

The New Brazilian Procedural Law Code: New Trends in Favour of an Important Balance among Speediness, Effectiveness and Juridical Predictability[#]

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1. Brief considerations

Firstly, I would like to thank Professor Doctor Masahisa Deguchi for this very kind and honourable invite. I am very delighted and honoured to visit Ritsumeikan University, in Kyoto, Japan. I am also happy to be in Japan for the first time and very motivated with the culture, people and the country itself. I would also like to register my tribute and condolences to the victims of the recent tsunami and earthquake, as well as their families. My sincere condolences and hopes that things get back on track again very soon.

The purpose of this lecture at Ritsumeikan University is to speak about some general features of Brazilian Procedural Law and the New Brazilian Procedural Law Code (NCPC), which is being voted before the Brazilian Legislature and is expected to be in force by the end of 2012.

The idea is not to go deep into detail, but to give the audience a flavour of several crucial points of the upcoming statute, focusing on a particular topic of interest related to the enhancement of the influence of precedents in Brazil, as well as the efforts made to speed-up proceedings and their effectiveness.

2. Introduction to the topic and overview of the country's context

As a preliminary issue to be addressed, it seems reasonable to ask whether a new

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Procedural Law Code was indeed necessary in Brazil and, if so, what would be the relevant reasons for this brand new statute.

In fact, the current Brazilian Procedural Law (CPC/1973) was enacted in 1973, that is, almost 40 years ago, when the Brazilian population barely reached 100 million people.¹⁾ Time has passed and Brazilian context has changed since the enactment of the Code currently in force, which was much influenced by Italian Law.

The population, which nowadays stands at almost 200 million people, has led to an increase in the number of civil action throughout the country. There are many reasons related to the government, private sector and the Judiciary itself why civil justice in Brazil is currently lengthy and, as a consequence, ineffective in a considerable part of the cases.

The number of lawsuits before state courts has risen sharply over the past decades. This appears to be one of the consequences of population growth and the mass consumption society that has been established, especially because there are not sufficient means to promote effective class actions, so there are many individual ones in the state courts. Hence, the time frame for obtaining a final decision has grown exponentially.

There may be scholars and practitioners who indicate that the explosive population growth and the increasing contentiousness – characteristic in Latin countries - could have worsened the effectiveness and rapidity of civil justice in Brazil. Differently from Japan, Brazil has no effective ways to avoid claims to get to the Judiciary, that is, there are no filters for new lawsuits. Nor is there a preliminary analysis of the controversy before it gets to the judge's desk, nor an efficient conciliatory mechanism. Therefore, if one person believes his or her rights have been violated or are about to be, the access to the Judiciary will not be subject to any major restriction. That is good in a sense, because it gives full effect to the constitutional principle of broad access to the Courts. However, it compromises speediness and effectiveness, which are other important constitutional principles.

One may also highlight as causes for such worsening the mass consumption evidenced throughout the country and the lack of effective means to promote class actions and group decisions, which would avoid a situation where multiple individual claims raise identical arguments, and therefore demanding an uniform solution.

Working conditions of the Judiciary – especially in particular states of the Brazilian federation - are often provided as a concurrent cause: late adoption of IT developments to

1) INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA. *Censo demográfico 2010*. Available <<http://www.ibge.gov.br/home/estatistica/populacao/censo2010/default.shtm>>.

track and follow-up the cases and exchange statements among the parties; lack of Law Clerks and training; and even a lack of judges.

As an illustrative data, Antônio Cláudio da Costa Machado - Court of Appeal Judge in the State of Sao Paulo - affirms that in the year 2000 there were 9 million pending lawsuits and 54.000 Law Clerks in the State of Sao Paulo. Nowadays the number of lawsuits has increased to 19.5 million, but the Clerks amount to 45.000 only, that is, 20% fewer people working, 50% more cases.²⁾

Also, the CPC/1973 is often criticised due to its alleged high number of appeals, which usually take a long time to be analysed by the courts throughout the country, including the Superior Court of Justice (STJ) and the Supreme Court (STF).

Taking this background into deep consideration and responding to society's need, a commission of high-profiled and well-known scholars has been nominated to head a project aimed to develop a new Brazilian Procedural Law Code (NCPC).

Mr Justice Professor Luiz Fux, Supreme Court Judge and head of this Commission, stated that the challenge of this project will be to rescue the trust in the Judiciary, as well as to turn into reality the constitutional promise of an immediate and speedy Justice in the country.³⁾

In fact, the NCPC has as one of its aims the enhancement of procedural effectiveness. The core idea is to produce an organised, organic and simplified statute, through which the focus would be turned towards the resolution of the disputes on their merits. In this sense, the judges would therefore be less concerned about solving minor procedural issues at all times, so they would be more able to concentrate themselves in applying the substantive laws and finally delivering justice. Indeed, this seems to be the real aim of Procedural Law, which shall not be put aside. In reality, civil procedure shall appear as the way through which the dispute will be resolved, instead of being the dispute in itself, as it has been evidenced in a considerable number of cases recently. The social interest of civil procedure is to provide an efficient dispute resolution to the parties.

Professor José Carlos Barbosa Moreira⁴⁾ highlights that the relevance of civil procedural

2) (Revista Veja, 30.11.2011, p.21).

3) BRASIL. Processo Civil. Código de Processo Civil: anteprojeto / Comissão de Juristas Responsável pela Elaboração de Anteprojeto de Código de Processo Civil. p. 381.

4) BARBOSA MOREIRA, José Carlos. Por um processo socialmente efetivo. *Revista de Processo*. São Paulo, v. 27, n.105, p. 183-190, jan./mar. 2002, p. 181.

Law is related to the effective application of substantive rules, in a sense that procedural Law will be regarded as an effective mechanism if it contributes to the solution of the case.

As an example of what is going to be improved in terms of speediness, the interlocutory appeal's admission requirements are intended to be narrowed, as the misuse of this appeal has been proved immoderate and procrastinating. As Professor Arruda Alvim⁵⁾ mentioned, Courts of Appeal have been turned into Courts of Interlocutory Appeals, as the number of interlocutory appeals is currently hugely larger than appeals filed against final judgements rendered by the lower instances.

3. A broad amendment to the current Code or a brand new Code?

The CPC/1973 is from 1973. Since then many amendments have been introduced in order to adapt the code to Brazilian social, political and economic developments, as well as society's aims. Indeed, the amendments have been shown to be pertinent and necessary, especially to speed up the resolution of the disputes and also to provide more juridical stability and effectiveness. Changes on the enforcement of judgements were made in 2005 and 2006. It is true that certain positive effects have been generated, although it is far from an ideal scenario.

Conversely, the successive alterations made the CPC/1973 lose part of its identity, as well as a considerable and desirable systematic distribution and linkage among its provisions. The differences between the original and the current versions are excessively high.

Concerning legal coherency, a statute should be systematic and its provisions need to be linked in a harmonic way, so misinterpretation of provisions and internal conflicts of rules are avoided, giving room for the substantive law discussions to prevail over minor procedural discussions. Procedural Law shall facilitate the delivery of Justice, not turn itself into the core issue.

New facts and trends have gained substantial importance in Brazil recently, such as population growth, a massive increase in the number of new claims – especially those related to collective rights violations – the necessity of conferring more predictability to judicial decisions in order to avoid conflicting decisions regarding the application of the same legal provision to a similar factual background, as well as modernisation of methods to enhance enforcement and effectiveness of judgements. As to the latter, the expectation has been not

5) ARRUDA ALVIM, Jose Manoel de. Notas sobre o projeto de novo Código de Processo Civil. Revista de Processo, São Paulo.191, janeiro 2011, p. 314.

only the reduction of the time frame for obtaining an enforceable judgement, but also the modernization of methods to allow this mentioned judgement to generate practical effects on litigants' lives. Service of claim and simplification of notices, as well as enhancement of money attachment methods, are good examples of this.

Then, would new amendments be reasonable? The answer appears to be no. It seems that a brand new Code would be more efficient, systematic, bespoke to fulfil most of the current needs highlighted by the society throughout the past years. Besides, a new Code would be more up to date in terms of adopting doctrinal and jurisprudential developments achieved in the past years.

Furthermore, a new mentality would be able to be applied and spread, what would be difficult in case of maintenance of the old CPC/1973, enacted during the Brazilian Military Dictatorship and before the democratic 1988 Federal Constitution, which shall illuminate the creation, interpretation and application of rules below it.

The NCPC needs to be a tailor-made uniform system to be adapted to a broad variety of circumstances evidenced on the pending and future claims in the country. It shall be a system, not a bunch of independent rules altogether. In fact, new amendments would not only have no power to change mentality, but also would have turned the CPC/1973 into a mosaic. A new Code will demand study, dedication and accurate perception of a modern philosophy.

4. Challenges on the New Brazilian Procedural Law Code

One of the challenges of the NCPC has been the balance among speediness, effectiveness of Justice and juridical predictability. On one hand, there is a clear intent of speeding up judicial proceedings, which may currently take too long in Brazil, mainly due to idle periods of the lawsuits. These periods are very much related, for instance, to the attachment of new statements to the case records, publication of new developments via Official Press, personal notification of the parties etc.

On the other hand, the new Law shall preserve citizens' rights and guarantees of broad access to the Judiciary. Moreover, the intent of optimising and speeding-up justice in the country shall not compromise effectiveness of the jurisdiction, in a sense that quick decisions must not correspond to weak or non-technical decisions. In truth, jurisdiction shall be expeditious and also effective, so the State may provide a rapid solution to the case, without undermining neither the quality of the judgements, nor the constitutional prerogative of the citizens to make use of all mechanisms available to deeply and broadly defend their rights.

There has been a trend to criticise the number of appeals allowed by Brazilian Law, their misuse to procrastinate the final and binding judgement (*res judicata*), as well as the time frame for the Courts to judge them, mainly due to their very high quantity. The following topic will address how Brazilian Procedural Law and the NCPC will deal with the problem concerning the appeals and their judgement, bearing in mind the necessity of enhancing speediness and effectiveness on one hand, but also not forgetting, on the other hand, preservation of fundamental and constitutional rights of the society, whose members cannot be arbitrarily refrained from exercising their legal guarantees, illuminated by due process and an adversarial system. Juridical predictability and stability shall be added to this mentioned balance.

4.1. Appeals and their judgement - Uniformity and stability of precedents

In England, as in several other Common Law countries, there is a basic principle of administration of justice according to which like cases shall be decided alike.⁶⁾ Courts in England, for instance, are bound to adopt precedents by a court hierarchically above it, and appellate courts are bound by their previous decisions. Specifically, courts shall follow the *ratio decidendi* – reason for deciding – found in a previous case. Moreover, any principle applied in a judicial decision is provided with the force of Law, so as statutory Law and customs – *lex scripta* and *lex non scripta*.

Conversely, precedents in Brazil have always been persuasive, but not binding. In this particular matter, although judges have a broader freedom to convince themselves about the arguments and apply the Law to the case according to their opinions, this may generate a certain juridical instability and a lack of foreseeability.

Brazil has slightly changed its view under the context of the NCPC, though.

Firstly, it is important to clarify that precedents have not been newly classified as sources of law. Source of Law corresponds to where to look in order to find the applicable Law. The formal sources of law in the country remain the same, as defined by the Civil Code Introductory Law: a) statutory Law; b) general principles of Law; c) analogy and d) costumes.

Hence, precedents do not create the Law, but identify the applicable Law to the facts under analysis, interpret the Law and finally apply the Law. Even when a specific part of the leading judgement that formed the precedent is used as a basis for ruling in other cases, there is no new Law formed by that particular judgement: it just reflects the interpretation and the

6) Cross and Harris. Precedent in English Law. Fourth Edition. p. 3

outcome of the application of a Law which had already been in force.

The NCPC clearly imposes to Courts the duty of uniformity and precedents stability maintenance. As a matter of fact, Courts shall edit and publish numbered short pronouncements (*Súmulas*), which summarise the core rulings extracted from leading cases, in order to facilitate the identification of a specific Court's position on a particular matter. This is aimed to encourage the lower judges presiding similar cases to adopt the Court's dominant ruling, mainly because the latter will further analyse the claim in case of appeal and will probably apply its precedent, overturning a former contrary decision.

Furthermore, the NCPC incorporated a new feature aimed to improve the management of a large number of individual claims which involve the same legal issue, so the interpretation reached by the Court on a leading case shall be applied to all similar cases that follow this mentioned leading one.

Inspired in the German Law (*Musterverfahren*), the name of the mechanism is *Repetitive Claims Resolution Incident*, which may be triggered by the judge presiding the case, one of the parties, a public prosecutor or a public attorney involved in the case. This mechanism will be applicable when identified a point of Law which is likely to replicate in a large number of other similar cases.

Therefore, the objective of the mechanism is to identify this relevant point of Law and submit it to consideration before a hierarchically higher tribunal, so it may render a decision that shall be adopted for the resolution of other similar cases. When identified, this relevant question in a particular case may generate a leading case.

In fact, all other similar cases shall be halted until a leading judgement is rendered in the leading case, refraining judges from rendering new decisions, mainly because they might be against the future ruling by the higher court. As the leading decision is rendered, all similar claims will be resumed and the presiding judges must apply the same conclusion achieved on the leading case. Should the leading decision not be applied to a similar case, the parties, public prosecutor or public attorney may apply for a ruling directly before the Court that had rendered the leading decision, so it may overturn the dissident decision.

There is a clear intent of making the application of the Law more uniform and speedy, as the margin for interpretation of the core legal issue will be narrowed and the application of this legal interpretation will be evidenced in all similar cases. Hence, if the situation submitted to the court's appreciation is similar to the one analysed by the superior courts, the outcome of the case will tend to be the same. Finally, the described mechanism avoids the

coexistence of conflicting decisions on the same matter, that is, different interpretations of the same situation, which might otherwise lead to juridical instability and lack of predictability.

4.2. Appeals before the Supreme Court and the General Repercussion of the case

The Brazilian Supreme Court (STF) is in charge of judging Extraordinary Appeals which challenge judgements against the Federal Constitution. Although the STF has constitutional-attributed competence for a certain number of other claims - for example, those filled against the President and Vice-President of the Republic and actions to *erga omnis* challenge or confirm the constitutionality of a Law - the largest chunk of STF demand is related to Extraordinary Appeals or Interlocutory Appeals filled against Court of Appeals' decisions on the admissibility of Extraordinary Appeals. Whilst United Kingdom Supreme Court judged less than 60 cases in 2010, the STF received 61,578 appeals and judged 90,090 in the same year.

It appears clear that the STF has been conceived by part of the society as a third ordinary appeal instance, in a sense that an Extraordinary Appeal is filed on a large number of claims, although lacking fundamental bases for appeal in most of the cases. The STF shall be guardian of the Constitution, in charge of judging violations evidenced in judgements. More than that, the STF shall be provoked to rule on cases where there is a broader legal repercussion throughout the society, not just for a specific individual on an independent claim. In other words, STF decisions shall affect the society - at least part of it - but not only an individual right of an isolated individual.

With this necessity in mind, Brazilian Federal Constitution then incorporated a new requirement revolving the Extraordinary Appeal named General Repercussion. This new admissibility requirement imposes that every Extraordinary Appeal needs to address a legal issue which may cause a social impact, not a individualist one. It does not mean that the Extraordinary Appeal will only be admissible in class actions or in claims filed by or against multiple claimants or defendants. It may be placed in an individual claim, but in one whose decision will irradiate effects to a significant part of the society. Rulings on prejudice against ethnic groups, university places for minorities, property and use of Indian (Brazilian natives) lands, and issues on retirement pensions are a few examples of matters which may interest society, even if not everyone. It appears clear that these claims may be individual ones, but their outcomes are broader, because the STF interpretation shall then guide future judicial pronouncements. Although it is not a development brought by the NCPC, this constitutional mechanism not only collaborates for a more uniform case law, but also for the preservation of STF's competence to rule on constitutional and important matters.

4.3. Application of cumulative fees for every dismissed appeal

The NCPC brings an innovative rule according to which every dismissed appeal filed by

the parties will entitle the court to impose new and cumulative fees, in order to discourage the parties to keep appealing when there is no reason to do so. Hence, parties are motivated by the NCPC to proceed a risk calculation during the whole proceedings, as every conduct in terms of appealing may generate an extra burden to those who postpone the resolution of the dispute.

4.4. Rules on evidence

A new provision inserted in the NCPC allows parties to produce evidence before the lawsuit commencement. The current CPC/1973 only allows this feature when parties have urgency to produce their evidence. Judges seldom allow the examination of witnesses, venues or objects inspection without the fulfilment of the requirement of urgency. Nonetheless, the NCPC grants permission for parties to produce evidence before the action is initiated when this potential evidence may increase the chances of reaching a settlement. Moreover, evidence production in the pre-action context will be also allowed when it may reasonably justify the existence of grounds for that particular lawsuit, or refrain the claimant's aim to proceed to trial. It is relevant to state that pre-action evidence is a right conferred to parties, but not a duty, as it may happen in England.

5. Enhancement of the Adversarial System

Article 10 of the NCPC prohibits Judges to decide any question arising out of the lawsuit without allowing the parties to present their statements on the issue under question. The purpose of this provision is to avoid surprises in the course of proceedings due to the adoption of arguments that might have not been addressed by the parties. Moreover, it gives the parties a valuable opportunity to present their allegations in favour or against a certain question, so the judge will tend to be more convinced of his final decision.

6. Other provisions in favour of the Speediness of proceedings

The excessive number of appeals is not the only responsible for the commonly evidenced lengthiness of the lawsuits. Neither the misuse of them by the parties to postpone a final, binding and enforceable decision.

The extended time frame is not only a result of long decision-making processes, but also the lack of them. In fact, lawsuits generally spend much time on the shelves awaiting examination or at least clerk's acts in order to make them develop towards a final resolution. In this particular situation, it is fairly reasonable to adopt and encourage the use of electronic

communication among parties and judge, shortening the timeframe directly involved to send out notifications, specially addressed by the Court to the parties. The NCPC follows this path and brings a considerable number of provisions which make reference to electronic procedural acts and will therefore contribute for speediness.

Nowadays, after a judgement is rendered in the first instance, the decision needs to be published by the Official Press. After that, the party who lost the claim would probably appeal. Then, as the clerk attaches the appeal to the case records, the counterparty will be notified to respond to the appeal. These acts may take up to one year. However, this period can be considerably shortened if the decision is immediately published on the Court's webpage, which would then generate an automatic notification to the parties. Continuously, the party who is not satisfied with the decision may electronically submit its appeal, which will be consequently sent to the counterparty for response, without idle periods.

7. Final considerations

The ideas presented here are aimed to give the audience an overview of the new Brazilian Procedural Law trends in favour of a balance among speediness, effectiveness and juridical predictability. As expected, this talk does not cover all points of the upcoming system, but attempts to provide you with a general outlook on how Brazil is converging efforts to enhance its Procedural Law system.

Thank you all for your presence. Special thanks to Professor Doctor Masahisa Deguchi for organizing this event and for being so kind and welcoming with me. Finally, I would like to thank Ms Candice Buckley Bittencourt Silva for reviewing this presentation and contributing with her very accurate comments.

I look forward to visiting Japan again in a very near future.