THE OPTION OF THE BRAZILIAN LEGISLATOR FOR THE FALSE MODEL OF DEMOCRATIC PROCESS AND THE VALIDITY OF *IN DUBIO PRO HELL*

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Abstract: This text will deal with the prediction of the Brazilian Criminal Procedure Code, which provides for the accusatory structure. The hypothesis is that the Brazilian criminal process may not be purely accusatory, since this structure does not seem to coincide with some legal provisions. As will be demonstrated, the Brazilian criminal process is approaching a false accusation.

Keywords: Criminal Procedure; Accusatory System; Democracy.

1 INTRODUCTION

In dubio pro hell?

The Latin frase *in dubio pro reo* is widely known among law operators, especially those in the field of criminal law. The term designates that, in case of doubt, the most favorable decision to the accused should be applied. The frase *in dubio pro hell*, used by Rosa and Khaled Jr. (2017) in the book that with the same title[2], is a semantic game transcribed in the replacement of the Latin word *reo* (accused) by the English word *hell*.

With the suggestion given by the *new* principle of *in dubio pro hell*, there is the possibility that doubt would not always favor the accused. Based on this premise, the present work aims to question whether the Brazilian legislator made an option for the accusatory criminal process by including article 3-A to the Code of Criminal Procedure expressly indicatng this direction.

Despite art. 3-A, introduced by Law 13,964 of December 24th, 2019, is the Brazilian criminal procedural law in fact accusatory? The hypothesis discussed in the text will point out that the Brazilian procedural system is pseudo-accusatory, not fulfilling the requirements of a pure accusatory system.

Without following a rigid structure, the common procedural models will initially be described, after which the legal provisions that would move the Brazilian model away from the pure accusatory model will be demonstrated.

2 PROCEDURAL SYSTEMS

The criminal procedural system is used in a specific legal system for the State to exercise the

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[2] ROSA, Alexandre de Morais; KHALED JR. Salah. In dubio pro hell. Profanando o sistema penal. Editora EMais, 3ª edição. Florianópolis, 2017.

potestas puniendi[3] (power to punish). In summary, the procedural system outlines the rules of investigation, procedure, and enforcement of the law, so that the offender can be liable to criminal intervention. According to the text *Immorality as a fundamental right and the etiquette of criminal law*[4], criminal law is the legitimation of violence practiced by the State against the individual. The State effectively practices violence against the offender by subjecting him/her to limited freedom of movement and social segregation.

However, State violence is unpunishable. It belongs to the exercise of *potestas puniendi*. When applying the penalty, the State has the power to exert violence on the offender, which is why there a limit this power is required. In the Republican State, as is the case in Brazil, the limitation on the power to punish is described in the law. Procedural law and the procedural system establish the rules that allow the State to apply the penalty to the offender. Traditionally, criminal procedural literature, as will be described below, indicates three procedural models, inquisitive, accusatory, and mixed.

2.1 Inquisitive System

The term inquisitive, with etymological origin in the Latin expression *inquisitīvus*, describes a procedural model with the assumption of inquiry by the inquisition. According to Pacelli (2012), the term demonstrates a procedural model, in which the judge also acts in the investigation phase. The process begins with *notitia criminis*, following the investigation, prosecution, and trial.

In the same sense:

> Adopted by canon law from the 13th century onwards, the inquisitorial system later spread throughout Europe, being used even by civil courts until the 18th century. Its main characteristic is that the functions of accusing, defending, and judging are concentrated in a single person who assumes the robes of an accusing judge, denominated an *inquisitive judge* (BRASILEIRO DE LIMA, 2013, p. 03, our translation).

Also according to Brasileiro de Lima (2013), a judge with this concentration of powers would be psychologically tied to the result, lacking objectivity and impartiality. Távora and Alencar go further by stating that:

> The inquisitive principle is characterized by the absence of an adversarial proceeding and right to a fair hearing, with a concentration of the functions of accusing, defending, and judging in a single figure (judge). The procedure is written and confidential, with the beginning of the prosecution, production of evidence, and delivery of the decision done by the magistrate (TÁVORA E ALENCAR, 2013, p. 40, our translation).

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[3] The term *potestas puniendi* (power to punish) was chosen instead of the term *jus puniendi* (right to punish) because the author understands that the penalty is the imposition of suffering as retribution to a crime committed. Nobody, even the State, has the right to impose suffering to na individual.

[4] Original title: *A imoralidade como direito fundamental e a etiqueta do direito penal*. Text published in the journal Revista de Direito Penal, Processo Penal e Constituição em 2018. Available at: https://www.indexlaw.org/index.php/direitopenal/article/view/3946/pdf

Aury Lopes Jr. (2007) acknowledges that this procedural model affects a psychological error when believing that the same person can perform functions as paradoxical as investigating, accusing, defending, and judging.

Távora and Alencar also point out that in the inquisitive model:

> The basic discourse is the effectiveness of the jurisdictional provision, the speed and need for security, which is why the defendant, a mere extra, submits to the process in a condition of absolute subjection, representing more an object of persecution than subject of rights (TÁVORA E ALENCAR, 2013, p. 40, our translation).

The accused, a mere adjunct to criminal prosecution, would have a secondary role in a procedure that seeks only to extract his/her confession or guilt. There would be no need to preserve guarantees such as the adversarial procedure and right to a fair hearing.

Távora and Alencar (2013) argue that a procedure in an inquisitive line would be of fascist inspiration, proper to an authoritarian state. This self-justification of the judge's power is not supported by a democracy. As described in the text *The reasoning of decisions and the effective exercise of the adversarial procedure*[5], democracy, understood as popular sovereignty, requires that the judicial response be given from the participatory construction of the decisions, that is, from the principle of the adversarial procedure.

It should be noted that in the Brazilian legal system, the Judiciary Police (as a rule)[6] has the role of investigating, while the Public Prosecutor's functions are prosecution and criminal accusation. The judge would only be responsible for judging. Is it thus?

2.2 Accusatory System

Unlike the inquisitive system, the accusatory system does not allow the judge to exercise the functions of investigation and accusation. In this sense, the Criminal Procedure Code (CPP) provides in article 3-A that the criminal process shall have an accusatory structure, the initiative of the judge in the investigation phase and the substitution of the probationary action of the accusatory body being prohibited.

Regardless of the fact that the aforementioned legal provision only came into force in 2020, following the promulgation of Law 13,964 of December 24th, 2019, the legal literature already recognized the Brazilian procedural system as being accusatory.

On the issue:

> As verified, although the Brazilian Code of Criminal Procedure is predominantly inspired by inquisitive principles - although there are provisions inserted by the successive reforms that honor the accusatory system - its reading must be done in the

[5] Original title: *A fundamentação das decisões e o exercício efetivo do contraditório*. Text in coauthorship, published in the Revista Eletrônica do Programa de Pós-graduação da Câmara dos Deputados E-Legis, in 2019. Available at: http://e-legis.camara.leg.br/cefor/index.php/e-legis/article/view/527/691

[6] When there is public interest, the law admits the investigation by the Federal Prosecution Office with the establishment of civil and administrative inquiries.

> light of the Constitution, so its model of process must conform to the constitutional accusatory (TÁVORA E ALENCAR, 2013, p. 42, our translation).

In the same sense:

> The accusatory system presupposes the following constitutional guarantees: jurisdictional protection (art. 5, XXXV), due legal process (art. 5, LIV), guaranteed access to justice (art. 5, LXXIV), guaranteed of a natural judge (art. 5, XXXVII and LIII), the equal treatment of the parties (art. 5, caput and I), the right to a fair hearing (art. 5, LV, LVI and LXII), the publicity of procedural acts and the motivation of deciding acts (art. 93, IX), and the presumption of innocence (art. 5, LVII) (Criminology, cit. P.31-8). It is the system in force among us. (CAPEZ, 2013, p. 85, our translation).

The quotes above demonstrate that even before the entry into force of Article 3-A of the CPP, the accusatory system was already recognized as being in force in Brazil. The accusatory system provides for the separation between the functions of investigating, accusing, and judging, prohibiting the concentration of these attributions in a single person or organ (PACELLI, 2012, p. 10). This is also the jurisprudential understanding of the Superior Court of Justice (STJ):

> SPECIAL APPEAL No. 1,658,752 - MG (2017/0051804-2)
> RAPPORTEUR: MINISTER NEFI CORDEIRO
> APPELLANT: T H A M DE F (MINOR)
> ATTOURNEY: PUBLIC DEFENSE OF THE STATE OF MINAS GERAIS. APPELLEE: PUBLIC MINISTRY OF THE STATE OF MINAS GERAIS
> SYLLABUS
> CRIMINAL AND CRIMINAL PROCEDURE. SPECIAL APPEAL. CHILD AND ADOLESCENT STATUTE. INFRATIONAL ACTION ANALOGUE TO THE CRIME OF DRUG TRAFFICKING. DEFINITIVE TOXICOLOGICAL REPORT INSERTED IN THE DOCKET AFTER SENTENCING. EXCLUSIVE DEFENSE APPEAL. COURT TO WHICH THE NULL OF OFFICE HAS BEEN GIVEN. OFFENSE TO THE ACCUSATORY SYSTEM. IMPLIED RECOGNITION OF THE ABSENCE OF MATERIALITY OF THE INFRATIONAL ACT. APPEAL PROVIDED.
> 1. The accusatory system is the foundation of the Brazilian criminal procedure, in which, in opposition to the inquisitorial modality, a clear division of powers is imposed between the procedural subjects responsible for prosecution, defense, and judgment in a criminal prosecution. (HC 347.748/AP, Rel. Minister JOEL ILAN PACIORNIK, QUINTA TURMA, tried on 09/27/2016, DJe 10/10/2016).
> 2. The position of the Collegiate of origin in raising and acknowledging a preliminary nullity, avoiding the matter brought in defensive appeal to judge it harmed and determine whether a new sentence is handed down, has injured the accusatory system.
> 3. The Third Section of this Superior Court confirmed that, despite the need for a definitive toxicological report to assess the materiality of the infraction, its proof is admitted by other means of proof that have the same degree of certainty as the final report. Precedents.
> 4. Special appeal provided to overturn the judgment under appeal and determine the return of the records to the Court of origin so that it can proceed with the judgment of the appeal, assessing the materiality of the infraction, considering the existing evidence at the time of the sentence. (BRASIL, STJ, 2018).

Likewise, in the judgment of habeas corpus number 404.228, Minister Jorge Mussi of the Superior Court of Justice (BRAZIL, 2018, our translation) added that the accusatory system prevails in Brazil, which "excels in the distribution of the functions of accusing, defending, and judging to different

bodies". If the figure of the judge-accuser would be provided for in the inquisitive system, the accusatory system only authorizes the judge to exercise his function as a judicial body. The judge's role would be to analyze the charge to acquit or convict the accused.

For Capez (2013), the respect for the adversarial procedure and the right to a fair hearing are essential in the accusatory procedure. The judge would have only the decision-making function, not participating in the collection of evidence. Therefore, he/she would maintain his/her impartiality. Corroborating with the above:

> By the accusatory system, explicitly accepted by the Federal Constitution of 1988 (CF, Art. 129, item I), which made filing of public criminal prosecutions the sole jurisdiction of the Federal Prosecution Office, the procedural relationship only begins with the provocation of an incarcerated person to deduce the punitive claim (*ne procedat judex ex officio*) and, although it does not remove from the judge the power to manage the procedure through the exercise of the power of procedural impetus, it prevents the magistrate from taking initiatives that do not align with the equidistance that he/she must take regarding the interest of the parties. Therefore, the magistrate must refrain from promoting acts of office during the investigative phase, an assignment that should be the responsibility of the police authorities and the Federal Prosecution Office (BRASILEIRO DE LIMA, 2013, p. 05, our translation).

As defended in the text *The reasoning of decisions and the effective exercise of the adversarial procedure*[7], a decision based on the constitutional principle of the adversarial procedure will have its legitimacy materialized in the concrete participation of the other procedural subjects.

2.3 Mixed System

The mixed procedural system, as the name suggests, would be an adaptation of the inquisitive system to the accusatory system. The procedure would present both an inquisitive phase, without an adversarial procedure and the right to a fair hearing, and an accusatory phase, in which the functions of investigating, accusing, and judging would be delimited and separated. On the issue:

> The mixed system has its roots in the French Revolution, a group of political and social movements of which ideals spread throughout continental Europe, and has, as a legal framework, the French *Code d'Instruction Criminelle* of 1808. It is characterized by a preliminary, secret, and written instruction, in the responsibility of the Judge, with inquisitive powers, to collect evidence, and by an adversarial procedure (judicial) stage in which the trial takes place, admitting the exercise of the right to a fair hearing and all the rights arising from it [...] thus we have: Preliminary Investigation, in the responsibility of the judicial police; preparatory instruction, sponsored by the instructing judge and judgment [...] on the examination of the adversarial procedure and the right to a fair hearing (TÁVORA E ALENCAR, 2013, p. 42, our translation).

The first phase (in which the judge would act as an investigator-accusor) would have a preliminary instruction, when without regard for the adversarial procedure and the right to a fair hearing,

[7] Original title: *A fundamentação das decisões e o exercício efetivo do contraditório*. Text in coauthorship, published in the Revista Eletrônica do Programa de Pós-graduação da Câmara dos Deputados E-Legis, in 2019. Available at: http://e-legis.camara.leg.br/cefor/index.php/e-legis/article/view/527/691

the evidence would be produced. In the second phase, after giving the accused the right to defend himself, the judge would render his condemnatory or acquittal decision. An inattentive reading of the order may suggest that the system adopted in Brazil is mixed, due to the existence in the criminal pursuit of an inquisitive phase (police investigation) and an accusatory phase (criminal action). On the subject, Pacelli (2012, p. 13, our translation) prelects that "some claim that the existence of the police investigation in the pre-procedural phase would already be in itself indicative of a mixed system; others, with more property, indicate certain powers attributed to Judges in the Code of Criminal Procedure".

The doubt regarding the adopted system is solved with the argument of the definition of procedural system, characterized "as the examination of the procedure, that is, of the Judge's performance in the course of the procedure" (PACELLI, 2012, p. 13, our translation).

The consideration of the police inquiry as an integral part of the process is mistaken. Such a statement would be erroneous because the police investigation is not part of the procedural stage. There is no effective action by the Judge or the Prosecution Office. According to the requirement of article 155 of the Code of Criminal Procedure, even the judge cannot convict an accused based solely on the information contained in the investigation[8].

About the subject:

> With origins dating back to Greek Law, the Accusatory System is the system adopted in Brazil, according to the model set out in the Federal Constitution of 1988. In effect, by establishing the filing of criminal action as a private function of the Prosecution Office (art. 129 , I, CF/88), the Constitution made clear the preference for this model, which has the fundamental characteristics of separation between the functions of accusing, defending, and judging, conferred to different characters (TÁVORA E ALENCAR, 2013, p. 41, our translation).

In the same sense:

> However, with the advent of the Federal Constitution, which expressly provides for the separation of the functions of accusing, defending, and judging, with the adversarial procedure and the right to a fair hearing ensured, in addition to the principle of presumption and non-culpability, we face an accusatory system. (BRASILEIRO DE LIMA, 2013, p. 5, our translation).

For the reasons listed, even having a preliminary inquisitive phase, it is possible to affirm that the procedural system adopted in Brazil is neither mixed nor inquisitive. On the other hand, is it possible to say that the Brazilian procedural system is purely accusatory?

3 THE PSEUDO-ACCUSATORY PROCEDURAL MODEL AND THE VALIDITY OF *IN DUBIO PRO HELL*

Initially, it is necessary to emphasize that the accusatory system is the most adequate for a

[8] CPP. Art. 155. The judge shall form his/her conviction for the free appreciation of the evidence produced in a judicial adversarial procedure, and cannot base his/her decision exclusively on the information gathered during the investigation, except for the precautionary, non-repeatable, and anticipated evidence.

Democratic State of Law. This is because article 5, item LV of the Federal Constitution provides that "litigants, in judicial or administrative proceedings, and defendants in general are guaranteed an adversarial procedure and the right to a fair hearing, with the inherent means of an appeal".

> In other words: the adversarial procedure is the dialectical exercise developed by the procedural subjects, consistent in the participative construction of decisions. It is necessary to understand, as mentioned above, that the adversarial procedure belongs not only to the parties (plaintiff - accused), but also to the judge. For the democratic process, the adversarial procedure (contradictory) that interests does not derive from the verb to contradict, but from the verb "to construct". To affirm that the process is the procedure submitted to the adversary is not the same as to say that the process is the procedure submitted to its contradiction. The procedure submitted to contradiction is the procedure submitted to its denial. The denial of the procedure, in turn, is the denial of democracy (VILAS BOAS NETO, 2019, p. 199, our translation).

In addition to the adversarial principle, the accusatory system provides for a series of important constitutional principles that must be observed due to the scope and breadth in protecting individual rights and guarantees. As a reference, it is possible to mention the principle of guarantee of judicial protection described in article 5, XXXV, of CF/88, which provides that the "law shall not exclude injury or threat to rights from the Judiciary's assessment".

Likewise, it is possible to quote the principle of due legal process, subscribed in article 5, item LIV, which guarantees that “no one shall be deprived of liberty or property without due process”. The Constitutional Text requires everyone to be equal before the law, as provided for in the head provision of article 5:

> All are equal before the law, without distinction of any kind, guaranteeing to Brazilians and foreigners’ resident in the country the inviolability of the right to life, freedom, equality, security, and property, in the following terms. I: men and women are equal in rights and obligations, under the terms of this Constitution. (BRASIL, 2020, our translation).

Thus, the provision mentioned in Article 3-A of the Code of Criminal Procedure, which affirms the accusatory structure of the Brazilian system, seems to confirm the democratic nature of criminal proceedings. However, as already pointed out, for a process to be properly democratic, respecting the accusatory system, it is necessary to separate the functions of investigation, accusation, and judgment.

Despite the express provision of the accusatory system, it is certain that there are other legal provisions in the CPP that make this structure more flexible, raising doubts rergarding the model adopted in Brazil. The first legal provision that seems to contradict the accusatory structure is described in Article 28-A, paragraph 5, of the Code of Criminal Procedure. The head provision of the article introduced into Brazilian law the provision of the non-criminal prosecution agreement, allowing the Prosecution Office (prosecuting body) to propose an agreement for the accused, provided the criminal offense is without violence or serious threat and that the minimum penalty does not exceed four years.

It occurs that the fifth paragraph of the referred article authorizes the judge (who is not an accusing body) to refuse the homologation of the non-criminal prosecution agreement when he/she

understands that it was not properly conducted[9]. There is an interference by the judge in the work of the Prosecution Office, who, as an accusing body, would have the freedom to fight for the filing or offer the complaint against the accused. Likewise, it would have the liberality to offer the non-criminal prosecution agreement subject to legal conditions.

However, as the agreement is observed, it requires the approval of a magistrate. Another rule that does not seem to correspond to the accusatory system is that described in the sole paragraph of article 212 of the CPP.

> Art. 212. The questions shall be asked by the parties directly to the witness and the judge shall not admit those that can induce the answer and have no relation to the cause or matter in the repetition of another already answered.
> Sole paragraph. On the points not clarified, the judge may complement the inquiry. (BRASIL, CPP, consultation on 03/05/2020, our translation).

Note that the law allows the judge to formulate questions for witnesses when he understands that there are unclear points. However, witnesses are listed by the prosecutor when the complaint is offered and by the accused when he offers his response to the prosecution. It would be up to the parties (prosecutor and accused) to ask their witnesses about the points they deem convenient. If there is any doubt after the witnesses' inquiry, it could not be clarified by questions asked by the judge.

The principle of *in dubio pro reo*, guarantee of the accused, states that doubt should always be in his/her benefit. If after the prosecutor's and defense's inquiries, doubts persist that the judge intends to resolve with his/her own questions, he/she will do so to the disadvantage of the accused. If the doubt favors the accused, it is possible to assume that its resolution may result in his loss.

It can be argued that the resolution of the doubt is favorable to the accused. The issue is that he/she does not require it, because doubt already favors him/her. The accused does not require certainty for his/her defense, as doubt will already benefit him/her.

It is possible to conclude that, when formulating his/her own questions to resolve the unclear points, the judge will act as a prosecuting body. Another situation that causes greater strangeness. If the judge is unable to resolve his/her doubts with the questions posed to the witnesses listed by the prosecutor and the defense, he/she may list his/her own witnesses. This is provided by article 209 of the CPP, which means that the judge, when deeming necessary, may hear other witnesses, in addition to those indicated by the parties. For what reasons would the judge produce evidence if not to convict?

Article 386 of the Code of Criminal Procedure authorizes the judge to acquit when there is insufficient evidence.

[9] CPP. Art. 28-A. Not being a case of filing and having investigated the person formally and circumstantially confessing to the practice of criminal offense without violence or serious threat, and with a minimum sentence of less than 4 (four) years, the Prosecution Office may propose a non-criminal prosecution agreement, as long as necessary and sufficient for reprobation and crime prevention, under the following cumulatively and alternatively adjusted conditions: (...) Paragraph 5. If the judge considers the conditions set out in the non-criminal prosecution agreement to be inadequate, insufficient, or abusive, he/she shall return the case file to the Prosecution Office to reformulate the proposed settlement, with the agreement of the investigated and his/her defender.

> Art. 386. The judge shall acquit the defendant, mentioning the cause in the dispositive part, provided that he recognizes that:
> (...)
> II - there is no proof of the existence of the fact;
> (...)
> V - there is no evidence that the defendant participated in the criminal offense;
> (...)
> VII - there is insufficient evidence for the conviction. (BRASIL, CPP, consultation on 03/05/2020, our translation).

If, in the absence of evidence, the judge must acquit according to items II, V, and VII of article 386 of the CPP, insisting on their production seems to indicate a desire to condemn. As in the previous case, the doubt or lack of evidence benefits the accused. Therefore, this proof is not produced in his/her favor, but in his/her detriment.

If due to lack of evidence the magistrate must acquit, would he/she not be replacing the prosecutor in the accusatory function when producing his/her own evidence? It seems, from the examples above, that there is a departure from the principle of *in dubio pro reo* and an approach to the new (paradoxically old) principle of *in dubio pro hell*.

The rule contained in article 234 of the Code of Criminal Procedure, appearing to have the same logic as the rule in article 209, also admits that the judge can produce his/her own evidence, by establishing that, if the judge has news of the existence of a document on a relevant point, he/she will provide its insertion into the docket, regardless of the request of either party.

There is yet another situation in the Brazilian criminal procedural legislation which seems to contradict the pure accusatory system. As previously stated, it is up to the prosecutor to offer public criminal action since he/she is the investee of the ownership of the criminal action. In other words, if the prosecutor does not offer a complaint, we would not have a criminal prosecution. However, despite responsibility of the Prosecution Office to file the public action, the judge may issue a condemnatory decree even if there is no condemnation request by the prosecution.

This is the provision of article 385 of the CPP, which describes that "in crimes of public action, the judge may issue a condemnatory sentence, even though the Prosecution Office has opted for the acquittal, as well as recognizing aggravating factors, although none have been alleged". Is the judge allowed to convict even if the prosecuting body has requested absolution?

The law authorizes and the jurisprudence of the Superior Court of Justice abides by the legal provision.

> AgRg at SPECIAL APPEAL Nº 1,612,551 - RJ (2016/0179974-
> RAPPORTEUR: MINISTER REYNALDO SOARES DA FONSECA
> APPELLANT: FEDERAL PUBLIC MINISTRY
> APPELLEE: LUCIMAURO CRUZ DA SILVA
> ATTOURNEY: EDGAR FLECHAS SANTACRUZ - RJ107375
> INTERES .: PROSECUTION OFFICE OF THE STATE OF RIO DE JANEIRO
> SYLLABUS
> INTERNAL INTERLOCUTORY APPEAL ON SPECIAL APPEAL. JURY. DOUBLE QUALIFIED HOMICIDE ATTEMPT. MANIFESTATION OF THE PROSECUTION OFFICE FOR ACQUITTAL. ARTICLE 385 OF THE CODE OF

> CRIMINAL PROCEDURE, RECEIVED BY THE FEDERAL CONSTITUTION. ABSENCE OF JUDGE BINDING. PRECEDENTS. APPEAL DENIED.
> 1. Under the terms of art. 385 of the Code of Criminal Procedure, in crimes of public action, the judge may issue a condemnatory sentence, even though the Prosecution Office has opted for the acquittal.
> 2. Article 385 of the Code of Criminal Procedure was approved by the Federal Constitution. Precedents of this Court.
> 3. Internal interlocutory appeal denied.
> JUDGMENT. The Ministers of the Fifth Panel of the Superior Court of Justice having seen, reported, and discussed the proceedings of the above-mentioned parties, and unanimously agreed to dismiss the appeal. Ministers Ribeiro Dantas, Joel Ilan Paciornik, Felix Fischer, and Jorge Mussi voted with Mr. Minister Rapporteur.
> Brasília (DF), February 2nd, 2017 (Judgment Date)
> Minister REYNALDO SOARES DA FONSECA (BRASIL, STJ, 2016, our translation).

The Federal Supreme Court (STF) adopts the same line as the Superior Court of Justice:

> EXTRAORDINARY APPEAL WITH INTERLOCUTORY APPEAL 1,002,209. AMAZONAS
> REPPORTEUR: MIN. DIAS TOFFOLI
> APPELLANT (S): MANUFACTURE OF SANTOS DE SOUZA
> PROSECUTOR (S) (ES): GENERAL PUBLIC DEFENDER OF THE STATE OF AMAZONAS
> APPELLEE (S): PROSECUTION OFFICE OF THE STATE OF AMAZONAS
> ATTORNEY (S) (ES): JUSTICE ATTORNEY GENERAL OF THE STATE OF AMAZONAS
> DECISION:
> Analyzed.
> Fabrício dos Santos de Souza files an interlocutory appeal against a decision that did not admit an extraordinary appeal based on contravention of article 5, items XXXVII, LIII, and LIV, of the Federal Constitution.
> In the extreme appeal, a ruling against the judgment issued by the Amazonas State Court of Justice is appealed against, as follows:
> CRIMINAL APPEAL. CRIMINAL AND CRIMINAL PROCEDURE. PRELIMINARY. ART. 385 OF THE CRIMINAL ADJECTIVE LAW. UNCONSTITUTIONAL ASSUMPTION. RESPECT FOR THE ACUSATORY SYSTEM. RECEPTION BY THE CITIZEN CONSTITUTION. INCREASED THEFT AND CORRUPTION OF MINORS. PROVEN DELITIVE MATERIALITY AND AUTHORSHIP. CONDEMNATION MAINTAINED. DETACTION OF THE PENALTY. SUBJECTIVE RIGHT OF THE DEFENDANT.
> 1. Art. 385 of the CPP was accepted by the Citizen Constitution of 1988, for being part of the accusatory system and of the principle of motivated free conviction.
> 2. Since the evidence set proves the materiality and criminal authorship of the crimes of increased theft and corruption of minors, the request for acquittal due to insufficient evidence should not be accepted.
> 3. The request to retract the sentence is denied, as it is the subjective right of the defendant. Analyzed and partially provided criminal appeal. (BRASIL, STF, 2016, our translation).

How could a judge, theoretically impartial, within the accusatory system, convict after the request for acquittal made by the Prosecution Office?

As argued in the text *Article 385 of the Brazilian Code of Criminal Procedure and the accusatory procedural system* (2017)[10], said legal provision should be considered as unconstitutional.

[10] Original title: *O artigo 385 do Código De Processo Penal brasileiro e o sistema processual acusatório* Text published in Revista argentina *Pensamiento Penal*, in 2017. Available at: http://www.pensamientopenal.com.ar/doctrina/45344-o-artigo-

However, as exemplified by the jurisprudence of the Federal Supreme Court and the Superior Court of Justice mentioned above, most jurisprudential understanding was due to the reception of article 385 of the CPP by the Brazilian Constitution.

Despite the decisions of the Superior Courts, it is possible to find jurisprudence to the contrary, as is the case of the decision handed down by the Court of Justice of the State of Minas Gerais (TJMG).

> Criminal Appeal 1.0702.09.565907-5 / 001
> State Judge: Alexandre Victor de Carvalho
> Date of publication of the precedent 07/02/2012
> APPEAL - INCREASED THEFT - ACQUITTAL REQUEST SUBMITTED BY THE PROSECUTION OFFICE IN THE FINAL CLAIMS – JUDGE'S BINDING - ACCUSATORY SYSTEM – DECREED ACQUITTAL.
> I - An acquittal must be decreed when a request to that effect is made in the final statements of the Prosecution Office since, in this case, there would be no accusatory claim to be eventually upheld by the judge.
> II - The accusatory system is based on the dialectical principle that governs a process of subjects whose functions are absolutely distinct, that of judgment, accusation, and defense. The judge, an impartial third party, is inert in the face of an accusatory action and withdraws from the management of evidence, which is the responsibility of the parties. The development of jurisdiction depends on the action of the accuser, who invokes it, and validity only takes place in the face of the action of the defender.
> III - It is stated that, if the judge condemns even in the face of the acquittal request prepared by the Prosecution Office in the final statements, he/she is certainly acting without necessary provocation, therefore, confusing him/herself with the figure of the accuser, and even, deciding without the fulfillment of the adversarial procedure.
> IV - The attachment of the judge to the request for acquittal made in the final statements by the Prosecution Office is a result of the accusatory system, preserving the separation between functions, while the possibility of conviction, even in the face of the empty space left by the accuser, characterizes the inquisitive judge, whose conviction is not limited by the adversarial procedure, on the contrary, it is decidedly partial to the point of replacing the accusing body, subsisting a pretension abandoned by the Prosecution Office. (BRASIL, TJMG, 2012, our translation).

The TJMG's decision finds chorus in the legal literature:

> The Prosecution Office is the holder of the accusatory claim, and without its full exercise, it does not give the State the opportunity to exercise the power to punish. State punitive power is conditioned to the invocation made by the Prosecution Office through the exercise of the accusatory claim. Thus, the request for acquittal is equivalent to not exercising that power. In other words, the accuser is giving up on proceeding against someone. Consequently, the judge cannot judge without accusation for failing to base his/her conviction on evidence or argue about it (BARRETO, accessed May 3, 2020, our translation).

In the same sense:

> The Accusatory System is characterized by the presence of different parties, opposing the defense charge in equal positions, and both equidistantly and impartially overlapping a Judge. Here there is a separation of the functions of accusing, defending, and judging (BRASILEIRO DE LIMA, 2013, p. 4, our translation).

Without prejudice to differences in jurisprudence or even literary and without entering into the

385-do-codigo-processo-penal-brasileiro-e-o-sistema-processual-acusatorio

discussion about the constitutionality or not of article 385 of the CPP, it is certain that it is fully in force in the Brazilian legal system by the decision of the Federal Supreme Court. Despite the legal provision in article 3-A of the CPP establishing the accusatory structure, that is, the democratic structure of the procedure with prevalence of the principle of *in dubio pro reo*, it is certain that Brazilian procedural legislation often departs from the pure accusatory procedural system, admitting the principle of *in dubio pro hell* as taught by Rosa and Khaled Jr. (2017).

It should be noted that, although the law allows the judge to act as the prosecution, in some cases, the Brazilian procedural system cannot be considered inquisitive or mixed. The most appropriate is to state that it is an impure accusatory system or a pseudo-accusatory system. Minister Reynaldo Soares da Fonseca recognized, in 2017, that the system adopted would not be accusatory:

> HABEAS CORPUS Nº 446.896 - SP (2018/0094258-6)
> REPPORTEUR: MINISTER REYNALDO SOARES DA FONSECA
> PETITIONER: PUBLIC DEFENSE OF THE STATE OF SÃO PAULO
> ATTOURNEYS: PUBLIC DEFENSE OF THE STATE OF SÃO PAULO
> RICARDO LOURENCO DIAS FERRO - SP232689
> DEFENDER: COURT OF JUSTICE OF THE STATE OF SÃO PAULO
> PATIENT: ELIZIARIO BATISTA BEZERRA (PRISON)
> Syllabus
> HABEAS CORPUS SUBSTITUTE OF APPEAL. INADEQUACY OF THE ELECTED ROUTE. CIRCUMSTANCED THEFT. APPLICATION FOR ACQUITTAL OF THE PROSECUTION OFFICE IN THE FINAL STATEMENTS. CONVICTION. INFRINGEMENT OF THE ACCUSATORY SYSTEM. INEXISTENCE. ART. 385 OF THE CPP. PRECEDENTS.
> The First Panel of the Federal Supreme Court, and the Third Section of this Superior Court of Justice, in view of the increasing and successive use of habeas corpus, began to restrict its admissibility when the illegal act is liable to be challenged through its own appeal, without forgetting the possibility of granting the order *ex officio* in cases of flagrant illegality.
> "The national procedural system does not adopt the pure accusatory system. Hence, there is no nullity when, unlike what is required by the Prosecution Office, in the final statements, the magistrate recognizes the defendant's responsibility, or does so for a more serious criminal offenses then that which, at the end of the instruction, understood to be adequate to the accused's behavior (HC n. 196.421/SP, Sixth Class, Rep. Min. Maria Thereza de Assis Moura, DJe of 2/26/2014). Therefore, in this case, there is no mention of the nullity of the patient's sentence for the simple fact that the Parquet has requested his/her acquittal (HC 407.021/SC, Rep. Minister FELIX FISCHER, Fifth Panel, tried on 19/09/2017, DJe 09/25/2017)".
> Habeas corpus denied (BRASIL, STJ, 2017, our translation).

Art. 3-A of the CPP indicates that the structure is accusatory. The jurisprudence and legal literature are consistent with legal provision. However, there are legal provisions that authorize the judge to act in substitution for the prosecution. These legal provisions, even if questionable, are validated by the prevailing jurisprudence. To reconcile these apparently opposing perspectives, it is possible to argue that Brazil's system is pseudo-accusatory. The Brazilian legislator seems to have adopted this preference when bringing articles such as 28-A, paragraph 5; art. 209; art. 212, sole paragraph; art.234; and art. 385, all from CPP.

4 CONCLUSION

As exposed during this paper, Article 3-A of the Brazilian CPP indicates that the procedural structure adopted would be the accusatory. Unlike the inquisitive structure that provides for the concentration of the investigation, accusation, and judgment functions in a single person or body and unlike the mixed structure that would merge the inquisitive with the accusatory systems, the structure mentioned in the referred legal provision presupposes the separation of the investigation, accusation, and judgement functions.

The legal literature, according to the notes of Pacelli, Brasileiro de Lima, among others, corroborates with the legal provision. In general, the jurisprudence also indicates the accusatory system as the one adopted in Brazil, and there seems to be a convergence of understandings between the legislator, the academy, the operator of the law, and the judge.

However, when verifying the existence of legal provisions that authorize the judge to produce evidence, settle controversy, and even condemn when there is a request for acquittal from the Prosecution Office, doubt arises as to the accusatory purity of this system. Such devices that seem to allow the judge to substitute the indictment depart from the procedural logic of *in dubio pro reo* and are closer to that of *in dubio pro hell*.

Considering that the Brazilian system is not inquisitive or mixed since these models suffer objections and rejections by literature and jurisprudence, it is concluded, at least, that the structure of the Brazilian criminal process is impure accusatory, or as suggested, pseudo-accusatory.

REFERENCES

BRANDÃO, Claudio Bezerra. **Tipicidade penal**: dos elementos da dogmática ao giro conceitual do método entimemático. Editora Almedina, Coimbra, 2012.

BRANDÃO, Claudio Bezerra. **Teoria Jurídica do Crime**. Editora D'Plácido. Belo Horizonte, 2019.

BRASILEIRO DE LIMA, Renato. **Curso de Processo Penal**. Editora Impetus. Niterói, 2013.

BRASIL. **Constituição da República Federativa do Brasil**. Disponível em http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Consulta realizada em 03/05/2020.

BRASIL. **Código de Processo Penal**. Disponível em http://www.planalto.gov.br/ccivil_03/decreto-lei/del3689.htm. Consulta realizada em 03/05/2020.

BRASIL. Superior Tribunal de Justiça. Recurso especial nº 1.658.752. Disponível em https://scon.stj.jus.br/SCON/decisoes/toc.jsp?processo=1.658.752&b=DTXT&thesaurus=JURIDICO&p=true . Consulta realizada em 03/05/2020.

BRASIL. Superior Tribunal de Justiça. Habeas corpus nº 404.228. Disponível em https://scon.stj.jus.br/SCON/decisoes/toc.jsp?processo=HC+404228&b=DTXT&thesaurus=JURIDICO&p=true. Consulta realizada em 03/05/2020.

BRASIL. Superior Tribunal de Justiça. Recurso especial nº 1.612.551. Disponível em https://scon.stj.jus.br/SCON/decisoes/toc.jsp?processo=1.612.551&b=DTXT&thesaurus=JURIDICO&p=true. Consulta realizada em 03/05/2020.

BRASIL. Superior Tribunal de Justiça. Habeas corpus nº 446.896. Disponível em https://scon.stj.jus.br/SCON/decisoes/toc.jsp?processo=HC+446896&b=DTXT&thesaurus=JURIDICO&p=true.

Consulta realizada em 03/05/2020.

BRASIL. Supremo Tribunal Federal. Recurso extraordinário com agravo 1.002.209. Disponível em http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=%28%281002209%2ENUME%2E+OU+1002209%2EDMS%2E%29%29+NAO+S%2EPRES%2E&base=baseMonocraticas&url=http://tinyurl.com/y9n48bva. Consulta realizada em 03/05/2020.

BRASIL. Tribunal de Justiça do Estado de Minas Gerais. Apelação criminal 1.0702.09.565907-5/001. Disponível: https://www5.tjmg.jus.br/jurisprudencia/pesquisaNumeroCNJEspelhoAcordao.do;jsessionid=CE5E8334C19B0B08B43F8E26E4F8A63E.juri_node2?numeroRegistro=1&totalLinhas=1&linhasPorPagina=10&numeroUnico=1.0702.09.565907-5%2F001&pesquisaNumeroCNJ=Pesquisar. Consulta realizada em 03/05/2020.

BRÊTAS, Ronaldo de Carvalho Dias. **Processo constitucional e Estado Democrático de Direito**. 4ª edição. Editora Del Rey. 2018.

CAPEZ, Fernando. **Curso de Processo Penal**. 20ª edição. Editora Saraiva. São Paulo, 2013.

COLEN, Guilherme Coelho; GONÇALVES, Antônio Fabrício de Matos; OLIVEIRA, Allan Helber de (organizadores). **Direito processual atual**. Editora Mandamentos. Belo Horizonte, 2002.

CRUZ, Clenderson. **A ampla defesa no processualidade democrática**. Belo Horizonte: Editora Lumen Juris, 2016.

FERRAJOLI, Luigi. **Direito e razão**: teoria do garantismo penal. 3ª edição. Editora Revista dos Tribunais, São Paulo, 2002.

GOMES FILHO, Antônio Magalhães. **A motivação das decisões penais**. 2ª edição. Editora Revista dos Tribunais. São Paulo, 2013.

LOPES JR, Aury. **Direito processual penal e sua conformidade constitucional**, volume I. Editora Lúmen Júris. Rio de Janeiro, 2007.

NASCIMENTO, Adilson de Oliveira. **Dos pressupostos processuais penais**. Editora Mandamentos, Belo Horizonte, 2008.

PACELLI, Eugênio. **Curso de Processo Penal**. 16ª edição. São Paulo: Editora Atlas, 2012.

ROSA, Alexandre de Morais; KHALED JR. Salah. **In dubio pro hell. Profanando o sistema penal**. Editora EMais, 3ª edição. Florianópolis, 2017.

SILVA, José Afonso da. **Curso de Direito Constitucional Positivo**. 28ª edição. Editora Malheiros. São Paulo, 2002.

TÁVORA, Nestor; ALENCAR, Rosmar Rodrigues. **Curso de Direito Processual Penal**. 8ª edição. Editora JusPodvm, Salvador, 2013.

TOURINHO FILHO, Fernando da Costa. **Manual de Processo Penal**. Editora Saraiva. São Paulo, 2009.

VEIGAS, Carlos Athayde Valadares. **Legitimidade democrática da jurisdição constitucional**. Editora D'Plácido, Belo Horizonte, 2014.

VILAS BOAS NETO, Francisco José. O artigo 385 do código de processo penal brasileiro e o sistema processual acusatório. **Revista Pensamiento Penal**, s.v., s.n., 2017. Disponível em: http://www.pensamientopenal.com.ar/doctrina/45344-o-artigo-385-do-codigo-processo-penal-brasileiro-e-o-sistema-processual-acusatorio

VILAS BOAS NETO, Francisco José. A imoralidade como direito fundamental e a etiqueta do direito penal. **Revista de Direito Penal, Processo Penal e Constituição**, v.4, n.1, p. 106-124. 2018. Disponível em https://indexlaw.org/index.php/direitopenal/article/view/3946/pdf

VILAS BOAS NETO, Francisco José; MAIA, Tomiko Yoshimura Carvalho. A fundamentação das decisões e o exercício efetivo do contraditório. **E-Legis**, v.12, n. 30, p. 194-210, set./dez., p. 194-210, 2019. Disponível em http://e-legis.camara.leg.br/cefor/index.php/e-legis/article/view/527/691