THE GROUNDS OF THE VERDICT AND FULL EXERCISE OF THE ADVERSARIAL PROCEDURE

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Abstract: The present paper deals with the concept of some constitutional norms, mainly the grounds of the verdict and full exercise of the adversarial procedure provided for in the Brazilian Constitution. The objective is to pinpoint the impact of the decision without fundament, listing the reasons for the obligation of this reason. It is intended to show that the basis of the verdict is the adversarial procedure. The traditional idea of the adversarial procedure as a formal element of due process is overcome.

Keywords: Democracy; Due Process of Law; Adversarial Procedure; Verdict; Reasons.

1 INTRODUCTION

What legitimizes a decision? In ancient times, the legitimacy of the decision was in the force (brute and violent) coming from the authority of the monarch or emperor. However, in a contemporary democracy, force could not be the criterion of the legitimation of a decision. This is because the very idea of legitimacy has evolved in the development and construction of democratic society. The legitimacy that was once described as the monarch's ability to impose his will came to be understood from the conception of cooperation and the conception of participatory construction of the aw-making process.

The famous phrase *The State Am I* attributed to the French King Louis XIV has lost vitality with democracy, since the former sovereignty, understood as the emperor's ability to enforce his will nationally and internationally, began to give way to the perception of popular sovereignty, which brought the view that the recipient of the law should at the same time participate in its creation process. In other words, what would differentiate a democracy (sovereignty of the people) from an autocracy (sovereignty of the emperor) would be the fact that in the Democratic State the people should respect only the law of their own making. There is a transfer of power from the king to the people, who would then say what the rules of the democratic game would be.

In this context, we add the question initially asked: what legitimates a court verdict? Such a question must be preceded and, paradoxically, succeeded by another: why does a court

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decision need legitimacy? The answer would be simple and obvious. The court decision needs legitimacy to avoid arbitrariness and abuse by the magistrate in the exercise of his jurisdiction.

How to legitimize a court decision? The purpose of this article is to argue that, for the decision to be legitimate, the principles and guarantees brought by the Constitution of the Republic of 1988 must be observed. One of these principles, as expressly provided in art. 93, IX, consists in the obligatory reasoning of the decisions. It will be for the reasons that the magistrate will show to the parties and society what were the reasons that justified his act. In reasoning, the magistrate presents the reasons of fact and law for which he made that decision, thus highlighting the effective exercise of the right to the adversarial procedure. (BRASIL, [2019])

In general terms, a judicial verdict that lacks substantiation is authoritarian and undemocratic. This autocratic decision will only be a demonstration of the unilateral will-power of the magistrate, suffering from any rational legitimacy. On the other hand, a decision based on the constitutional principle of the adversarial will have its legitimacy materialized in the concrete participation of the other procedural subjects.

2 CONSTITUTIONALIZATION OF THE PROCESS AND CONSTITUTIONAL PRINCIPLES

The current Republican Constitution, based on democracy as its basic precept, has brought several guarantees aimed at protecting freedom and fundamental rights. The imperative force of the Constitution, because of its nature, has contaminated the entire legal system, giving constitutional vitality to the whole normative set. This effect of constitutional irradiation allowed the assertion that all valid legislation and all discussion affecting law should be permeated by constitutional premises.

Thus, it must be said that there is no longer a purely procedural right. One can not just talk about Civil Procedural Law or Criminal Procedural Law, but Constitutional Civil Procedure or Constitutional Criminal Procedure, etc. Specifically, what happened was a constitutionalization of the legal system.

This constitutionalization of the law solidifies the perception that the process can no longer be understood only as the instrument or way of formalizing the judicial decision. First, the process should be understood as the fundamental guarantee that the individual has in front of the State.

From the 1988 Constitution, there was a conceptual shift in the idea of the process, the adversarial procedure and the broad defense, among many other principles related to the provision of jurisdiction. This conceptual shift in the face of principles is demonstrated as follows:

a) Principle of Due Process of Law

The art. 5, LIV, of CR / 88, states that "no one shall be deprived of liberty or his / her property without due process of law." (BRASIL, [2019]. This principle works as a guide to all other principles that must be observed in the process.

> The understanding that due process of law works as a supreme principle, a basic principle, guiding everything else that must be observed in the process is peaceful. In addition to the procedural aspect, due process of law also currently applies as a factor limiting the power of legislating in the Public Administration, as well as to ensure respect for fundamental rights in private legal relations (NEVES, 2016, p. 113).

The *due process of law* is the constitutional guarantee of a balanced regular process, guaranteed to all citizens. It basically indicates the minimum conditions under which a process must be developed. It would be the criterion to be observed by the judge and the other subjects in the procedural dynamics.

If access to justice materially constitutes the view that the Judiciary is open to the citizen in situations of threat or damage to the law, the due process of law basically indicates the minimum rules for the development of coordinated pursuit of acts. In the words of Bueno (2017, p.49), *due process of law is the Judge-State's method of action to deal with the assertion of a threatening or injurious situation.*

He also states:

> It is a matter of conforming the method of manifestation of the Judge-State's performance to a standard of adaptation to the values that the Federal Constitution itself imposes on the State's performance and in accordance with what, given the characteristics of the Brazilian State, hope those who address the judiciary get from it as a response, is a principle, thus, of conformation of the state's action to a special (and perceived) model of action (BUENO, 2017, p. 49).

It must be understood that due process of law symbolizes obedience to procedural norms, guaranteeing the parties a balanced and equitable judgment, with all motivated acts and decisions, allowing a broad control of the acts of the magistrate.

Due process of law, radiated by the normative force of the Constitution, is no longer seen only as the ordered and coordinated set of acts that would make it possible to formalize the judicial provision. Due process of law, which, in essence, must now be understood as due process of constitution, requires that this set of acts be subject to constitutional principles, especially the adversarial principle.

Simply put, the ordered and coordinated set of acts that would make it possible to formalize the jurisdictional provision would be just the procedure. In turn, process is the

procedure submitted to the adversarial procedure.

b) Principle of Isonomy

The article 7 º of the CPC (Code of Civil Procedure) governs the Principle of Isonomy as a duty of the court. (BRASIL, [2015]). The procedural isonomy reflects the perception of arms parity. The law should treat everyone equally in the process, and the judge must show a certain distance, showing that there will be no favoritism to any of the parties involved in the process.

> The rule that the law should treat everyone equally (art. 5 º, caput and item I of the Federal Constitution) also applies to the process, and both the law and the judge must guarantee the parties a material parity (art. 139, I, of the NCPC), as a way of keeping the judicial situation between them balanced.
> Isonomy in the procedural treatment of the parties is even the judge's way of demonstrating his *impartiality* (NEVES, 2016, p. 133).

If in the procedural relationship there is no isonomy between the parties, what will be the imposition of the will of one on the other, thus negating the very democratic content of the constitutional process. It should be emphasized that in respect of the Constitution, the discourse of isonomy should not only be formal. Procedural isonomy should be materially guaranteed, so that the parties in particular have the capacity for equal debate. Formal isonomy is only the right to the right to procedural equality. Material isonomy (constitutionally required), in turn, guarantees not only the right to the right, but indeed procedural equality.

c) Judge Impartiality Principle

Judicial impartiality should be described as the disinterested removal of the judge from other procedural subjects. That is: the judge will not be able to choose one side of the process. His interest should be solely in resolving the questions raised. The treatment given to the parties should be isonomic, ensuring the adversarial and the broad defense in parity situation. The judge must be impartial.

As Marinoni, Arenhart e Mitidiero (2016, p. 185) lectures, the essential assumption of impartiality is independence. Independence is a "statut" that makes "vertu" impartiality possible. From the constitutional view, judicial independence is linked to impartiality. The distancing of the judge, consistent in his impartiality or disinterest, would be a consequence and at the same time a condition for observance of the principle of isonomy. Procedural impartiality will allow the magistrate to analyze procedural theses and antitheses without a preference for this or that party. There would be no prejudice on either side and his concept will be grounded in what was built during the procedural debate.

d) P Principle of Publicity of Procedural Acts

The publicity of the procedural acts enables the supervision of the activities practiced by the judges, allowing a greater reach of trust by the society. It is provided for in art. 5, LX (BRASIL, [2019]), which provides that the law may only restrict the publicity of procedural acts when the defense of intimacy or the social interest so requires, and also in art. 93, IX, in describing that all judgments of organs of the judiciary will be public.

> The principle of publicity allows procedural acts to be vulnerable to knowledge by the parties concerned and those involved in the proceedings, as well as by anyone, and can handle the records, assist the hearings and judgments, both at first and second degree of jurisdiction (JORGE JUNIOR, 2008, p. 7).

The principle of publicity of procedural acts has the function of informing the litigants of the procedural acts and also informing the society about the performance of the judiciary, allowing interested parties, if they wish, to manifest in the process. Advertising is a guarantee of respect for fundamental rights, as it is intended to greatly limit the arbitrariness and violence that could mutually be committed. Advertising allows for visibility. In turn, visibility tends to limit abuse.

e) Adversarial principle and Broad Defense principle

Broad defense is the right to defend oneself through all means and remedies provided for in the legal system. Its foundation lies in its willingness to plead the legally relevant facts with all the possibilities of proving them by all means permitted by law. It is a subjective constitutional right, guaranteed to the accused as a figurative part of the passive pole. Commonly the broad defense is described by self-defense, consisting in the self defense of the accused, through the interrogation and the technical defense, promoted by the one who has legal qualification (lawyer, prosecutor, public defender, etc.).

In turn, the adversarial procedure is described by the expression *audiatur et altera pars* (hear the opposite party) and has a function aimed at clarifying the dispute. It is not only put to the parties, but also to the judge himself. It allows the judge to adjust his verdict as closely as possible to what would be reasonable.

According to Article 5 LV of the CR / 88 (BRASIL, [2019]), to the litigants, in judicial or administrative proceedings, and to the accused in general are assured the adversarial procedure and the broad defense, with the inherent means of appeal.

> Traditionally, the adversarial principle is considered to be formed by two elements: information and the possibility of reaction. Its importance is such that modern doctrine understands that it is a component element of the concept of process itself. (...) In this perspective, the parties must be duly informed of all procedural acts, opening up to them the possibility of reaction as a way to ensure their participation in the defense of their interests in court. As the adversarial procedure applies to both parties, the term "bilateral audience" is commonly used, representing the parity of arms between the opposing parties in court (NEVES, 2016, p. 115).

Barroso (2010) teaches that the broad defense is analyzed as a guarantee of the individual (accused), while the adversarial procedure would be a guarantee of the process itself.

Without prejudice to understanding the adversarial procedure as a guarantee assured to the parties to have knowledge of all acts that are performed in the process, to, from this science, produce reaction, it must be understood that its concept is inseparable from the co-participation of procedural subjects.

> The procedural activity developed by the parties, with the presentation of arguments, with requests for evidence, building theses, substantiates an authentic contribution to the formation of the conviction of the judge, also benefiting from the adversarial exploitation (BARROSO, 2010, p. 6).

In other words: the adversarial procedure is the dialectical exercise developed by the procedural subjects, consistent in the participatory construction of decisions. It must be understood, as mentioned above, that the adversarial not only belongs to the parties (plaintiff - defendant), but also to the judge. For the democratic process, the adversarial procedure that matters is not derived from the verb contradict but from the verb "build". To state that the process is the procedure submitted to the adversarial procedure is not to say that the process is the procedure subject to its contradiction. The process subject to contradiction is the process subject to its negation. The denial of the process, in turn, is the denial of democracy.

Process is process only if submitted to the adversarial procedure. Process is process only if submitted to the cooperation of the parties in the dialectical exercise consistent in the participatory construction of decisions. The adversarial procedure cannot be understood as the competition between the thesis and the antithesis. The thesis is completed by the antithesis and this is the assumption of the thesis. This is how the magistrate comes to synthesis (verdict).

f) Principle of good faith and principle of procedural loyalty

Often the court case is seen and understood as a contest of ideas or as a contest of theses, expecting the best argument to win. However, despite this competitive perspective, the process is in fact the exercise of mutual cooperation between the subjects who demand it. This mutual cooperation stems from the very previous conception in which the concept of adversarial

procedure was described.

Understanding the adversarial as the participatory construction of decisions, even though the theses of procedural subjects are divergent, they will not be competitive, but cooperative. It is from the dialectical exercise between thesis-antithesis that the synthesis (verdict) will emerge.

Opposition of ideas is not synonymous with competition of ideas. It is the opposition to an idea that will make it possible to reinforce or reject it. This is the role of the adversarial procedure. Role of cooperation and not of competition. The antithesis is the assumption of the thesis and not its negation. For this to be possible, procedural loyalty (truth) is critical. One procedural subject needs to trust the other, even though their theses are different. The confidence is in knowing that the other will also respect the rules of the game and that the evidence, counterproofs and antithesis will be produced in good faith.

g) Principle of reasoning for verdicts

The principle of grounds for verdicts is provided for in Article 93, IX of the Federal Constitution:

> Art. 93. [...]
> [...]
> IX - all judgments of the organs of the judiciary will be public, and all decisions are substantiated, under penalty of nullity, and the law may limit the presence, in certain acts, to the parties themselves and their lawyers, or only to them, in case in which the preservation of the right to privacy of the person interested in confidentiality does not prejudice the public interest to the information (BRASIL, [2019]).

All court decisions must be explicitly substantiated, enabling the party to know what was the reason for convincing the judge.

> Thus it can be seen that the motivation of the judicial acts required by the Constitution entails the limitation of the powers exercised by the magistrate, requiring proper application of the principle of legality, showing that he has not violated fundamental rights or decided against the law or have extrapolated the assurance of knowing the reasons that convinced the judge to judge, whose decision, if correct, will be applied by virtue of the application of the effects of the principle of *res judicata*. The motivation of judicial decisions mirrors, reflects the path of thought employed by the judge to reach the solution of the conflicting case and if it contains an error it will be promptly verified by the content of the motivation and may be challenged (JORGE JUNIOR, 2008, p. 6).

The reasoning of judicial decisions is a constitutional requirement, as it is an observation of the principle of due process of law, being a duty of the judge, a right of the parties and a guarantee of the public power. Failure to do so results in the verdict being invalid:

> As regards the requirement to state reasons for judicial decisions, these are both procedural principle, the duty of the judge, the individual right of the party and the guarantee of the Public Administration. It is a constitutional principle because the Constitution provides for it as a standard imposed on the courts, in general, whose non-compliance causes the nullity of the decision making (CF, art. 93, IX). It is a duty of the judge, because it derives from due process of law, also constitutionally ensured (CF, art., 5 º, LIV), and is an essential part of the formal response that the judge cannot fail to give apart, according to the legal framework of the judgment and decisions in general (NCPC, art. 489, II). It is a right of the party, because in the democratic process the litigant has the subjective right to participate in the formation of the judicial provision and to demand that his participation be taken into account in the act of composition of the dispute (NCPC, art. 6 º, 9 º, 10 and 11), and it is also a necessary device to control the regularity and legitimacy of the exercise of the duties of the natural judge, curbing abuses and illegalities. As a guarantee to the Public Administration, the motivation requirement goes beyond the extraprocessual guarantee, to the benefit of the parties, acting as a political guarantee of the existence and maintenance of the jurisdiction itself, as regards the control of its exercise (BUENO, 2017, p. 56).

Whereas in the previous civil procedural legislation the judge did not need to face all the theses argued, with the 2015 Code of Civil Procedure, there is an obligation for the judge to face all the points presented to him.

The reasoning of the decision must also enable the court to understand its reasoning and what are the relevant reasons that led the judge to decide that way.

> What is worth noting is that judges, as public agents, must keep in mind that they are liable to error and that their function must be controlled by society. Members of the judiciary must justify their decisions, clearly state how and why they decide in a certain way. The decision is not justified by itself. It lacks foundation, explanation about the path that was taken to reach that verdict, building the structures and paving the ground, through the reasons for deciding exposed in clear language and facing all the arguments raised by the parties. In deciding, on the assumption that everyone is under an obligation to guess their reasoning, the judge cannot understand the reasons why he claims that a claim is well founded or unfounded. Often - several involuntarily - judges imagine that they have been sufficiently clear in deciding a case or incident in the case. Perhaps clarity and precision exist only for the judge, not for the verdict. It is precisely at this point that the magistrate should be concerned: to put himself in the position of the parties, to situate himself as an ordinary citizen and to verify whether he would understand that verdict (BARROSO, 2010, p. 8).

The principle of the grounds of the decision is explicit in the perception that the decision is not justified by itself. The premise that "this is how it is" is not valid for court decisions. The “I don't know, I just know it was like this” cannot serve the jurisdiction. It is the right of the court to know the essence of the judgment and it is not sufficient to know only its substance.

To know the essence of a court decision is to know the reasons why the decision was made. For this to be possible, it is essential, above all, that the decision be based on the adversarial procedure. As stated earlier, the adversarial does not belong only to the parties (plaintiff-defendant). The adversarial procedure belongs to the procedural subjects, among them the judge.

Because of the principle of impartiality and also judicial inertia, the reasoning for decisions should be based on what was put and opposed by the parties during the procedural instruction.

That the court decision must be substantiated is clear. The questions to be asked now are different. What is the reason that matters? How will the reason be given?

This is the perspective of this work.

3 THE GROUNDS FOR DECISIONS WHILE MATERIALIZING THE ADVERSARIAL PRINCIPLE.

The adversarial principle has already been described earlier in this paper as the dialectical exercise of procedural subjects, consistent in the participatory construction of verdicts. This concept is brought up in many textbooks, articles and academic papers. The problem is that this metaphysically brought concept is not sufficient for a truly democratic state. To say that the adversarial principle is a fundamental right in the procedural relationship is important, but not enough.

Admitting that the parties examine the evidence submitted and produce their own evidence and counter-evidence is necessary, but still, the adversarial procedure is only formally presented.

For the Due Constitutional Process to actually exist, it will be necessary to materialize the adversarial procedure. And how does the materialization of the adversarial occur? It is important to make clear that a court decision that sees only one side of the story is not democratic. Not being democratic, there is nothing to talk about materializing the adversarial procedure.

To imagine that the party exercised the adversarial procedure simply because it had the opportunity to express itself on the contrary evidence, or simply because it was disposed to produce its own evidence is, to say the least, innocence. This situation reflects nothing more than the formal or metaphysical presentation of the adversarial principle. It is the right to have the right, but it is not the right to actually have the adversarial principle.

Is it good for the party to produce its evidence if it has even been appreciated by the judge? What is the point of presenting the antithesis if the basis of the judicial decision is nothing more than the transcription of the thesis? For the adversarial principle to really exist (and not just in the world of ideas), the judicial decision must be based on it. The materialization of the adversarial procedure is its concrete demonstration in the judicial decision. So how will this be possible?

3.1 Observance of constitutional principles for the legitimation of judicial verdicts

The verdict is legitimate when it meets all the necessary requirements for its concreteness. It is odd that the judge, when deciding, be mindful of constitutional principles, even so that the verdict is not affected by defects.

> [...] but even if these principles were respected, it would not make sense to make a judicial verdict without the magistrate having explained, demonstrating how he reached the necessary conclusion to point and determine the correct right to the specific case, that is, without reasoned, motivated the decision, because without respect to the principle of the reasoning of judicial decisions, there is a risk of discretion, subjectivism of the judge, which cannot be allowed. But knowing the motivation, the reasoning of the verdict made in court, all may know of it and conclude it and conclude that it was made in accordance with the law, the evidence, which convinced him, applying the just, correct and truthful verdict (JORGE JUNIOR, 2008, p. 2).

The legitimate verdict must be reasoned. The judge must demonstrate what the reasons that convinced him to that decision were.

> The legitimacy of the court verdict depends not only on whether the judge is convinced, but also on whether the judge justifies the rationality of his verdict based on the concrete, the evidence produced and the conviction he formed about factual and legal situations. That is, it is not enough for the judge to be convinced - he must demonstrate the *reasons for his conviction from the dialogue he had with the parties* throughout the process as, moreover, he points out in the new Code of Civil Procedure in his articles 7º, 9º, 10 and 489, paragraph 1º. This allows the parties or any citizen to control the activity of the judge, since the verdict must be the result of logical and argumentative reasoning that can be demonstrated by the relationship between the report and the grounds, the operative part, the allegations made and the evidence produced by the parties to the proceedings (MARINONI, ARENHART AND MITIDIERO, 2016, p. 115).

It must be understood that respect for constitutional principles is not a faculty of the magistrate, but a duty. A duty not only deontic in the sense of "must be," but an ontic duty, a material duty. It is the duty to respect the constitutional and procedural principles that make the process a guarantee of the citizen in the face of eventual abuse by the State.

The first step for the judicial verdict to consist in the materialization of the adversarial principle is to see that it is up to the magistrate to respect the principles and rules described in the Constitution. Compliance with constitutional principles presupposes a judicial decision that seeks to be democratic.

3.2 The necessary confrontation of all theses presented

It is necessary for the magistrate, in the statement of reasons, to demonstrate that all the issues raised were addressed.

> The motivation of the decision in the Constitutional State, to be considered completely and constitutionally adequate, requires a minimum articulation, in summary: (i) the statement of the choices made by the judicial body to, (i.i) individualization of the applicable norms; (i.ii) settlement of the allegations of fact; (i.iii) legal qualification of factual support; (i.iv) legal consequences arising from the legal classification of the fact; (ii) the context of the implication and coherence links between such statements; and (iii) the justification of the statements based on criteria that show that the judge's choice was rationally correct. In "i" must necessarily state the pleas put forward by the parties, so that the court's serious consideration may be given to the reasons given by the parties in their procedural statements (MARINONI, ARENHART AND MITIDIERO, 2016, p. 514).

The need for complete motivation stems from the right to the adversarial of procedural subjects, understood as being a right given to the parties to influence the judge, placing it as the subject of the adversarial. The statement of reasons must therefore be properly stated in the verdict.

> [...] about the motivation of judicial verdicts, it is concluded that to have a fair decision, the judge must respect the constitutional guarantees listed in the Federal Constitution, out of respect for the adversarial principle, since the unsuccessful party must appeal, the judge it should mention the reasons that led to his conviction, as well as facilitate the trial in the higher court and give the general public to understand the reasons for the verdict (KRIEGER, 2012).

Humberto Theodoro Junior (2015), about the parties' participation in the judicial verdict, teaches that democracy and the adversarial procedure are closely linked. In the field of jurisdiction and process, it has immediate repercussions, requiring a new methodological phase, focused on the model of the democratic adversarial, strengthening the role of the parties and the judge, in the field of facts and in the legal valuation of law. He adds that deductive logic is replaced by argumentative logic and the adversarial one is the space to exercise a right to influence the magistrate in his decision:

> [...] the deductive logic of conflict resolution is replaced by the argumentative logic, making the adversarial, as a right of information / reaction, give way to a right of influence. In it, the idea of representative democracy is complemented by that of deliberative democracy in the field of proceedings, thus reinforcing the role of the parties in shaping the judicial verdict (THEODORO JUNIOR, 2016, p. 108).

And by reasoning the decisions that it will be possible to verify the observance of the applied constitutional principles, demonstrating that the right to the adversarial was realized.

> It is important to always bear in mind that the adversarial provided by the Constitution includes the possibility of influence of all the subjects of the proceedings (including the parties) in the formation of the pacifying provision of the dispute. Without proper motivation, it will not be possible to assess whether the judgment has really appreciated the reasons and defenses produced by the parties, nor will the necessary control of the judge's behavior by the interested parties be allowed through mechanisms of dual jurisdiction (THEODORO JUNIOR, 2016, p. 117).

As stated earlier, by opting for a thesis, without considering the antithesis, the magistrate will be hurting the concreteness of the adversarial procedure. Failure to confront all theses conditions the adversarial only to its metaphysical conception. However, for a Democratic State of Law, what is expected is a counter-metaphysical application of the adversarial.

To say that in a given procedural relationship the application of the adversarial was simply because a party was able to present its evidence and analyze the contrary evidence, is to reduce the constitutional principle to the merely formal conception. It is repeated: it would be the right to the right, but not the right in fact. The formal conception of the adversarial is important, so that it is possible to know what it is and how it works. However, this ideational conception is not enough.

To actually and materially speak adversarial, it is necessary for the judge, in deciding, to address all the questions put to him. It should be noted that this confrontation cannot be merely descriptive, as this would not be adversarial either. This confrontation has to be analytical, and the magistrate must state the reasons and the grounds justifying the rejection of one thesis in favor of another.

The logic is very simple: the non-analytical confrontation of all theses would imply material disrespect to the adversarial principle; disrespect for the adversarial violates due process of law; the verdict that violates due process of law is unconstitutional and, in turn, would be invalid.

As stated in the introduction, legitimacy lies in the possibility that the recipient of the law is at the same time its creator. Thus, the legitimacy of a judicial verdict lies in the possibility that its recipient may have participated in its construction process from the adversarial point of view. The verdict that violates the material principle of the adversarial is not democratic. It would be autocratic, abusive and arbitrary.

3.3 Annulment of the verdict for failure to state reason

The reasoning of the verdict is an essential act and its absence is a serious defect, so that the unsubstantiated judgment is void. In this sense, it can be said that the complete reasoning cannot be dismissed, since it is in it that the judge would face all the relevant questions of fact and law.

Reinforcing the Constitutional provision, the CPC, in its article 11, also enshrines the great importance of the grounds of the decisions by stating that all judgments of the organs of the Judiciary will be public, and all verdicts based, under penalty of nullity. (BRASIL, [2015]).

It is emphasized that the grounds are indispensable for the supervision of judicial activities. Gonçalves e Lenza (2016) teaches that without the grounds, the parties, the higher bodies and society would not know why the judge made that verdict. It is noteworthy that the legislator now required that from the reasoning it was possible to extract that all issues were faced.

> The reasoning of the verdict, given its essentiality, was made mandatory by the Constitution (articles 93, IX, of the CF, and 11 of the CPC). This shows an absolute difference between the norm created by the legislator and the verdict. The general rule is not justified. The so-called "explanatory statement" that sometimes accompanies it is not part of the law (MARINONI, ARENHART AND MITIDIERO, 2016, p. 116).

Article 489 of the CPC lists the essential elements of the verdict. Failure to observe these essential elements will result in their nullity.

See:

> Art. 489. The essential elements of the verdict are:
> I - the report, which will contain the names of the parties, the identification of the case, the sum of the request and the defense, and the record of the main occurrences occurred during the process;
> II - the grounds, in which the judge will analyze the questions of fact and law;
> III - the device in which the judge will analyze the main questions submitted by the parties (BRASIL, [2015]).

Note that the essential requirements of the verdict relate to its structure and it is a summary of everything that has happened in the course of the proceedings, It must therefore contain a statement of the facts and reasons raised by the parties and relevant events arising during the succession of acts, so that anyone can understand how the decision was made. Essential elements are mandatory and, therefore, the lack of any of them will result in the nullity of the decided. In this sense, the country courts have walked:

> Declaration embargoes in criminal appeal. omitted judgment. verdict canceled for failure of grounds. non-manifestation about maintaining social and educational meeting measures. (tj-go - apl: 634048120168090052, rapporteur: dr. sival guerra pires, judgment date: 11/07/2017, 2th criminal chamber, publishing date: dj 2430 of 01/19/2018).
> Contract termination and request of possession. kiosk exploration on the seafront. verdict canceled for failure of grounds. (tj-rj - apl:

> 00272342420118190209 rio de janeiro barra da tijuca regional 4 civil court, rapporteur: ricardo rodrigues cardozo, judgment date: 07/26/2016, fifteenth civil chamber, publication date: 07/282016).
> Social security. retirement for disability or disease aid. verdict canceled for failure of grounds (article 489, paragraph 1 º, iv, of the cpc). application of article 1.013, paragraph 3 º, iv. total and temporary disability. due benefit. partial application procedure. (trf-3 - ac: 00134818820174039999 sp, rapporteur: david dantas federal desembargador, judgment date: 06/26/2017, eighth group, date of publication: e-djf3 judicial 1 date: 07/10/2017). (BRASIL, [2018]; [2016]; [2017]).

It should be noted that in all cases the lack of reasoning resulted in the nullity of the judgment. From the jurisprudence presented, it is possible to realize that there is a search for the concretization of the democratic process. The "deciding by deciding" is no longer enough. The incessant search for democratization of the judicial process is necessary and this will only be possible when effectively the adversarial is observed as an essential element of the judicial verdict. It should be noted that the wording of article 489 of the CPC did not remove from the judge the personality characteristic of his decision. When facing the process, after analyzing the evidence set, he will make a verdict in person.

> By this I mean that, unlike what is meant by a portion of the doctrine, article 489 of the CPC does not remove from the judicial decision its characteristic of act of solitary creation by the magistrate. The judge may even be more controlled and his performance overseen by law but at the end of the day it is always the judge, in the isolation of his office or home, who makes the verdict. And that's where he makes interpretations of the law that are obviously influenced by his personal opinions. After all, is adopting one of several plausible doctrinal understandings is not a human act that expresses personal opinion? An opinion based on solid arguments, but still a personal opinion (NEVES, 2016, p. 124).

On the other hand, it turns out that, based on the cooperative process (and not the competitive process), the judge became the subject of the process, acting equally in the construction of a judicial provision. The materialization of the adversarial at the time of the decision conditions the magistrate to judge based on the isonomic debate that took place during the procedural instruction. The magistrate cannot neglect to judge only on the basis of his conscience, that is, to judge on the basis of an idea of intersubjective responsibility.

With this, it is clear that it will not be for the magistrate alone to find the way to the judicial provision. Solomon's judgment, heteronomous and purely enforceable, does not matter to democracy. The democratic process requires autonomy. It requires participatory construction of verdicts.

4 CONCLUSION

It must be understood that not all victory is honorable and not all success is decent. Even understanding the process as competition of theses or as the victory of the best argument, one would have to respect the concreteness of the adversarial principle. Even in competition, competitors must be positioned in a parity situation. Otherwise, it would not be competition. It would be a show of strength.

There is no merit in defeating who could not win. This is also the procedural logic. If the situations of parity and equality are not guaranteed to the parties and if, at the moment of judging, not all the theses are faced, there is nothing to talk about adversarial. The process would be merely the formal instrument of imposing one will on another. The process would be nothing more than an instrument of power. If one of the parties has never been able to win, then there was no win for the winner. There was only discretion.

Is there adversarial principle in this kind of process? If it exists, it would be façade. It would be a pretended and hypocritical concept. Fortunately, the process is being viewed, albeit shyly, as cooperation rather than competition. This cooperative judicial process presupposes the adversarial in its material aspect and as described during the text, this cooperation would not inhibit the opposition of theses or ideas. The antithesis would not be the negation of the thesis, but an assumption of it. Together, the thesis and antithesis would enable the formulation of the synthesis (court decision).

It would be the utmost to see to it that the state (judge) takes care of it. It would be to decentralize the power that was once concentrated in the hands of the judge and to share it among all procedural subjects. What is clear from the perspective presented is that the abstract prediction of the adversarial does not guarantee the right to the adversarial. The abstract prediction of the norm is nothing but a goal, a way. To stay in abstraction would be to legitimize an empty right.

The adversarial principle must be put into practice from a content that is inserted in the social context. In other words, the adversarial must come out of the Platonic world of ideas and be placed in the concrete and real world of the judicial process. By leaving the vicious circle of formalism and giving concrete application to the adversarial, the subject will be inserted in the due constitutional process.

Formal understanding of the adversarial is of utmost importance and relevance. It is important to define its concept and its scope. But to remain in formalism is to deny the very existence of the created institute. This is why the grounds for adversarial decisions break the bars of formalism and give practical coherence to the principle that is so fundamental to democracy.

By facing all theses, evidence, counterproofs and antitheses and by respecting all constitutional principles, the judge will be giving practicality to the adversarial. He will be turning the abstract into concrete and thus promoting the due process of law and constitution. The materialization of the adversarial is not in the mere opposition of ideas. The adversarial will exist

only when the verdict is constitutionally grounded.

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