional Acts was near. Formally, its text established the procedural rights of equality (Art. 150, §1º); of access to justice (Art. 150, §4º); of ample defense (Art. 150, §15º, first part), of the double degree of jurisdiction (implicit in the existence of courts) and the natural judge (Art. 150, §15º, second part). However, the rights to due process of law and due process within a reasonable time have been removed from the wording, which was evidently to be expected. Although there was hope of a new democratic established by the entry of the 1967 Constitution, the Institutional Act Number Five (IA-5), implemented on December 13th, 1968, buried this hope (BONAVIDES, 2006). This Institutional Act affronted the nature of the Brazilian people and traumatically suspended the rights and freedoms of citizens, establishing a dictatorship, in which the generals, upon receiving the fourth star, felt entitled to receive a fifth: the position of the president of the republic (CONTREIRAS, 2005). On October 17th, 1969, the Ministers of the Navy, Army, and Air Force promulgated Constitutional Amendment No. 1 to the 1967 Constitution, which was, in reality, a new legal text granted by the Military Junta that governed the country (FARIA, 2007). This new text brought few changes to the judicial system (SAMPAIO, 2007) and none to the constitutional rights of the civil process, which continued to be arranged in the same way as in the 1967 Constitution, being disregarded, as they had been doing since the beginning of the military coup.

The Redemocratization and the 1988 Constitution: After more than twenty years of the so-called "years of lead", it was time to build a new citizenship, to unravel society, which was exhausted, divided into patricians, plebs and outcasts (LOPEZ; MOTA, 2008). The process of democratization in Brazil began with the indirect election of a civilian president in 1985, leading to a new Constitution in 1988 – the "Citizen Constitution" – the current one. The 1988 Federal Constitution was approved in a difficult economic and social context, when the accumulated inflation in 1988 was about 1000 % (SAMPAIO, 2006). It was also reaffirmed as the foundation of the legal order, the principle of legality, source of rights and duties, besides the limit to the power of the State and the autonomy of the will (TACITO, 2004). It emphasized the tendency to convert the process into an instrument of defense of citizenship and of the values enshrined in the new constitutional order (LOPES, 2004). Thus, it did not just work in the process through the constitutional norms, but to employ them in the very exercise of the jurisdictional function (OLIVEIRA, 2014). As fundamental procedural rights, the Brazilian Constitution of 1988 expressly provides: access to justice (Art. 5, XXXV); the natural judge (Art. 5, LIII and XXXVII); the adversary and ample defense (Art. 5, LV); the publicity of trials and motivation of court decisions (Art. 93, IX); and the reasonable duration of the process (Art. 5, LXXVIII).

CONCLUSION

It can be seen, therefore, that fundamental procedural rights – even though not with this express label – have always been present – to a greater or lesser extent – in Brazilian constitutions. However, when conducting historical research of sources, it is important not to lose sight of the fact that the same (legal) text can be given a different

meaning over time. This is due to the fact that, from a historical perspective, even if the text remains the same, interpreters, by changing their cultural conditions, tend to attribute different meanings to the data in another historical-cultural context, even if in the same geographical space. To understand the validity of this statement, it is relevant to consider the meaning of equality over time in the same circumscribed environment. Taking (young) Brazil as a reference, it is easily observable that the notion of equality, although socially recognized as desirable at any time, was quite different in the 19th century from that used in the 21st century. In order to dimension this difference, the search for equality in the 19th century was admitted in a context where, for example, slavery was accepted (abolished in 1888) and women were forbidden to vote (a right achieved in 1932). A simplified interpretation of the right of equality (among other rights and guarantees) today abominates both situations mentioned above. The theme of the interpretation of legal texts over time gains even more diffuse contours when the Constitution is analyzed. Since the constitution is the fundamental rule of a given State and the foundation for the entire legal system, its text is expected to be more open to interpretation (which, in the case of the Brazilian Constitution, did not always happen). It is through infra-constitutional legislation (complementary laws, ordinary laws) and precedents that the reduction of the indeterminate meaning of the text is sought.

In terms of ordinary legislation, the structural change that the fundamental procedural rights have undergone is palpable. Throughout the history of Brazilian civil procedure, three nationwide Codes of Civil Procedure were enacted, in the years 1939, 1973 and 2015. All of the Codes presented concerns, albeit with different names, with fundamental procedural rights. The first two Codes were enacted in periods of low democratic representativeness (Estado Novo and the military regime) and dealt in a technical and procedural way with the adversarial process, the ample defense, among others. The constitutional guarantees of the period that comprehended the 1939 and 1973 codes were reflected in the procedural rules as technical mechanisms, not having explicitly as rules of direction and interpretation of procedural phenomena. On the other hand, the Civil Procedural Code of 2015, created under the 1988 Constitution and in the middle of the democratic regime, dedicates its initial articles to the treatment of the fundamental procedural norms, even expanding the catalog provided in the Constitution. The observation of the impact of the constitutional text on the laws that are subordinate to it reveals how the way fundamental rights are viewed in a legal system may vary even when the same text is taken into consideration.

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