CRITICAL ANALYSIS OF STRUCTURAL PROCESSES FROM THE DEMOCRATIC PROCESSUALITY PERSPECTIVE

ANÁLISE CRÍTICA DOS PROCESSOS ESTRUTURAIS NA PERSPECTIVA DA PROCESSUALIDADE DEMOCRÁTICA

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ABSTRACT

The article seeks to present the conceptualization and aspects that gave origin to the so-called structural process, with the aim of questioning it in the face of the conjectures of democratic process in the Demo-

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cratic State of Law developed based on the neoinstitutionalist theory of the process. The text will address the introductory aspects of democratic processuality, seeking to synthesize its main ideas. Theoretically, the neoinstitutionalist theory of the process, associated with the constitutional principles of the process, is intended to criticize the approach to the structural process as a result of judicial activism. The research presented is bibliographical and uses the hypothetical-deductive basis methodology, according to the Karl Popper proposal.

Keywords: Structural process. Democratic procedurality. Neoinstitutionalist theory of the process. Legal democracy.

RESUMO

O artigo busca apresentar a conceituação e os aspectos que deram origem ao denominado processo estrutural, com o objetivo de questioná-lo frente às conjecturas da processualidade democrática no Estado Democrático de Direito desenvolvidas com base na teoria neoinstitucionalista do processo. O texto abordará os aspectos introdutórios da processualidade democrática, buscando sintetizar suas principais ideias. Tendo por referencial teórico a teoria neoinstitucionalista do processo, associada aos princípios constitucionais do processo, pretende-se criticar a abordagem à temática do processo estrutural como fruto do ativismo judicial. A pesquisa apresentada é bibliográfica e se utiliza da metodologia de base hipotético-dedutiva, aos moldes da proposta de Karl Popper.

Palavras-chave: *Processo estrutural. Processualidade democrática. Teoria neoinstitucionalista do processo. Democraticidade jurídica.*

1 INTRODUCTION

This article aims to address the issue of structural or structuring processes, also known as decisions, measures, structural reforms, analyzing them against the premises of democratic processuality, notably from the perspective of the neo-institutionalist theory of the process.

To this end, a study will be carried out on the structural process, as to its conceptualization, objectives and historical basis, pointing out criticisms as to its connection to judicial protagonism and, consequently, to the theory of the process as a legal relationship.

Next, a synthesis will be presented on the premises of democratic processuality, taking as a starting point the allocation of Citizenship, in the same existential plan of the State, emphasizing the citizen's action as a true conductor of decisions and builder of the legal system, this due to the prerogative of citizen self-inclusion, which will be detailed throughout the work.

In the same vein, the principle of access to justice will be approached as being the basis for citizen legal participation in the construction of judicial decisions, so that only the discursively constructed decision will be considered democratic.

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Finally, presenting the relevant points in an approach to legal democracy, the structural process conceived as a result of judicial activism is criticized, seeking to resignify it under the gaze centered on the founding principles of the neo-institutionalist theory of the process.

The research developed here is of a bibliographic nature and has as its methodology the logical-deductive basis, in which a comparison is made between the theories, putting them to the test in order to examine their possibilities in the face of the proposed problem.

2 IDENTIFICATION OF THE SO-CALLED STRUCTURAL PROCESSES

The structural process, also called structural decision, structuring decision or structural reform, can be understood as a new procedural form of differentiated protection of fundamental rights, especially collective rights (BAHIA; NUNES; COTA, 2019, p. 30).

In the conception of Fredie Didier, Hermes Zaneti and Rafael Alexandria de Oliveira, the structural decision is one that seeks "to implement a structural reform (structural reform) in an entity, organization or institution, with the objective of realizing a fundamental right, carrying out a certain public policy or solving complex disputes" (DIDIER; ZANETI; OLIVEIRA, 2017, p. 48-49).

In this bias, "the structural process was first outlined in the United States, in view of the perception of a new category of litigation, structural litigation"[4] (BAHIA; NUNES; COTA, 2019, p. 31).

As outlined by Alexandre Melo Franco de Moraes Bahia, Leonardo Silva Nunes and Samuel Paiva Cota, polycentric structural litigation, that is,

> contemplate different points of influence that interact with each other in different ways. They are also marked by the existence of structural violations of rights, which occur as a result of a set of practices and institutional dynamics, within a complex causality and a multiplicity of overlapping, often antagonistic interests. In this context, they end up demanding the construction of peculiar procedural forms for the realization and satisfaction of rights (BAHIA; NUNES; COTA, 2019, p. 33-34).

Also, as highlighted by Fredie Didier, Hermes Zaneti and Rafael Alexandria de Oliveira,

4 Such litigations cover what Edilson Vitorelli called irradiated diffusion litigations. According to the author: "These are those situations in which the litigation resulting from the injury directly affects the interests of several people or social segments, but these people do not make up a community, do not have the same social perspective and will not be reached, to the same extent, by the result of the litigation, which makes their views on its desirable outcome divergent and, not infrequently, antagonistic. These situations give rise to changeable, multipolar conflicts, opposing the group holding the right not only to the defendant, but to itself. Exemplify yourself with the conflicts arising from the installation of a hydroelectric power plant. If, at the beginning of the licensing process, the prospective impacts of the installation of the enterprise are discussed, in its social and environmental aspects, the construction phase already changes the scenario of the location, with the arrival of large contingents of workers that alter the social dynamics. The problems become other, often unforeseen, and the groups affected are no longer the same as they were in the first moment, when the contours of the project were decided. In the environmental area, the course or flow of the river is altered, blocking roads and separating previously neighboring communities. People are displaced. In the natural environment, fauna and flora suffer significant impacts. With the end of the works, the whole dynamic changes again. Many workers who came, go. Others remain. The displaced people form new neighborhoods and settlements, which require the implementation of new public services. Only because of the realization of a work, the natural environment and social dynamics change in such a way that the society that existed in that place acquires features totally different from the one that originally existed". (LIMA, 2015, p. 97-98).

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The structural problem is defined by the existence of a state of structured non-conformity - a situation of continuous and permanent illegality or a situation of non-conformity, even if not exactly illegal, in the sense of being a situation that does not correspond to the state of things considered ideal. Whatever it may be, the structural problem is configured from a state of affairs that needs reorganization (or restructuring) (DIDIER; ZANETI; OLIVEIRA, 2020, p. 104).

In this scenario, Paulo Henrique dos Santos Lucon understands that the expression structural processes designates:

processes aimed at the protection of rights whose performance is not achieved by isolated acts or by watertight measures, on the contrary, require dialogue and cooperation throughout the procedure and the adoption of flexible measures that can be changed according to the modification of phatic circumstances (LUCON, 2017, p. 12).

In Ada Pellegrini Grinover's view, the structural process can be seen as an appropriate means of judicializing public policies, in view of the so-called "conflicts of public or strategic interest" that "arise in society due to the impossibility or difficulty of enjoying fundamental social rights, of a benefit nature" (GRINOVER, 2016, p. 48).

The term structural process, according to Fredie Didier, Hermes Zaneti and Rafael Alexandria de Oliveira, is used as a structured procedural way, because "it is based on the premise that the threat or injury that bureaucratic organizations represent to the effectiveness of constitutional rules cannot be eliminated without such organizations being rebuilt" (DIDIER; ZANETI; OLIVEIRA, 2017, p. 48-49).

Historically, this concept originated in U.S. law, notably through the previous Brown v. Board of Education (1954), from which the expression "Structural injunctions" originated. Through that collective action, the Judiciary was called upon to intervene against the policy of racial segregation admitted in the fundamental schools of the city of Topeka, Kansas, and, therefore, the Supreme Court decided that the discriminatory practice was unconstitutional. However, after unsuccessful attempts to apply the decision, it was found that, in order to be effective, that decision had to be implemented in a progressive manner, gradually making it possible to eliminate the obstacles arising from the policy in force until then (ARENHART, 2013; BAHIA; NUNES; COTA, 2019).

Owen Fiss (2004) would have been the first author to talk about the issue in the United States, and his doctrine, in fact, seeks to give evidence to the judicial protagonism, with the judge as the interpreter of constitutional values, since, according to the author's doctrine, in a synthesis made by Leonardo Silva Nunes, "the Judiciary Power would also have legitimacy (and duty) to participate in the dialogue held in the political arena, in order to give concreteness to the values enshrined in the constitution" (NUNES, 2021, p. 689).

. For the American author,

The structural judicial process is one in which a judge, facing a state bureaucracy in terms of constitutional values, restructures the organization to eliminate the threat imposed on such values by existing institutional arrangements (FISS, 2004, p. 26-27).

In addressing the issue, Fabrício Bastos lists the theme as a result of judicial activism, taking into consideration that "it is a decision-making modality that (pre)occupies itself

more with the effectiveness of the command issued in its body than with the resolution of the procedural legal relationship. This is because, according to him, "the court, in addition to indicating the solution of the dispute, provides a decision that has prospective effectiveness" (BASTOS, 2018, p. 59).

It is noted, therefore, that the theoretical basis so far outlined about the so-called structural process is, fatally, linked to legal dogmatics, more notably, to the instrumentalist theory of the process, whose origin is the Bulowian theory, in which process is perfomed as a subjective legal relationship.

From this perspective, the judge is endowed with innate knowledge, is seen as an authority that possesses considerable cognitive privilege, and the interpretative function of the norm loses relevance vis-à-vis the interpreter himself.

The emphasis given by traditional doctrine to the structural process revolves around judicial protagonism, in which the premise is that the judge will be able to impose the necessary measures to unfold the proposed problem. It is a question of staggered decisions, in which at first, after analyzing the process (with reference to the dogmatic view), the judge will make a decision, which will be limited to fixing in a general manner the guidelines for the protection of the protected right. From this decision on, others will come according to the implementation given to the measures initially imposed.

As Sérgio Cruz Arenhart summarizes,

> These decisions can (and often should) go beyond the simple specification of the result to be obtained, clarifying the means for this. The judicial sentence, by fixing the expected consequence, may impose a plan of action, or even delegate the creation of such a plan to another entity, so as to achieve, in a more prompt manner and with the least sacrifice to the interests involved, the desired result. This is what Ricardo Lorenzetti calls micro institutionality. In fact, the structural provision must often take the form of a "new institution", created to monitor, implement and think about the achievement of the scope of the judicial protection offered (ARENHART, 2013, p. 394).

The authoritarian bias of the way the subject has been treated is thus verified, even, so to speak, by removing from the scene the main stakeholders of the measures to be taken, the citizens. Whether in the face of complex litigation, or even when dealing with the implementation of fundamental rights, the focus, as placed, revolves around the central figure of the judge, who, as a divine expression, will "offer" a judicial tutelage capable of fully covering, even in a staggered and gradual manner, all the necessary measures.

In addition, although there is no legislation dealing with the issue, part of the doctrine has defended the compatibility and operability of the use of the structural process based on article 139, IV of the Code of Civil Procedure[5] (BRAZIL, 2015), since such provision encompasses a general clause of effectiveness or atypicality of executive measures.

As such, what is evident is that the structural process worked by the doctrine so far ignores a point that, in fact, should have real prominence: Citizenship as an element of democracy.

5 Art. 139. The judge shall direct the proceedings in accordance with the provisions of this Code: [...]IV - determine all inductive, coercive, mandatory or subrogation measures necessary to ensure compliance with a judicial order, including actions for the purpose of pecuniary restitution; [...] (BRAZIL, 2015).

In view of this, the way in which the structural process has been approached so far is criticized under a dogmatic aspect, based on judicial activism, ignoring the principiology of the Democratic State of Law.

3 NOTIONS ON DEMOCRATIC PROCESSUALITY

Even before entering into the attempt to correlate the ideology of the structural process from the perspective of democratic processuality, it is necessary to explain, even if in synthesis, the basic concepts inherent to the Democratic Rule of Law.

The first delimitation that is made concerns Citizenship, since, differently from the way it is approached by juridical dogmatics, in which Citizenship is subjugated to the State, in a democratic approach, Citizenship must be understood on the same hierarchical level of the State.

For Rosemiro Pereira Leal, Citizenship is characterized as "a deliberate legal-political-constitutional bond that qualifies the individual as a driver of decisions, builder and reconstructor of the legal system of the political society to which he has affiliated" (LEAL, 2002, p. 150-151).

Based on this conception, Roberta Maia Gresta points out the fundamentals by which Citizenship is not subordinated to the State, providing that:

> (1) Citizenship is not a state benevolent, but a bond that connects the person directly to the juridical-political status inscribed in the Constitution; (2) the legal system is not a donation of the State, but an object of permanent construction and reconstruction through decisions (legislative, administrative and judicial); and (3) the citizen is not a mere recipient of state tutelage, since he participates in these decisions as a driver (GRESTA, 2014, p. 9).

Thus, Citizenship fits into the same institutional level, because both State and Citizenship are constitutionally drawn institutes, therefore, they fit into the same existential plan, that is, both are born with the Constitution[6].

The citizen, therefore, is not seen only as a sheltered subject, receiver of rights, subordinated to the State, on the other hand, with Citizenship occupying an institutionally isonomic space, the citizen emerges the prerogative of self-inclusion, which grants him/her the possibility of promoting his/her own insertion in the legal order (GRESTA, 2014, p. 10).

In the democratic vision that is defended here, man must be understood as a 'natural subject', that is, his own biological nature makes him the holder of rights that belong to all

6 In addition to these points, it is worth mentioning that for Leal the Constitution is part of the so-called world 3, an expression coined by the philosopher Karl Popper when dealing with his theory of objective knowledge, because, according to Leal, "the Constitution emerges as a linguistic entity, autonomous in relation to the historical context in which it is produced and the concrete situations that demand the application of the Law" (GRESTA, 2014, p. 185). In this sense it is observed that the theory of knowledge developed by Popper lists the coexistence of three worlds, world 1 being made up of the physical bodies and their physical and physiological states, world 2 being the mental states, while world 3 is the world of the products of the human mind, both physical, such as sculptures, paintings and drawings, as well as immaterial things such as knowledge and science.

men indistinctly. Thus, "natural subjects are invested, directly by the Constitution, in fundamental rights" (GRESTA, 2014, p. 55).

In this sense, therefore, man is given the right to participate in the construction of the legal order, and the point of this work is more precisely the construction of the judicial decisions that concern him. The materialization of this participation, which is placed as an 'autonomous and nuclear legal element of Citizenship', is exactly in the prerogative of 'self-inclusion', defended by Leal, and this should be seen as the possibility given to the subject of effectively discussing the content of state acts when they are produced (GRESTA, 2014, p. 51-52).

An effective 'direct action' is then defended, understood as:

> the opening of decision-making bodies to citizen participation, not just to representatives. From a legal perspective, this openness includes the enunciation of meanings with a binding character. This means that it is not enough to ensure that citizens attend the places of deliberation, as listeners, or granting them the opportunity to demonstrate. The entrance to the decision-making instance is made when the sense enunciated by the citizen, even if it does not prevail, cannot be disregarded in the decision making (GRESTA, 2014, p. 56).

In the judicial sphere, direct action is analyzed from the perspective of access to justice, a fundamental right instituted by the 1988 Constitution of the Republic, which is embodied in access to jurisdiction (BRAZIL, 1988).

However, it is considered that in the current panorama, whose basis is legal dogmatics, the interpretation of Law is given to the judicial authority, and the access to justice is approached in the sense that the Judiciary is responsible for the production of decisions.

Jurisdiction is understood as the activity of the Judicial State that resolves the conflicts placed before it. Thus, in this bias, the citizen is placed before the judging state only as the addressee of its decision, so that by provoking the exercise of jurisdiction, he immediately submits himself to the judge, giving cause for the formation of the process. His participation is reduced to a persuasive character, since his "function" is simply to influence the convincing of the judicial authority.

On the other hand, in the democratic conception treated by Rosemiro Pereira Leal, the access to jurisdiction is approached from the compatibility of the state decision-making activity (what Leal calls judicial) with the premises of the Democratic State of Law, so that "jurisdiction is presented as a set of legal contents that, produced by the due legislative process, are accessible to the entire legal-political community" (GRESTA, 2014, p. 58). Thus, in line with this perception, in democratic law jurisdiction cannot be identified as an enforcement activity of a decision produced under the authoritarian cloak of the Judicial State.

Thus, in summary to Leal's thought, Gresta clarifies that "Judication consists in structuring the State's decision-making activity in the form of procedures" (GRESTA, 2014, p. 58), and it is only configured in a democratic manner when it is presented "as a legal duty to assure the parties of the Constitutional Process, and not as a tutelary or interdisciplinary activity of rights freely discovered by the judge's intelligence on the margin of the structural scope of the processualized procedure" (LEAL, 2014).

In democracies, therefore, the judge or decision maker "is not a free interpreter of the law, but the enforcer of the law as interpreter of the logical-legal articulations produced by the parties building the procedural structure. (LEAL, 2014)

In this respect, "access to democratic jurisdiction, therefore, requires the opening of judicial procedures to citizens, not only formally, but by recognizing them as the articulator-builder of the judicial decision. (GRESTA, 2014, p. 59).

Thus, taking up the constitutional principle of access to justice, which is the basis for the legal participation of the citizen in the production of the judicial decision, it is reiterated that only a decision constructed discursively can be considered democratic, that is, in the face of the legitimate possibility that is opened to the part of being the builder of the decision that will affect him.

Inseparable from the right to petition is the approach to the legitimacy to be in court. It is considered that democratic legitimacy, as treated here, differs from legitimation, which is usually approached by dogmatics, because:

> While the legitimacy of the exercise of state functions is gauged by its constitutional framework, especially by the intangibility of the prerogative of total population self-inclusion, legitimization involves a strategic state effort to stabilize practices that undermine institutional equality between state and citizenship (GRESTA, 2014, p. 81).

Legitimacy to be in court is a fundamental guarantee guaranteed constitutionally since, according to article 5, XXXV of the Constitution of the Republic, "the law shall not exclude from the Judiciary's appreciation injury or threat to the law" (BRAZIL, 1988). Thus, in this perspective, the law is illegitimate when it restricts access to jurisdiction by means of a 'permission rule' (what is dogmatically called legitimation), which is exemplified in the sphere of public civil actions (Law 7347/85), in which the law stipulates a list of persons or entities authorized[7] to bring claims that give rise to injury or threat to rights affecting the community (BRAZIL, 1985).

From this feeling, by democratically understanding legitimacy,

> It is noticeable that: a) the citizen can only enunciate meanings autonomously in State procedures when these are normatized as structures enabling horizontal articulation between Citizenship and the State; b) the first requirement affecting this normatization is the non-restriction of the scope of the principle of inapplicability of jurisdiction, by the exclusion, even if implicit, of constitutional legitimations to act (GRESTA, 2014, p. 85).

7 Article 5, Law 7.347/85. They have legitimacy to file the main action and the precautionary action:
I - the Public Prosecution Service;
II - the Public Defender's Office;
III - the Union, the States, the Federal District and the Municipalities;
IV - the autarchy, public company, foundation or mixed economy society
V - the association which, concomitantly:
a) has been established for at least one (1) year under civil law;
b) includes, among its institutional purposes, the protection of public and social heritage, the environment, the consumer, the economic order, free competition, the rights of racial, ethnic or religious groups or the artistic, aesthetic, historical, tourist and landscape heritage.
[...] (BRAZIL, 1985).

It means, then, that as a starting point to make a democratic process viable it is necessary not to legally restrict the citizen's access to jurisdiction, preserving the constitutional prerogative of self-inclusion.

> The prerogative of self-inclusion is permanent, constitutionally instituted and, therefore, independent of the State's predisposition to admit it. The space for the exercise of Citizenship presupposes that the creation and interpretation of the law is linked to the confrontation of the senses enunciated by citizens, as a guarantee of access to jurisdiction (GRESTA, 2014, p. 98).

Thus, in this bias, the interest in participating in the procedural relationship must be self-proclaimed, so that the "provocation to exercise the judicial function is, in itself, the demonstration of the existence of an interest to act, that is, the interest to enter the judicial decision-making instance and enunciate meanings" (GRESTA, 2014, p. 102).

The construction of democratic processuality has as its premise the possibility of free enunciation of interests, especially when it concerns the exercise of fundamental rights expressly brought by the Constitution of the Republic.

Under these bases the objective of the procedures is defended, whose core is the legal argument. It means, therefore, that the interested party, in provoking the Judiciary, presents his pretension, which will be confronted with the legal system in order to build a judicial decision.

In the objective procedure the analysis of the pertinence to the debate is redirected from the subject to the object (GRESTA, 2014, p. 105), so that the focus of the judicial process will not be the convincing of the judge of the cause, but rather the argumentation presented in order to achieve the claim exposed there.

The change in this panorama is based on the theory of objective knowledge of Karl Popper[8] (1975), which, although founded on the growth of scientific production, has premises applicable to decision-making procedures.

The theoretical basis brought by the Austrian philosopher points to the importance of the argumentative function, so that in the procedural sphere, the interested party will present the facts by means of the descriptive function, which has the ability to expose the facts according to their existence in the world, however, it is the argumentative function that allows the formulation of problems and their confrontation through competing theories (proposals offered to criticism), with results that exert a retroload on individuals (their minds) and the collectivity (traditions) (GRESTA, 2014, p. 106).

In the words of Roberta Gresta,

> When the self-proclaimed interested party acts before the judicial body (initiation of the procedure or intervention in it), one must observe how it manifests itself. [...] If the manifestation reaches the superior functions of language, through the conformation of the object (descriptive function) and the construction of a reasoned claim (argumentative function) regarding this object, the interested party inaugurates or integrates the debate. Since formulated, the claim is submitted to tests during the procedure, by the production of evidence and the argumentative objections presented by other

8 The exhibition of which took place in the work "Objective knowledge: an evolutionary approach". Published in Brazil by the University of São Paulo in 1975.

> participants. In the end, the decision must be the result of rational criticism, forwarding the thesis that has shown itself to be more resistant to the tests of falsifiability. The judgment corresponds, then, to the prevalence of one of the meanings forwarded by the legal argument (GRESTA, 2014, p. 107).

However, it is considered that the judgment cannot be definitive. This is because the senses enunciated and debated throughout the procedural process will not be considered as dogmas, i.e., they will not be considered unquestionable or indisputable, being possible to open them for rediscussion in another procedure, if so.

These conceptions meet the neo-institutionalist Theory of Process developed by Rosemiro Pereira Leal. Thus, from now on, the work will stick to the brief presentation of this theory in order, then, in counterpoint to it, to criticize the judicial protagonism that has been the focus on the so-called structural processes.

4 THE STRUCTURAL PROCESS IN COUNTERPOINT TO THE NEO-INSTITUTIONALIST THEORY OF THE PROCESS

The neo-institutionalist theory of the process, conceived by Rosemiro Pereira Leal (2013), is based on popperian theory, with emphasis on critical rationalism and the formation of objective knowledge based on the criteria of the theories' falsibility. Based on these conceptions, Rosemiro Pereira Leal develops his own theory establishing criticism about legal democraticity.

The initial scope of this theory is to break with the dogmatic science of law, emphasizing the authoritarianism of the Liberal and Social States, previously in force, pointing out a new paradigm of State, being it "an accessory and protossignificant institution to configure itself [...] as a Democratic State of Law already received in the Brazilian Constitution of 1988 with the designation of a Democratic State of Law (art. 1). (LEAL, 2013, p. 3).

As explained by Rosemiro Pereira Leal,

> The neo-institutionalist theory has in the Constitution the institution that originated from its existential possibility; however, the Constitution itself, by proclaiming itself a Democratic of Law, with little importance to the legifiable scope of its elaboration, as is the Brazilian one of 1988, already puts itself under the regency of the constitutional institution of the process as a democratizing and juridical-discursive condition governing the realization, recreation and application of the rights assured in the constitutional discourse (LEAL, 2014).

For this conception, as Roberta Maia Gresta explains, the Democratic State of Law requires the elaboration of a critical rationality:

> a) establish meanings from the logical relations between the theoretical elements gathered from its principiology (connection between world 2 and world 3); b) produce (provisional) solutions compatible with the democratic institutional matrix (production of scientific knowledge in world 3); and, from there, c) apply such solutions in order to refute "subjectivities and [...] behav-

> ioral dispositions, [...] individual, collective and cultural expectations of ways of life incompatible with democratic principiology (GRESTA, 2014, p. 187).

The exercise of interpreting the Law is carried out in an isonomic manner, in which the interpreter is bound by the normative sense of fundamental rights, allowing for an opening of interpretation and argumentation to all equally.

It is worth remembering that in the sense of democracy as outlined in this perspective, Citizenship occupies the same space of existence as the State, which allows for the citizen's self-inclusion and a full opening of the judicial function to the interpretation and argumentation of legal contents.

The neo-institutionalist theory of the process seeks to redefine the due legal process and for this purpose presents the principles of the contradictory, broad defense and isonomy as the markers of the process as a 'constitutional institution', through which a permanent critical-argumentative opening is inaugurated. The principles in question are considered institutions, a characteristic that gives them precedence over the exercise of the judicial function (GRESTA, 2014, p. 188).

In the words of Leal, the process, as an institution, is therefore presented as follows:

> [...] set of legal principles and (institutes) gathered or approximated by the constitutional text under the name of due process, whose characteristic is to ensure, by the institutes of the adversary, broad defense, isonomy, right to the lawyer and free access to jurisdiction, the exercise of rights created and expressed in the constitutional and infra-constitutional order through procedures established in legal models (due process) as manageable instrumentality by the legally legitimized (LEAL, 2014)

According to Leal, the institution of a constitutional process is the legal-discursive framework for the creation of judicial procedures, as well as legislative and administrative ones, and its provisions (judicial decisions, laws and administrative decisions) derive from the dialogical-procedural sharing within the constitutionalized legal community in the creation, amendment, recognition and enforcement of rights (LEAL, 2014).

Thus, such a principiological conception creates, through the process, a space open to the direct participation of all interested parties, thus allowing a joint construction of the state provision.

It can therefore be seen that the process, for this proposal, is a "constitutionalised and constitutionalising theory that makes possible, by the principles of contradiction, broad defence and isonomy, the installation of spaces for production, reproduction and interpretation of democratic law" (LEAL; ARAÚJO, 2016, p. 145).

The principle of the contradictory, as an institution, is equivalent to the necessary dialogicity between interlocutors (parties) who place themselves in defense or dispute of the alleged rights, being still possible to exercise their freedom to say nothing (LEAL, 2018, p. 155).

> Unlike the opportunism of saying and contradicting, and even of not saying, the contradictory, developed between the parties, as a constitutional principle, assured in article 5, LV, of the Constitution of the Republic of 1988, finds in the neo-institutionalist theory a position different from that given by

> Fazzalari, because the right to the contradictory does not integrate a simple rituality of the procedure to convince the judge (LEAL; ARAÚJO, 2016, p. 147)[9]

On the democratic side, therefore, the contradictory is the institutional basis of the process, referring to legal democracy, thus enabling the enunciation of meanings by the interested parties in favor of the construction of the legal decision, not limited to a mere saying and contradiction for the formation of the judge's conviction.

In turn, the principle of isonomy is substantially linked to the procedure in contradictory, since it is characterized by the equality in time between the saying and the contradictory exercised by the procedural parties in the constructive and implementing realization of the procedure (LEAL, 2018, p. 155).

The broad defense, in turn, correlates directly with the principles of the adversarial and isonomy, since the scope of the defense is made within the temporal limits of the adversarial procedure (LEAL, 2018, p. 156).

It is fair to clarify that the defense must be produced by legal and systemic means and elements by allegations and evidence in the procedural time provided by law. It means, therefore, that the defense must be broad, assuming the opportunity to exhaust the argumentative articulations of the law and the production of evidence (LEAL, 2018, p. 156).

Thus, according to the neo-institutionalist approach, the process is "the governing institution and attribute of legitimacy of all creation, transformation, postulation and recognition of rights by the legal, judicial and administrative provisions" (LEAL, 2018, p. 145).

Still in this area, Gresta, based on neo-institutionalist theory, points out that the process is demarcated by a permanent 'space of refutation', which identifies in the constitutional discourse binomials that connect fundamental rights and institutional principles of the process (GRESTA, 2014, p. 189).

Leal highlights that in neo-institutionalist theory,

> The process is an institution (linguistic-autocritical-legal), co institutionalizing and co institutionalized (constitutional) that propositionally enunciate itself by the institutes (normalized principles) of the contradiction-life-, broad defense-freedom, isonomy-dignity (equality). This biunivocity is presented as fundamental, liquid, certain and enforceable fundamental rights of the system, depending on how they are placed, in a pre-cognito character, in the bulge of the legal system (LEAL, 2013, p. 40).

In the concept outlined by Leal, the term contradiction-life-is conceived by the idea that the contradictory does not constitute a fundamental right, but only if it is capable of realizing the right to a dignified human life. The ample defense of freedom is verified by the free manifestation of ideas, being coextensive to the principle of the contradictory, making possible the reanalysis of a monocratic decision by a collegial organ. Finally, isonomy-dignity (equality) means that it is not enough to have equal time for the manifestation of the parties, it is neces-

9 It is observed that Fazzalari, although he constructs his discourse in the sense of trying to move away from the theory of the process as Bulow's legal relationship, ends up, like Bulow, focusing on the role of the judge, so that the contradictory loses its referential as a constructor of decisions whose legitimacy does not originate from the presupposed knowledge of the judge. Unlike the neo-institutionalist theory of the process, for which the contradictory is a reference of legal democracy (LEAL; ARAÚJO, 2016, p. 147)
The expression 'space of refutation' is by Andréa Alves de Almeida, who in her work, Espaço Jurídica Processo na Discursividade Metalinguística (Curitiba, CRV: 2012), lists "democratic participation as the occupation of the procedural space, conceived this as a space of refutation (testification by exercise of argumentation) [...]". (GRESTA, 2015, p. 188).

sary that the decisions that concern them be comprehensible, even more, the interpretation of the Law and the possibility of requesting the modification and exclusion of norms must be equally accessible to all (LEAL, 2013, p. 10-11).

In a nutshell,

> The neo institutionalist theory of process seeks to establish the constitutional concept of what is legally a process, with the productive basis of its contents as the structure of a discourse arising from the permanent exercise of citizenship through continued plebiscitizing in the procedural space of the issues fundamental to the effective construction of a legal society of democratic law (LEAL, 2018, p. 145).

From the above, the so-called process/decision/structural measure, although it seeks in its essence the protection of very sensitive rights, notably fundamental rights constitutionally guaranteed, is in fact an authoritarian discourse, since the center of what is proposed is the decision of the judge, characterized as a logical and direct result of judicial activism.

As already described in this work, the structural process is made possible by the gradual implementation of judicial decisions, so that as the judicial decision is put into practice it will have the exact notion of eventual problems that arise, opening itself to the verification of eventual other impositions that the case may require.

In the words of Sérgio Cruz Arenhart, it will be the complexity of the cause that, commonly, will imply the need to try various solutions to the problem presented in court, so that this 'trial-right' technique will allow the selection of the best technique and the search for an optimized result (ARENHART, 2013, p. 394).

The lack of commitment to the structural process as presented by the doctrine is criticized, especially in view of its emphasis on judicial protagonism combined with the lack of critical-argumentative openness to interested parties.

However, without trying to exhaust the possibilities of discussion on the subject, it is possible to conjecture such an ideology from the perspective of democratic processuality, resignifying the structural process based on the principiological conception brought by the neo-institutionalist theory of the process.

5 CONCLUSIONS

Thus, the realization of a public policy, the implementation of a fundamental right, or even the resolution of complex or 'radiated diffusion' disputes, both in the judicial and administrative spheres, must be effected through a procedurality, which is based on the principles of contradiction-life-, broad defense-freedom and isonomy-dignity, in which an open space is created for the democratic participation of all interested parties, who thus proclaim themselves.

The process, therefore, as a facilitator of a 'critical argumentative opening', should make it possible for the interested parties (self-includers) to effectively debate the contents of state

decisions when producing them, thus making it possible for them to enunciate meanings that will truly be taken into account by the judgment.

Thus, to speak of structural processes from the perspective of democratic processuality means to remove the emphasis from judicial protagonism, in order to opportunize to the legitimized broad dialogical openness in the construction of structured decisions. Let us say decisions because, due to the complexity of the demands, the parties will arrive at a first decision, which cannot be definitive, since the meanings enunciated and debated there will be put to the test, since they cannot be considered as dogmas, being then possible to rediscuss them as the needs arise, to provide a series of decisions in the best interest of the legitimate.

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