THE FOUNDATION OF DECISIONS AND THEORY OF LEGAL ARGUMENTATION TO THE BURDEN OF PROOF'S DYNAMIZATION: THE CPC/2015 AND THE SEARCH FOR A CONSTITUTIONALIZED PROCESS

DA FUNDAMENTAÇÃO DAS DECISÕES E TEORIA DA ARGUMENTAÇÃO JURÍDICA À DINAMIZAÇÃO DO ÔNUS DA PROVA: O CPC/2015 E A BUSCA DE UM PROCESSO CONSTITUCIONALIZADO

Victoria Santos Marques[1]
Eduardo Cambi[2]
Jaime Domingues Brito[3]

ABSTRACT

The article aims to analyze the duty and right of judicial reasoning, to which the theory of legal argumentation contributes, as well as the system of distribution of the burden of proof brought by the Code of Civil Procedure of 2015, to ensure the constitutional guarantee to an adequate and effective judicial protection. It was found, through the deductive method, that the judge should legitimize his argumentation, granting material isonomy to the litigants regarding the production of proof, allowing procedural cooperation to lead the process. The

1 Lawyer. Master's student in Legal Science in the research line Political Function of Law by the State University of Northern Parana (UENP). Scholarship from CAPES and Fundacao Araucaria. Graduated in Law at the State University of Northern Parana (UENP). Participates in the Research Group State Intervention in the Lives of Persons (INTERVEPES). Experience researching in the areas of Civil Law, Civil Procedural Law, Constitutional Law, and Human and Fundamental Rights, with emphasis on issues related to Education. ORCID: http://orcid.org/0000-0001-8420-8412.

2 Master and PhD in Law by the Federal University of Parana (UFPR). Post-doctoral researcher at Univesità degli Studi di Pavia. Professor at the State University of Northern Parana (UENP). Prosecutor in the State of Parana. Advisor to the Attorney General's Office. Coordinator of the Higher School of the Public Prosecutor's Office of Parana. Member of Parana Academy of Legal Letters. ORCID: https://orcid.org/0000-0003-4944-1256.

3 Professor in the law courses of the State University of Northern Paraná (UENP) since 1987, where he is a member of the Undergraduate, Master's, and Doctorate studies. He also teaches in the Specialization Course of Civil Law and Civil Procedure of the Institute of Constitutional Law and Citizenship (IDCC), Londrina, PR. In addition to dedicating himself to the study of Civil Law, he also researches Constitutional Law and Civil Procedural Law. His studies and reflections include subjects related to the following topics: the defects of legal business; prescription and decay; the repair of material and immaterial damage; the principle of the dignity of the human person in the 1988 Constitution. He has also investigated issues related to Bioethics and Biolaw, as well as methods for the use of precedents in the Brazilian legal system. Coordinates, together with the State University of Northern Parana (UENP), the Research Group Entitled "Fundamental rights and the Brazilian system of precedents". Lawyer. ORCID: https://orcid.org/0000-0002-5461-8514.

How to quote this article:/*Como citar esse artigo:*
MARQUES, Vitória Santos; CAMBI, Eduardo; BRITO, Jaime Domingues. From judicial reasoning and the theory of legal argumentation to the dynamization of the burden of proof: the Code of Civil Procedure of 2015 and the search for a constitutionalized process. Journal Meritum, Belo Horizonte, vol. 16, n. 1, p. 9, 2021. DOI: https://doi.org/ 10.46560/meritum.v16i1.8442.

research contributes to the areas of Constitutional Law, Human and Fundamental Rights, General Theory of Process, and Civil Procedural Law.

Keywords: judicial decision; judicial reasoning; argumentative discourse; burden of proof; procedural cooperation.

RESUMO

O artigo objetiva analisar o dever e direito de fundamentação das decisões judiciais, no que a teoria da argumentação jurídica contribui nesse ponto, bem como o sistema de distribuição do ônus da prova trazido pelo CPC/2015, como forma de assegurar a garantia constitucional a uma tutela jurisdicional adequada e efetiva. Por meio do método dedutivo, constatou-se que o juiz deve legitimar a sua argumentação, conferindo isonomia material aos litigantes no que concerne à produção probatória, pautando-se o processo na cooperação processual. A pesquisa contribui nas áreas do Direito Constitucional, Direitos Humanos e Fundamentais, Teoria Geral do Processo e Direito Processual Civil.

Palavras-chave: *decisão judicial; motivação das decisões; discurso argumentativo; ônus probatório; cooperação processual.*

1. INTRODUCTION

The Code of Civil Procedure of 2015 (referred to as CPC/2015) brought important progress, such as the attempt to provide judicial relief within a reasonable time, legal certainty as a guarantee for citizens, and greater democratization of the process itself to the litigant parties, who collaborate with the judicial body in the best way to resolve the conflict. What CPC/2015 aims at is making the proceedings more efficient.

Such a goal can be achieved by fostering dispute settlement techniques, the precedent approach, and the prohibition of surprising decisions. The judge's duty of reasoning is also highlighted, which is an issue that has increasingly been discussed nowadays since it aims to protect the integrity of judicial pronouncement, legal certainty, and human dignity. In addition, the CPC/2015 brought changes to the general theory of the proof, innovating by contemplating the possibility of dynamic distribution of the burden of proof, despite the previous model of static distribution of CPC/1973.

This article intends to deal with the duty of judicial reasoning and the theory of legal argumentation, as well as the change in the way of facing the burden of proof under the light of the CPC/2015, searching for an interpretation under the values and rules established by the Federal Constitution. The research problem that this study intends to meet is: how can the theory of legal argumentation, along with the duty to rationalize decisions and the distribution of the burden of proof, contribute to the magistrate's activity to reach a constitutionalized civil process?

The text was divided into three parts. The first of them presents a brief explanation of the innovations brought by CPC/2015 so that judicial relief is provided adequately and effectively. The second part discusses the theory of legal argumentation and judicial reasoning as a rational demand of the Democratic State of Law, reflecting on when a judicial pronouncement should be considered properly reasoned. The third and final part provides statistical evidence and the dynamic distribution of the burden of proof as instruments capable of validating a process based

on constitutional principles. It is concluded that the mechanisms brought by the CPC/2015 are increasingly based on procedural democratization and cooperation, and the judge, when deciding, must support his decision with appropriate rationality, distributing the burden of proof according to the peculiarities of each case.

The scientific method used for the preparation of this article was the deductive one, through a documentary explanation, with data collection and analysis of its significance, from bibliographic research, readings of doctrinal works, other scientific articles, legal journals, and other texts and materials, including the analysis of the national legislation. The research, therefore, suits the areas of Constitutional Law, Human and Fundamental Rights, General Process Theory, and Civil Procedural Law.

2. THE INNOVATIONS OF CPC/2015 FOR ADEQUATE AND EFFECTIVE JUDICIAL RELIEF: THE SEARCH FOR JUDICIAL DECISION REASONING

The constitutionalization of the civil procedure is the methodological and interpretative bias for the understanding of CPC/15, according to which the judicial procedure must be analyzed as an instrument of the effectiveness of constitutional values (NERY JÚNIOR, 1996, p. 19). Being hierarchically superior, the constitutional rules are those to which all others must adapt, including procedural norms (REALE, 2002, p. 343).

According to Article 1 of the CPC/2015, it is possible to observe that the procedural reform had the scope of organizing the civil procedure. The judicial activity was adapted to the current needs, being the magistrate's responsibility, after analyzing the peculiarities of each specific case, to address the meaning of the norm in the light of the Constitution, emphasizing fundamental rights and guarantees (CRUZ; CRUZ, 2010, p. 03-09).

In addition, the CPC/2015 created its mechanisms for the implementation of procedural safeguards, such as the establishment of the essential elements of the judgment, the primacy of the judgment upon the merits, the parity of treatment between the disputing parties, the need to state reasons for judicial decisions, and the prohibition of surprising decisions, which allowed the full defense led to the due legal process effectiveness, and generated, as a consequence, greater democratization of the procedure (ASSAF FILHO, 2015, p. 02). The encouragement of dispute settlement methods reinforced the participation of the population in the exercise of power, making the parties protagonists in the solution of conflicts (TRIGUEIRO; BORGES, 2019, p. 321).

This democratic view is closely linked to the realization of the Democratic Rule of Law (art. 1, *caput*, CF/88), by encouraging popular participation in the exercise of jurisdictional function (SILVA; NEVES, 2017, p. 100). Contemporary democracy is characterized by a broad context of institutional guarantees in which fundamental rights can be rendered effective (ALVES, 2014, p. 37-38).

The search for providing successful judicial relief within a reasonable period is aimed at ensuring means and results. This perspective binds the legislator and limits their performance,

guiding the regulation of procedural rules in a way the Federal Constitution can be ensured to the greatest extent possible (CAMBI, 2020, p. 302-304). Contemporary civil proceedings must seek the achievement of material law's aspirations, in particular the fundamental rights (ZOLLINGER, 2005, p. 121), and it must not raise unreasonable obstacles against justice attainment.

However, for fundamental rights to be guaranteed and concretely satisfied, it is necessary to draft appropriate techniques to ensure the maximum degree of effectiveness. At the level of constitutional jurisdiction, judges are not only subject to laws, but also the critical analysis of their meaning, as a means of controlling constitutional legitimacy (CAMBI, 2020, p. 302-303). After all, it is of no use for anyone to hold a material right if there is no right to the necessary process that shall ensure its effectiveness (CAMBI, 2020, p. 305).

As fundamental rights do not operate automatically, all involved parties in the proceedings shall participate: the judge must support their decisions; on the other hand, to achieve a fair decision, the parties need to cooperate (MITIDIERO, 2009, p. 140).

Article 93, IX of the Federal Constitution of 88 establishes that the complementary law edited by the Supreme Court shall issue the Statute of the Judiciary, binding it to a list of guiding principles, among which, that "all judgments rendered by the Judiciary shall be public, *and all decisions shall be reasoned*, under penalty of nullity" (BRASIL, 1988, online, bold added). This fundamental guarantee is corroborated by article 11 of the CPC/2015. Furthermore, article 20 of the Law on Introduction to the Rules of Brazilian Law (Decree-Law No. 4,657/1942) establishes that all decisions, whether from the administrative, controlling, or judicial spheres, must be public and reasoned, all practical consequences considered, and prohibits abstract legal values to support them (CAMBI, 2020, p. 447-448). The broad publicity of judicial decisions can be restricted when the protection of fundamental rights to privacy and advertising is recommended, limiting the debate to the parties, their lawyers, public defenders, and District Attorney's Office members.

Even in these cases, any judicial decision must be reasoned and explained in a clear, express, and consistent way. Also, the reasons of fact and law that led to such understanding, as well as the merits or procedural obstacles that would have prevented the analysis shall be described. All this is so that the judicial activity is transparent, allowing its control, so that the parties and third parties can understand the decision and, if applicable, challenge it (TALAMINI; WAMBIER, 2014, p. 73).

In addition to enabling the decision to be appealed, the reasoning is a means of preventing the judge from deciding based on personal impressions, which would give room for arbitrariness. By rendering a reasoned decision, the magistrate is observing the duty of cooperation towards the parties (article 6 CPC/2015), to which the civil procedural legislator attributed strong relevance. Also, to prevent the parties from being taken by surprise, the judge must ensure the right of both parties to be heard, if new and relevant circumstances arise (supervening facts or rights, for example), or if absolute nullities are found, as established by article 10 of the CPC/2015, which is the fundamental rule of civil proceedings and is bound to the principle that prohibits surprising decisions (BRASIL, 2015, online).

> [...] According to the traditional line of thought, judicial reasoning was seen as a guarantee of the parties, and the possibility of their challenge for reform was safeguarded. This used to be the only time in which procedural laws commonly ensured the need for supporting decisions [...]. In modern times*, the political* function of judicial reasoning was highlighted, which affects not only

> the parties and the competent magistrate to judge appeals, *but any person,* to specifically assess the impartiality of the judge and the legality and fairness of the decisions (CINTRA; GRINOVER; DINAMARCO, 2015, p. 92, authors' griffins).

The absence of reasoning violates the due process of law, so the judge shall carefully present support to every rendered decision. Article 489, § 1, of the CPC/2015 lists the occasions in which the reasons are not considered to have been given in any judicial ruling.

The CPC/15 adopted the mitigated principle of complete judicial reasoning, by establishing that a decision that does not face all the arguments opposed by the parties is not properly reasoned (CAMBI, 2020, p. 426). This principle, however, does not require the judge to face every request filed by the parties. When one plea is sufficient to determine the granting or denial of the claim, there is no reason for the magistrate to examine any other legal grounds that might have been presented (CAMBI, 2020, p. 428).

This means that the judge must examine all arguments of fact and law presented by the parties that are objectively capable of altering the outcome of the case. The evidence shall be indicated, and the interpretation used must be made clear. Not all questions raised shall be answered: irrelevant and impertinent arguments shall be discredited. If the magistrate focuses on the main allegations, the most relevant evidence, and the law applied to the specific case, the decision shall be properly motivated (RODAS, 2015, online). Moreover, if there is no need to produce further evidence, providing proper reasoning, the judge may enter a summary judgment upon the merits, following article 355, I, CPC (BRASIL, 2015, online).

> The duty of judicial reasoning: a) is a guarantee against the arbitrary exercise of power; b) serves as a guarantee against the influence of personal points of view (subjectivism); c) enables the parties to know the grounds of the decision, being a form of objection and a way of controlling the magistrate's reasoning; d) contributes to a greater degree of predictability and certainty of legal standards (CAMBI, 2020, p. 428-429).

The Democratic Rule of Law requires the judge to motivate its decisions so that there is no room for the magistrate's intimate conviction. When there are rational arguments, they justify the decision themselves, it becomes unnecessary that the magistrate convinces the parties or public opinion of their "right". To avoid the arbitrary exercise of power, the judge must not lose the dimension of objectively achievable procedural truth. It is known that the human perspective of the truth is imperfect and incomplete. The search for it, however, shall not be discredited (CAMBI, 2020, p. 417).

The truth is a "political value that cannot be renounced in democratic societies" (CAMBI, 2020, p. 424), the goal of every proceeding, a crucial element for judicial reasoning, and an outcome from the evidence filed into the records. A fact is considered true if it is confirmed by the evidence produced in the process (CAMBI, 2020, p. 423).

The obligation to state reasons is taken seriously when the judge motivates both legal and factual matters. The fictitious reasoning - in which there is no justification regarding the factual matters or the ones considered legally irrelevant - must be prevented. The fight against the arbitrary exercise of power must be carried out by avoiding legal discourses based on judicial subjectivism, which are manifested through decisions without any motivation or that present fictitious motivation (CAMBI, 2020, p. 424-425).

MERITUM LAW JOURNAL • v.16 • n.1 • p. 9-28 • Jan. - Apr. 2021

> [...] the risk of judicial omnipotence is not waived by simply using the principle of rational persuasion of the judge and respecting constitutional principles and guarantees. The judicial body, by justifying a certain view of the facts, based on vague and undefined criteria, cannot benefit from purely rhetorical formulas, devoid of content, by alluding, for example, to “material truth”, “moral proof”, “moral certainty”, “prudent appreciation”, or “intimate conviction”. Such expressions, and other similar ones, allow subjectivism and semantic manipulation to take place because they do not guarantee any rationality in the evidence analysis, as well as imply false motivation of the decision. Also, they prevent society’s effective control of judicial activity, the ones submitted to the jurisdiction and the higher instance (CAMBI, 2020, p. 425).

Judicial decisions need to be socially legitimized. Politically outrageous decisions do not result in the judge’s replacement; however, they generate the discredit of legal institutions and law enforcement processes, which is catastrophic to society, which becomes unstable and less cohesive (CAMBI, 2020, p. 424). It should be noted that the duty of motivation is even more complex when said sufficiently motivated decisions are questioned.

It is not possible to state what a rightful decision is without talking about the problem of infinite regress since reasoning is an exercise that can be done indefinitely, with an unlimited series of arguments that may be challenged (CAMBI, 2020, p. 428).

> It is impossible to conceive of a situation that is well-founded in all its aspects. This, however, does not preclude the possibility of judicial reasoning. It does not discard the need to rationally seek the best arguments [...] it is a commandment of optimization or a principle that must be fulfilled to the best extent possible [...] Considering article 93, IX, of the Federal Constitution of 1988 a principle means saying that it must be obeyed according to the weighting of other values in conflict (legal limits) and the available factual possibilities (factual limits) ... the reasoning of the decisions necessarily passes through all the relevant legal facts for the solution of the case (CAMBI, 2020, p. 428-429).

The judge, when analyzing the facts that are relevant and relevant, fulfills a dual function: considering proven the facts that correspond to the facts narrated in the case records and analyzing these same facts in the light of the legal system, framing them within the principles and rules. However, it is not enough to address the fact as relevant: the magistrate must say why it is considered that way without clouding the merits’ judgment with personal knowledge (except when this is legally allowed).

In order to comply with the principle of impartiality, the judge must not hold prior knowledge of the facts at issue (CAMBI, 2020, p. 430-431). Also, for reasoning a decision it is not enough to merely depict the event. For example, a fabricated photograph can cause the same visual stimulus as a real one. For this reason, the judge should qualify the described event as being an accurate and factual representation (CAMBI, 2020, p. 432).

> The procedural narrative to be sought by the judge lies in the reconstruction of the legally relevant events as well as those that may be pertinent to the judgment of the case; it must be true, even if it is not good [...] Since the lawyer does not have a duty to seek the truth since they are hired to defend the client’s interests, they must present the most persuasive narrative. Thus, their narrative needs to be good, even if it is not true. This may be enough to win the case (especially when it comes to trial by the Jury Court, where jurors [...] are not submitted to the duty to motivate their decision). On the other hand,

> the judge, because of their impartiality, has the primary function of seeking the true narrative, that is, adequately reconstructing the facts, even if these are not transcribed in a good way. Good narratives that included false statements and private facts of evidential support, led to erroneous, biased, and unfair decisions. Ideally, the judge should produce good and true narratives, but if the first ones are not achievable, the second ones must be sought (CAMBI, 2020, p. 432-433).

When deciding the case and applying the law, the judge must consider rules, principles, values, and facts. Since a rule may carry several meanings when objectively interpreted, the magistrate builds the decision. The outcome of the court decision for the specific case is a legal standard.

The judge starts from an issue presented by the parties and operates guided by a "pre-understanding" of both existential reality and the text to be interpreted (CAMBI, 2020, p. 433-434).

> Supporting that article 93, IX of the Federal Constitution of 1988 should be understood as a principle means determining its application as far as possible. This conception allows working around the problem of infinite regress since there is no natural end to the chain of possible arguments as the possibility of new information and better arguments to be added cannot be excluded. However, to avoid an endless process of argumentation, with the impossibility of obtaining a "single correct decision", it is necessary to draw a boundary line (CAMBI, 2020, p. 437).

The judge must also explain the relevance of the presented evidence, indicating the reasons for assessing it in such a way. Therefore, although weighing the elements of evidence is typically an act that is not bound to any specific legal rule, the judge's conviction is not entirely free, as it subjects to logical and rational criteria of decisional control. This is done so that the personal and intimate criteria of the judge are reduced, and objective guidelines for a logical and rational evaluation are established (CAMBI, 2020, p. 435).

The proper motivation delivers sufficient justifications regarding the factual and legal matters and is based on good arguments not only for the judge who renders the decision but for all those who can later weigh the reasons for such understanding. The good judge manages to persuade the legal community, supporting every rendered order after considering the relevant points for the conflict solution, in addition to observing the same line of thought in related cases (CAMBI, 2020, p. 437-438).

The law must be constantly interpreted and reinterpreted, and the judicial decisions must be well-reasoned to ensure that there is no arbitrariness and that the parties have the real dimension of the meaning attributed by the Judiciary to the rights discussed in the case. The duty of judicial reasoning, therefore, exercises an intraprocedural function, in seeking to convince the parties of the reasons that generated the magistrate's understanding, which facilitates the challenge of the decision through appeal (the party knows the reasons that should be challenged). It also holds the extra procedural function of serving as a mechanism of democratic control of the power exercise. The motivation interests the succumbing party more than the prevailing one because the losing side needs to seek comfort and clarification in the court decision. Finally, the reasons stated are addressed to society in general, which has the right to acknowledge the arguments leading to the final understanding to exercise citizenship and social control of judicial power (CAMBI, 2020, p. 439).

> [...] It is not any decision that should be accepted socially as a form of exercise of power. One must therefore seek the social legitimacy of the judicial decision, and the judge cannot hide behind the supposed neutrality of the rule. Realizing fundamental rights is not the same as turning judges into legislators. Therefore, in addition to principles and rules, there must be a theory of legal argumentation, in which it is possible to seek a rationally reasoned decision (CAMBI, 2020, p. 439-440).

It should be stressed that, although the judge has the legal responsibility to motivate decisions, all the involved parties in the case must abide by the principle of procedural cooperation and provide legal arguments for their statements and claims. This allows a more adequate, quick, and effective judicial relief, with the distribution of justice and reduction of cases and appeals that hold the sole purpose of delaying the proceedings.

The correct argument leads to the appropriate reasoning, in so far as it contributes to legal certainty, the promotion of the procedural economy, and the intervention of the judiciary only in cases in which such pronouncement is required.

3. THE THEORY OF LEGAL ARGUMENTATION AND THE MOTIVATION OF DECISIONS AS A RATIONAL REQUIREMENT OF THE DEMOCRATIC RULE OF LAW

As for the rationality and righteousness of judicial decisions, the theory of legal argumentation is a great tool of neo constitutionalism, which is a methodology inspired by a post-positivist conception, based on the qualification of rules and their distinction of principles. According to this theory, the law cannot be studied as a finished product, created by legislative action, and should be seen as a process at the end of which a judicial decision is rendered. This is done not only through the analysis of traditional legal aspects, but also through information from other sciences, such as Politics, Philosophy, Sociology, Language Theory, etc. The principles hold a position of relevance, for they are considered fundamental norms that operationalize the effectiveness of constitutional standards (DORICO, 2013, online).

> [...] Both rules and principles are norms because they both say what should be. Both can be formulated using basic deontic expressions of duty, permission, and prohibition. Principles, like rules, are, reasons to legitimize judgments, even if of a very different species. The distinction between rules and principles is therefore a distinction between two species of standards (ALEXY, 2011, p. 87).

The existence and effectiveness of the facts depend on the legal argumentation. The judge shall decide which arguments are relevant to the settlement of the conflict. To do so, the magistrate must be based on axiological parameters offered by legal principles and rules, when selecting events within the spheres of interests protected by the legal system (CAMBI, 2020, p. 422).

In legal argumentation, legal discourses relate to internal and external justification. In the internal justification, which implies the logical control of the decision, what is sought is whether the predetermined forms were observed. The internal logic seeks to present the premises that

MERITUM LAW JOURNAL • v.16 • n.1 • p. 9-28 • Jan. - Apr. 2021

must be externally justified, avoiding the hidden reasons on which the decision is based, and which may be challenged and criticized by the interested parties. Internal justification requires the interpreter to use the general rules, contributing to the standardization, legal certainty, and fairness of the decision. External justification, on the other hand, is concerned with the social dimension of the decision and is based on empirical argumentation, interpretation, dogmatics, the use of judicial precedents, and general practical argumentation (CAMBI, 2020, p. 440-441).

> In summary, in legal argumentation, one can distinguish between internal and external justification. The first one concerns the discipline of the rules and the authority (competence) of the interpretive authority [...] External justification, on the other hand, does not concern logical-deductive principles, but rational acceptability, which is the acceptability of the premises of internal justification. Therefore, it is focused on the problem of correction or righteousness of the decision; from teleological, moral, political, or other points of view, which compose the rational acceptability of the decision-making act (CAMBI, 2020, p. 441).

Regarding the argument that legal reasoning should be shown as a *practical argumentation*, Neil MacCormick points out that the first is a branch of the second and consists of *the application of reason* by human beings to decide what is the correct way to behave in situations where there is choice (MACCORMICK, 2006, p. 07, bold added). And he states:[4]

> A system of positive law, in particular the law of a modern State, encompasses an attempt to consolidate broad principles of conduct in the form of relatively stable, clear, detailed, and objectively understandable standards, as well as to provide an acceptable and inspiring process of interpersonal trust to make those standards in force ... Consequently, the logic of application of the norm is the central logic of law within the modern paradigm of legal rationality under the mantle of the "rule of law". Perhaps, to the disappointment of important theorists, this logic is in fact, relatively simple and direct. The simple but much-criticized formula "N+F=C" or "Rule plus fact generate conclusion" is the essential truth (MACCORMICK, 2006, p. 08).

According to Alexy, every dogmatic declaration put in doubt must be substantiated by the use of at least one practical argument of the general type. He believes that every dogmatic statement must face systematic proof, in both strict and broad senses. If dogmatic arguments are possible, they should be used (2011, p. 292).

Formerly, the law used to be enforced through the strength of weapons. Nowadays, such enforcement comes from purely linguistic resources, so legal arguments are instruments of persuasion to convince the magistrate who will render the judgment. For this reason, legal certainty is seen as an indispensable value of contemporary societies, for generating stability (decisions cannot be arbitrarily altered), and predictability (for requiring certainty and calculation on the part of citizens to the legal effects of normative acts, addressing reliability to the order) (CAMBI, 2020, p. 441-442).

> Legal certainty is an instrument through which the values of freedom, equality, and dignity may be achieved: i) freedom because the greater the citizen's material and intellectual access to the legal standards they must obey, the greater the conditions for them to conceive the present and plan the future; ii) equality, because the more general and abstract the norms, and the more

4 Said author, in the preamble of the work *Legal argumentation and theory of law,* states that despite several researchers defend that the law grants space to deductive reasoning or even logic, he is convinced that a form of deductive reasoning is essential for legal argumentation, not meaning, therefore, that legal argumentation is exclusively deductive, so much so that it takes care, in the work, to rethink the elements of legal argumentation that are not deductive.

> uniformly they are applied, the greater the isonomic treatment among citizens; iii) of dignity, because the more accessible and stable the standards, as well as more reasonably applied, the greater the citizen's ability to define themselves with autonomy. The legal uncertainty generated by the instability in judicial decisions is a stimulus to procedural adventures and even to the abuse of procedural law, besides meaning a factor that inhibits the observance of spontaneous compliance with obligations in the field of material law (CAMBI, 2020, p. 442).

Ensuring legal certainty through the issuance of rational correction judgments about the decisions that are interpreted is a precondition of the very legitimacy of the exercise of power. The court decision must be properly motivated, depending on a formally valid legal order, which must also be rational and fair. A decision based on an incorrect or irrational law, even if it is valid on a formal level, is flawed because it denies rationality and justice. For example, if a victim of unemployment is sentenced to prison for the criminal misdemeanor of loitering (article 59 of Decree-Law 3.688/1941), even if the decision is based on formally valid law, it is not correct, because the law is unfair, contrary to human dignity. Thus, there are ethical, political, and legal values that transcend the rules of law and guarantee their legitimacy, which must be respected by judges (CAMBI, 2020, p. 442-443).

The legal standard must be understood in the text and the act. The "living right" results from legal argumentation and the interpretation of the order necessary for the enforcement of rights, more than from the rules themselves. Tradition is a mere starting point for judicial decisions to be legitimized. An argument so far accepted by the community cannot be set aside without a justification or a stronger argument (CAMBI, 2020, p. 443-444).

> In the theory of legal argumentation, the foundation of the rules of discourse (discourse theory) is a procedural theory of practical correction. A standard will be correct and, thus, valid, when it can be the result of a procedure, that is, a rational practical discourse. The common point of legal discourse and general practical discourse is that the two forms of discourse are concerned with the correction of normative statements. Legal discourse is a special case of general practical discourse because the legal basis falls on practical issues, which concern what is ordered, prohibited, and allowed. This is a special case because the legal argument is restricted by a series of restrictive conditions, summarized in the subjection to laws, judicial precedents, legal dogmatics, and limitations imposed by procedural rules (CAMBI, 2020, p. 444-445).

In this sense, for example, it is debatable the validity of letters psychographed by mediums filed into the case records. Denying such evidence under the argument that the State is secular is invalid since if there is no official religion, all of them shall be admitted. The problem lies in the absence of logical arguments to control the discursive rationality of the evidence, which makes it impossible to exercise the right to be heard and the due legal process. The credibility of these letters must be analyzed by authenticity and veracity: authenticity can be proven by the signature of the dead person, whose spirit communicates with the medium; veracity is more difficult to prove, because it depends on the belief of each one, in the suitability and reliability of the medium. Because it depends solely on faith, the psychographed letter cannot be used as the only means of proof, since the judge's conviction must be rationally motivated, by 93, item IX, of CF/88, and article 371 of CPC/2015. Such a document, however, can be used in the Jury Court (jurors do not need to substantiate their understanding, it may be intimate). However, the decision rendered by the Sentencing Council may be annulled if it is clear that the conviction of the jurors contradicted the evidence in the file, according to article 593 of the Code of Criminal

Procedure. It turns out that a conviction based solely on the psychographed letter and which distinguishes from the evidentiary set cannot produce valid legal effects. Therefore, the judge's conviction should be built on real-life data, and not only on faith (CAMBI, 2020, p. 445-446).

Finally, it should be stressed that the collision of fundamental rights makes the motivation of judicial decisions rather complex since it requires the harmonization of principles for the solution of the specific conflict. According to article 489, § 2, of the CPC/2015, if there is a collision between legal norms, the magistrate must motivate the object and the weighing criteria applied, indicating the reasons for removing a certain norm and the technical premises that underlie the conclusion (CAMBI, 2020, p. 446).

The theory of legal discourse establishes criteria for discussion and judgment, but it is not flawless. It simply shows that it is possible to deduce rational arguments about rights. Legal argumentation is conditioned to the public to which it is addressed, it depends on the time and place, on the levels and environments of understanding, involving communication and understanding of the message. Thus, it is not argued permanently, with no infallible solutions to practical problems (CAMBI, 2020, p. 446-447).

> Judges must take the Constitution seriously, not allowing fundamental rights to become unfulfilled constitutional promises ... they must base their decisions on objective legal standards, without, debuting, acting arbitrarily or may put themselves in the place of legislators [...] the judicial body, especially in the imposition of public policies, must assess the consequences of its decision for the Democratic Rule of Law, for public order, for the economy, for the exercise of citizenship and, finally, for social well-being (CAMBI, 2020, p. 447).

Legal problems should be addressed according to the effects of the proposed solutions, in the short or long term, for individuals or the system. Interpreting is considering the consequences of alternative solutions, and choosing the one that confers greater effectiveness to constitutional principles, especially the ones linked to human dignity This is corroborated by article 8 of the CPC/2015, which determines that the judge promotes this value in the application of the legal system (CAMBI, 2020, p. 447-448).

The judge's job is to realize the constitutional duty to an adequate and legitimate basis for judicial decisions, which must be rational, predictable, accessible, and controllable, instead of arbitrary, discretionary, solipsistic, subjective, superficial, and unpredictable reasoning. However, to be effective, the judicial decision must be based on a rational perspective, with the weighting of principles for the solution of difficult cases, which is defended by the theory of legal argumentation.

4. THE STATISTICAL TESTS AND THE DYNAMIC DISTRIBUTION OF THE BURDEN OF PROOF AS COROLLARY OF THE CONSTITUTIONALIZED PROCESS

A criticism addressed to judges when they enforce fundamental and social rights or control public policies, is that of the credibility of the sources of information they use to judge. It is known that normative theories of fundamental rights lack rigor and knowledge, because they

address complex problems, making use of vague and imprecise terms. For decisions to be properly motivated, scientific information and evidence are needed to clarify the consequences that involve economic, social, and cultural rights. Such information, to be reliable, should indicate the context to be influenced by the decision (CAMBI, 2020, p. 448-449).

> The Model Code of Collective Procedures for Ibero-America, in the caput of article 12, asserts that "all means of proof are permissible in court, provided that they are obtained by lawful means, including statistical or sampling evidence". Such evidence, even if it is not legally regulated in the Brazilian legal system, is admissible and should be considered atypical evidence, under Art. 369 of the NCPC. Its admissibility also stems from the fundamental right to adequate and effective judicial protection (Art. 5, XXXV, CF/1998), from which the need to construct procedural techniques capable of protecting the violated material rights (CAMBI, 2020, p. 449) arises.

The statistical evidence, which has still very controversial use, indicates, probabilistically, the scientific data that is relevant to a statement referring to specific facts that need to be proven. This does not mean that low probability waives the credibility of certain data and the validity of information for certain contexts: it all depends on the scientific accuracy of the information. The great danger is linked to the use of unjustified, unverified, or unfounded data. Statistical quantifications without scientific criteria, wrong or invented, influence the generalization of false, vague, and misleading premises that cover prejudices of race, gender, nationality, sexual orientation, etc., preventing the fact from being discovered and justice from being promoted, contrary to what the Democratic State of Law proposes (CAMBI, 2020, p. 449-451).

Nevertheless, statistical proof can be very useful for the protection of the fundamental social rights of the community, especially the protection of the existential minimum, since such rights have costs that vary according to the personal condition of each one, and statistical planning is necessary for the provision of the service. For example, from lists prepared by the Guardianship Council, it can be verified the number of mothers who have small children and who need to work, and which region of the city needs greater investments in the construction of daycare centers (CAMBI, 2020, p. 453-454).

> [...] The statistical test is very useful in monitoring the application of the postulate of the progressive development of fundamental rights. The realization of statistics is indispensable to measuring the meaning and effectiveness of public policy [...] This control allows us to know whether public policies, aimed at the realization of fundamental social rights, are adequate, sufficient, and capable of fully realizing the rights provided for in the Constitution. They also allow the comparison of budget percentages destined for the realization of fundamental social rights with other public expenditures, considered socially less relevant. Moreover, the evidential use of statistical data may be the starting point for the development of techniques for distributing the burden of proof that promotes the fundamental right to adequate judicial protection, avoiding the rights that require greater evidential complexity to perish (CAMBI, 2020, p. 454).

So, if used correctly and if sufficiently motivated, statistical proof can have great value in the promotion of fundamental rights, especially those linked to the dignity of the human person. The judge must make use of this type of evidence whenever the case demands to promote an increasingly adequate and effective judicial relief.

Moreover, a correct decision is not that centered solely on the figure of the judge, and there must be the participation of the parties, who must support their allegations with evidence. Such exercise, in addition to being a fundamental right, is also a burden.

> The burden consists in assigning a certain task to a subject in the interest of that subject himself. In other words, the party has prescribed the conduct to be adopted, through which he may obtain an advantage or prevent a situation that is unfavorable to him. Burden and duty are distinct legal figures in at least two aspects: (i) the duty implies a right correlation of another subject, that is, it is a conduct that the law prescribes in the interest of another person, while the burden is established in the interest of the burdened person himself; (ii) failure to comply with the duty may imply the incidence of a sanction, while failure to comply with the burden only causes the party in charge of the task to eventually lose the chance to enjoy a better situation (TALAMINI, 2016, online).

Conceptually, the burden of proof is the attribution, apart from the task of proving the facts that are favorable to you in the process, if the evidence in the file is not sufficient to do so. That is, the burden of proof is indispensable when there is no evidence of a certain claim in the case. If this evidence is already in the process, regardless of who produced it, the rules of the burden of proof are unnecessary, and the judge must recognize the effects it produces, according to the facts to the relevant legal norms (TALAMINI, 2016, online).

Thus, if there is no evidence in the case- law, the institute of the burden of proof must be applied so that the magistrate can resolve the claim, applying the right to the specific case. This is because the process cannot last indefinitely in the search for truth. On the contrary, there must be the swiftest resolution of the case, under penalty of serious affront to the fundamental right to the reasonable duration of the proceedings, to the guarantees of procedural speed and effectiveness. On the other hand, the judge cannot fail to decide on the grounds that he could not form a conviction about the facts of the case (*non liquet* prohibition). And it is, for these hypotheses in which the magistrate has not yet formed his conviction, that the law sets out the rules on distribution of the burden of proof (TALAMINI, 2016, online).

Regarding the distribution of the burden of proof between the parties, the 1973 CPC adopted the static theory. This diploma, based on the liberal-individualistic conception, considered the position of the parties, the interest in the fact to be proven, and the nature of the facts (constitutive, impeditive, modifiable, or extinguishing). There was no concern about the peculiarities of the material right to be protected or with the circumstances of the case under analysis, which was incompatible with the promotion of a collective and democratic process, and with the constitutional precepts themselves (CAMBI, 2020, p. 454-455).

> Article 333 of the CPC-1973 distributed the burden of proof, without taking into account the fundamental right to adequate and effective judicial protection (Art. 5, XXV, CF/1988), in addition to starting from the premise that both litigants were formally in parity of arms and, therefore, were equally able to produce proof [...] the rule of Art. 333 of the CPC-1973 was materially incompatible with the production of evidence in collective proceedings because it jeopardized the effectiveness of the protection of collective material law (CAMBI, 2020, p. 455).

This panorama, however, was altered by CPC/2015 in article 373, § 1, which adopted the theory of dynamic distribution of the burden of proof, surpassing the liberal-patrimonial model of the previous Code. This theory was harmonized with the microsystem of the collective pro-

MERITUM LAW JOURNAL • v.16 • n.1 • p. 9-28 • Jan. - Apr. 2021

cess and became materially compatible with the production of evidence in processes involving homogeneous diffuse, collective, and individual rights (CAMBI, 2020, p. 455-456).

In this sense, Article 373 of the CPC/2015 establishes that the burden of proof will be the author, “as to the constitutive fact of his right”, and to the defendant, “as to the existence of an impediment, modification or extinguishing fact of the author’s right” (items I and II). Paragraph 1 provides that the judge may “assign the burden of proof differently, *provided that* he does so by reasoned decision, in which case he must allow the party to discharge the burden assigned to him”, which will occur both when there are “peculiarities of the cause related to the impossibility or excessive difficulty of fulfilling the burden under the caput or the greater ease of obtaining proof of the fact contrary” as in the other hypotheses provided for by law (BRASIL, 2015, online, our griffin).

It should be emphasized, therefore, that the application of the dynamic distribution of the burden of proof depends on a strictly reasoned decision that justifies the reasons of fact and law, which should be done in the sanitation of the process and never in the judgment, according to article 357, item III, CPC/2015 so that none of the parties are surprised. After all, the surprise undermines the exercise of constitutional guarantees of due process, contradictory and broad defense (CAMBI, 2020, p. 468-469).

The burden of proof is closely linked to the formation of the judge’s conviction. If the magistrate, to decide, goes through a context of discovery, he must have knowledge not only of the object intended in the action, but also which of the litigants have real conditions to clarify it. The requirement of convincing varies according to the situation of the material law, and there is not a single understanding for all concrete situations. Consequently, the burden of proof cannot be seen in the same way, without considering the difficulty of conviction proper to the case analyzed (CAMBI, 2020, p. 461).

Thus, according to the new distribution system, the test is up to those who have greater ease for its realization (either by technical knowledge or by specific information). It cannot be demanded from the Public Prosecutor’s Office, for example, when it filed a public environmental civil action, the burden of proving that the ad party, a company that operates telephone services, generates a risk to the health of the population by building base stations near daycare centers, schools, hospitals, nursing homes, and residences. The exploitative company is the one who must bear that burden. For this reason, the ACP cannot be dismissed for lack of evidence if there is no scientific consensus on the ills that health or the environment can suffer from radiation from telephone antennas. It is verified, thus, that the theory of dynamic distribution of the burden of proof is in line with the environmental principle of precaution (CAMBI, 2020, p. 457).

In the search for truth, the problem of the distribution of the probative burden to the parties is according to the particularities of the concrete case. The burden of proof “will be at odds with the postulates of the process under the aegis of the Democratic State of Law” when it becomes “impossible or extremely difficult to exercise the evidential faculty” (DIAS, 2016, p. 521).

> The New Code of Civil Procedure [...] revolutionizes the evidential treatment, because it breaks with the previous and abstract distribution of the burden of proof, not binding the magistrate to the criteria of the position of the parties in court and the species of facts at issue, recommended by the technique contained in art. 333 of the CPC-1973. On the contrary, it allows the allocation of evidential burdens to take into account the real condition of the parties to

> demonstrate the facts necessary to protect the material law that, given its peculiarities, may require a differentiated procedural technique to adjust the burden of proof to the nature of the intended substantial right. Thus, the NCPC reinforces the use of common sense and the maxims of experience, by recognizing, in the light of the material law discussed, that who must prove it is who is best able to demonstrate the fact at issue, to prevent one of the parties from being inert in the procedural relationship, since the difficulty of proof benefits it (CAMBI, 2020, p. 459).

The application of the theory of dynamic distribution of the burden of proof, to the detriment of the previous static theory, allows the facilitation of evidence for the protection of the legal good without the prior assessment of the judge's pre-established criteria of inversion of the burden (as it occurs in article 6, item VIII, the Consumer Protection Code). However, it is up to the judge, in addition to the cases provided by law, to assign the evidential burden differently when, given the peculiarities of the specific case, there is an impossibility or excessive difficulty in complying with it, and, on the other hand, there is greater ease of obtaining the evidence by the opposing party. With the dynamic distribution, therefore, the judge must pay due to the concrete case, being the manager of the evidence, attributing the burden of its production to those who have better conditions for this (CAMBI, 2020, p. 458-459).

The distribution of the burden of proof, thus, is no longer linked to previous, abstract, and immutable criteria that existed before. The current burden-sharing considers the phatic, axiological, and normative dynamics present in the specific case, to be explored by the judges (CAMBI, 2020, p. 459).

However, an important difference is noted between the rule contained in Article 373, § 1, of the CPC/2015, and that contained in article 6, item VIII, do CDC. This last legal law, based on the fundamental right according to which the State must promote consumer protection (article 5, item XXXII, of CF/88), establishes as a basic right of all consumers "the facilitation *of the defense of their rights, including the reversal of the burden of* proof, in their favor, in civil proceedings, when, at the discretion of the judge, the claim is verifiable or when it is hyposufficient, according to the ordinary rules of experience" (BRASIL, 1990, online, our griffin).

It is denoted that the specificity of reversing the burden of proof, inserted in the microsystem of defense and consumer protection, is justified by its vulnerability to the supply chain, considering that it does not always have the technical knowledge or information necessary to perform the test itself. For this reason, and to ensure that the parties are in a similar position to participate in the process of influencing the conviction of the judge, the reversal of the burden of proof, deferred using adequate reasoning, generates the balance of the parties, avoiding prejudice to the one who cannot prove the constitutive fact of his right, especially when it is found that the adversary is better able to prove the negative fact (DIAS, 2016, p. 522).

However, article 6, VIII of the Consumer Code can only be applied if the consumption ratio is characterized (CAMBI, 2020, p. 461). The increase in the burden of proof, on the contrary, can be applied in any case, not restricted to the common procedure, extending in a superfluous way even to special procedures. For example, the leveling of the evidentiary burden in the Food Law can be used, so that the food user is given the burden of proving his economic and financial conditions while protecting the most vulnerable person from the legal (fed) relationship. This demonstrates that the increase in the burden of proof applies beyond the hypotheses

of consumer relations, concretizing the principles of good faith and procedural cooperation, by ensuring greater equality for the hyposufficient parties (CAMBI, 2020, p. 460).

> The techniques of inversion of the burden of proof are not limited to Art. 6, VIII, of the CDC. The imbalance between the parties is not exclusive to consumer law. Inequalities also need not be economic or financial [...] within the theory of dynamic distribution of the burden of proof, it is sufficient that one of the parties is better able to prove the facts legally relevant and pertinent than the adversary (CAMBI, 2020, p. 468).

However, the mere condition of vulnerability or hyposufficiency is not sufficient for the evidential burden to be reversed or mitigated, and the limits imposed by procedural law must be respected. The dynamic, therefore, is not automatic, depending on the judicial analysis of the circumstances of the specific case. It also cannot be used as a form of prejudgment of the cause (reverse diabolical proof), since the burden of proof cannot be demanded from the opposing party when it is impossible or when it is extremely difficult to discharge it, under Article 373, § 2, of the CPC/2015 (CAMBI, 2020, p. 460).

> One cannot require someone to prove beyond what is within his reach to demonstrate, because this creates a diabolical evidential burden, that is, the extreme difficulty of proving prevents the realization of material rights. As the process is merely an instrument for the realization of material rights, there will be a denial of the fundamental right to adequate judicial protection (Art. 5, XXXV, CF/1998) if, by not formulating procedural techniques, there are no mechanisms for facilitating proof (CAMBI, 2020, p. 468).

In this sense, it is important to emphasize that, despite article 77, item I, the CPC/2015 establishes the duty of all procedural subjects to expose the facts in court according to the truth, this does not require the production of evidence in favor of the opposing party. It is authoritative to require the lawyer to sacrifice his client's interest in seeking justice or obtaining the truth, in the same way, that it is totalitarian to require apart from the duty to affirm everything he knows or to present evidence that is harmful to him (CAMBI, 2020, p. 464).

> The lawyer cannot be required to tell the whole truth to the point of harming his client by contributing arguments and evidence in favor of the opposing party. But professional ethics determines that the defense takes place within the limits of the legal system, and it is required that its action is limited to reasonable moral standards and legal limitations, and the destruction of evidence, misrepresenting or manipulating, cunningly, the facts, or even coerce or bribing witnesses, since the process as a civilizing conquest of the promotion of justice, is not tolerable, cannot allow the purposes (obtaining victory) to justify the means (CAMBI, 2020, p. 466).

The case is not reduced to a game of cleverness, in which the parties and their lawyers can do everything so that their publicist's character is lost, and the judge is reduced to a mere mediator of conflicts, a puppet of the parties in the service of concealment and fraud. This removes society's trust in justice (CAMBI, 2020, p. 466).

> The impersonal search for truth by the judicial body (art. 370 of the NCPC) allows the Judiciary to exercise its role as guardian of the Constitution, not limiting the process to a game of sophistry and trickery because the limitations of human knowledge prevent complete access to the truth of the facts, these obstacles do not imply concluding that the truth should not be pursued or that decisions based entirely on facts can be considered fair. dissociated from the

> reality of life or to legitimize any reconstruction of the legally relevant facts [...] The magistrate cannot be satisfied with purely formal equality between the litigants, having the duty, in directing the proceedings, to ensure equal treatment to the parties and to prevent or suppress any act contrary to the dignity of justice ... Good faith must guide the relationship between the judge and the parties, imposing the reciprocal duty to act within the ethical parameters necessary for the rational and peaceful resolution of conflicts (CAMBI, 2020, p. 466-467).

Therefore, even if it is stated, on the ground of freedom, that the opposing party cannot be obliged to cooperate with the Judiciary in the discovery of the truth, it is possible that techniques of dynamic distribution and reversal of the burden of proof are developed to facilitate the protection of material law. Summary 301 of the Superior Court of Justice, for example, states that the refusal of the alleged father to undergo DNA testing induces a presumption of paternity, which is relative (*Juris tantum*), assuming evidence to the contrary later. This institute, therefore, ensures the right to silence of the defendant, while avoiding that he is benefited from his inertia, since this would result in the loss of the action by the plaintiff, unable to produce proof of the constitutive fact of his right (CAMBI, 2020, p. 467-468).

Finally, it should be noted that despite the great advances in the theory of dynamic distribution, it can still be improved, so that the reversal of the burden of proof is integral and includes the financial burden since it is not reasonable that the party benefited by the institute has to bear the anticipation of expert fees (CAMBI, 2020, p. 463).

It is up to the judge to enhance the procedural dialogue, observing the contradictory, and cannot apply the theory of dynamization to surprise the parties, even if its decision is fair in the specific case. Overcoming the static model of the burden of proof distribution, the process may be an ethical instrument in favor of material equality (CAMBI, 2020, p. 460). Thus, it is verified that the facilitation of the burden of proof, through its dynamic from the CPC/2015, is a form of protection of material law, being directly linked to adequate and effective judicial protection (CAMBI, 2020, p. 462).

The exercise of the fundamental right to proof and the distribution of the burden, through its dynamic and inversion, and provided that the guarantees of the contradictory and the broad defense are respected, directly influence the search for a constitutionally fairer process, as desired by the Democratic State of Law.

5. CONCLUSION

This research approached the decision-making system of the CPC/2015 and the mechanisms that enabled the discussion about productivity, procedural economy and streamlining, and proactivity of the Judge and the litigant parties of the process, in the name of an increasingly adequate and effective judicial relief. The contemporary civil process, based on constitutional rules, must be open to democratization and inclusion through good faith, cooperation between procedural subjects, parity of treatment, full and effective right to defense, among other principles.

An examination of the constitutional duty to render reasoned decisions, which must be observed by the judge, was carried out so that the parties understand what leads to the

declaration of a particular right, which reasons should be debated if an objection is filed, and so that the society has the knowledge and legal certainty regarding the interpretation and application of the law.

Judicial decisions that are properly supported are predictable, accessible, and controllable, based on a rational perspective, with the weighting of principles for the solution of difficult cases, which is defended by the theory of legal argumentation. A sufficiently motivated decision, which has given the parties a prior opportunity to be heard, is a way of ensuring the Democratic Rule of Law in civil proceedings. On the other hand, if the judge does not observe the duty of motivation imposed by the Federal Constitution and the CPC/2015, procedural nullity might arise, which, would represent a major waste of time and money, discrediting the judiciary before society.

The contemporary constitutional judge must be open to dialogue with those under the jurisdiction and committed to solving the case respecting what dictates the politics and the Legislative, through well-reasoned decisions under the laws and the Constitution. This does not mean that the process should be based on judicial protagonism: the parties and other procedural subjects are summoned to dialogue with the State-Judge, to build a collaborative procedure.

The procedure brought by the CPC/2015 is increasingly based on cooperation and democratization for the solution of controversies. The greater the integration between the parties and the more consistent a decision is, the greater the compliance to the law applied, which contributes to the dejudicialization of conflicts, that shall be better solved through dialogue, inclusion, and promotion of peace.

Faced with this new scenario, the role of the Judiciary in conducting the proceedings deviates from the traditional triangular paradigm – parties subordinated to the judge, to open the way to a cooperative model, with parity between litigants and the judge. The judge must weigh the parties' interests, provide clarification, dialogue, anticipate issues, and assist them, granting a fair and effective decision within a reasonable length. Furthermore, by analyzing the specific case and the parties involved in it, the magistrate must verify whether the evidence chosen is sufficient to elucidate the matter.

Therefore, it is up to the judge to verify the sufficiency of the evidence, regardless of who produced it (considering that the produced evidence belongs to the case records instead of the party). In the case of insufficiency, however, the rule of burden gains prominence, because it is from the proof's absence that it is determined who should bear its production. The judge may, depending on each case, comply with the requests of the parties or determine *ex officio* the production of evidence, to make the process efficient.

The reverse onus clause may be applied, whether in a consumerist conflict (when there is a likelihood of the allegations or the technical hyposufficiency of the consumer), or in civil claims, by the dynamic distribution of the burden of proof (when it is impossible or extremely difficult for the interested party to produce the evidence while it is easier for the opponent to do so, or when the law so determines). Such order shall prevail only under reasonable motive, according to the case's peculiarities, to seek the truth.

It is, therefore, necessary to guarantee material isonomy to the litigants, encouraging the right to be heard and procedural cooperation, so that the controversies brought to the judiciary are solved. Civil proceedings must be an instrument of consolidation and effectiveness of

constitutional principles and values, in order not only to grant effective, quick, adequate, and fair judicial relief but also to fulfill the social purpose of the jurisdiction, which is the fair pacification of conflicts.

REFERENCES

ALEXY, Robert. *Theory of Legal Argumentation*. Translation Zilda Hutchinson Schikd Silva. 3rd ed. Rio de Janeiro: Forensics, 2011.

ALVES, Fernando de Brito. *Portuguese democracy: democratic* rhetoric in the Lusophone legal tradition. Rio de Janeiro: Lumen Juris, 2014.

ASSAF SON, Alexander. *The sealing of the surprise decision and the democratization of the contradictory*. Jus Navigandi Magazine, ISSN 1518-4862, Teresina, year 24, n. 5789, 8 May. 2019. Available in: https://jus.com.br/artigos/73774/a-vedacao-a-decisao-surpresa-e-a-democratizacao-do-contraditorio. Accessed: 26 Oct. 2020.

BIANCO, Paolo Roberto de Angelis; MARQUES, Victoria Santos. *The role of the contemporary judge in civil proceedings: from the fundamentality of decisions to the management of the judiciary*. *In*: IX International Symposium on Critical Analysis of Law (SIACRID), 2019. Proceedings of Civil Procedure. Jacarezinho: UENP, 2019. p. 284-301. Available in: http://siacrid.com.br/repositorio/2019/novos-rumos-do-processo-civil.pdf. Access: 18 Mar. 2021.

BRAZIL. Decree-Law No. 3,688 of October 3, 1941. *Criminal Misdemeanors Act*. Available in: http://www.planalto.gov.br/ccivil_03/decreto-lei/Del3688.htm. Accessed: 27 Oct. 2020.

BRAZIL. Decree-Law No. 3,689 of October 3, 1941. *Code of Criminal Procedure*. Available in: http://www.planalto.gov.br/ccivil_03/decreto-lei/del3689compilado.htm. Accessed: 27 Oct. 2020.

BRAZIL. Decree-Law No. 4,657 of September 4, 1942. *Introductory Law to the norms of Brazilian law*. Available in: http://www.planalto.gov.br/ccivil_03/decreto-lei/del4657compilado.htm. Accessed: 27 Oct. 2020.

BRAZIL. *Constitution of the Federative Republic of Brazil.* Brasília, DF: Senado Federal, 1988. Available in: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Accessed: 26 Oct. 2020.

BRAZIL. Law No. 8,078 of September 11, 1990. *Consumer Protection Code.* It provides for consumer protection and provides other measures. Available in: http://www.planalto.gov.br/ccivil_03/leis/l8078compilado.htm. Accessed: 29 Oct. 2020.

BRAZIL. Law No. 13,105 of March 16, 2015. *Code of Civil Procedure.* Available in: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm. Accessed: 26 Oct. 2020.

BRITO, Jaime Domingues; BIANCO, Paolo Roberto de Angelis; MARQUES, Victoria Santos. *Fundamental right to proof and burden of the parties: constitutional aspects and implications from the CPC/2015*. Index Law Journals Journal of Process, Jurisdiction and Effectiveness of Justice, Virtual Meeting, v. 6, n. 2, p. 36-56, Jul/Dez. 2020. Available in: https://indexlaw.org/index.php/revistaprocessojurisdicao/article/view/7172. Access: 18 Mar. 2021.

CAMBI, Eduardo. *Neoconstitutionalism and Neoproceduralism*. Journal of the Graduate Program in Law of the Federal University of Bahia: Tribute to Professor Luiz de Pinho Pedreira, Salvador/BA, v. 2008-2, n. 17, p.93-130, 11 Dec. 2008. Available in: https://vitorfreitas.goias.ufg.br/up/662/o/Eduardo_Cambi_Neoconstitucionalismo_e_Neoprocessualismo.pdf. Accessed: 26 Oct. 2020.

CAMBI, Eduardo. *Neoconstitutionalism and Neoproceduralism:* fundamental rights, public policies and judicial protagonism. 3rd ed. Belo Horizonte, São Paulo: D'Plácido, 2020.

CINTRA, Antonio Carlos de Araujo; GRINOVER, Ada Pellegrini; DINAMARCO, Candide Rangel. *General process theory*. 31st ed. São Paulo: Malheiros Editores, 2015.

CRUZ, Danilo Nascimento; CRUZ, Karine Rodrigues Piauilino. *Contemporary Civil Procedure:* conceptual aspects, constitutionalization, and effective judicial protection. 2010. Available in: http://www.abdpc.org.br/abdpc/

artigos/O%20PROCESSO%20CIVIL%20CONTEMPORANEO%20-%20ASPECTOS%20CONCEITUAIS.pdf. Accessed: 26 Oct. 2020.

DIAS, Patricia Mendanha. *The burden of proof in the constitutional proceeding under the aegis of the Democratic Rule of Law***.** Electronic Journal of Procedural Law - REDP. Rio de Janeiro. Year 10. Volume 17. Number two. July to December 2016. Semi-annual Journal of the *Stricto Sensu Graduate Program* in Procedural Law of UERJ. ISSN 1982-7636, p. 515-530. Available in: https://www.e-publicacoes.uerj.br/index.php/redp/article/view/25989/18977. Accessed: 29 Oct. 2020.

DORICO, Eliane Aparecida. *The theory of legal argumentation as an instrument for the fair solution of cases*. 2013. Available in: https://ambitojuridico.com.br/edicoes/revista-116/a-teoria-da-argumentacao-juridica-como-instrumento-para-a-solucao-justa-dos-casos/. Accessed: 29 Oct. 2020.

IBERO-AMERICAN INSTITUTE OF PROCEDURAL LAW. *Model Code of Collective Processes for Ibero-America*. Available in: http://www.politicaeprocesso.ufpr.br/wp-content/uploads/2017/02/CodigoModelo.pdf. Accessed: 29 Oct. 2020.

MACCORMICK, Neil. *Legal argumentation and theory of law*. Translation Waldéa Barcellos. Translation review Marylene Pinto Michael. São Paulo: Martins Fontes, 2006.

MITIDIERO, Daniel. *Collaboration in the civil process:* social, logical and ethical assumptions. 1st ed. São Paulo: Revista dos Tribunais, 2009.

NERY JUNIOR, Nelson. *Principles of civil procedure in the Federal Constitution*. 3rd ed. São Paulo: Revista dos Tribunais, 1996, p. 19.

REALE, Miguel. *Preliminary law lessons.* 27th ed. 15th tir. São Paulo: Saraiva, 2002.

RODAS, Sergio. *Reason of decisions in the new CPC generates confrontation between lawyer and judge*. 2015. Available in: https://www.conjur.com.br/2015-mai-26/fundamentacao-decisoes-gera-confronto-entre-advogado-juiz. Accessed: 27 Oct. 2020.

SILVA, Anna Isis Teran; NEVES, Isabela Dias. *Democratic Civil Process:* judicial activism in the face of evidence. Legislative Information Journal: RIL, v. 54, n. 215, p. 97-115, Jul./Sept. 2017. Available in: http://www12.senado.leg.br/ril/edicoes/54/215/ril_v54_n215_p97. Accessed Oct. 26. 2020.

TALAMINI, Eduardo; WAMBIER, Luiz Rodrigues. *Advanced course of civil procedure*: general theory of process and process of knowledge, volume 1. 14th ed. rev. and current. São Paulo: Revista dos Tribunais Publishing House, 2014.

TALAMINI, Eduardo. *Burden of proof*. 2016. Available in: https://www.migalhas.com.br/depeso/235364/onus-da-prova. Accessed: 29 Oct. 2020.

TRIGUEIRO, Victor Guedes; BORGES, João Paulo Resende. *Economic analysis of litigation* - basic assumptions and the Code of Civil Procedure 2015. Electronic Journal of Procedural Law - REDP. Quarterly Journal of the *Stricto Sensu Graduate Program* in Procedural Law of UERJ. ISSN 1982-7636. Rio de Janeiro, year 13, v. 20, n. 2, p. 313-338, May/Aug. 2019. Available in: https://www.e-publicacoes.uerj.br/index.php/redp/article/view/44561/30281. Accessed: 26 Oct. 2020.

ZOLLINGER, Marcia Brandão. *Procedural Protection of Fundamental Rights*. Curitiba, 2005. Dissertation (Master's degree in Law) - Federal University of Paraná. Available in: http://www.dominiopublico.gov.br/download/teste/arqs/cp007803.pdf. Accessed: 26 Oct. 2020.

Received: 03.27.2021.

Approved: 05.06.2021.