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À PROPOS DE NOUS

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ABOUT US

The **International Journal of Open Governments / Revue Internationale des Gouvernements ouverts (RIGO)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

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ELECTRONIC JUDICIAL PROCEEDINGS AND TRANSPARENCY OF THE COURTS

by **Daniel Willian GRANADO**, Ph.D. and Master of Law and Professor of Civil Law at Faculdades Metropolitanas Unidas – FMU, Brazil.

The objective of this brief study is to examine the electronic judicial proceeding and its implementation in Brazilian civil law, as a means to ensure more transparent dispensation of justice for legal practitioners and claimants alike.
To be sure, the judicial process has undergone a number of changes over time, all associated with the latest technological innovations applied, above all in the field of information technology. In this light, electronic judicial proceedings represent one of the many avenues for realizing and implementing transparency in the Justice System, insofar as it permits not only the parties to a suit, but anyone, to access ongoing proceedings before the Courts, provided, of course, the matter is not under seal. Therefore, the broad access offered by the electronic procedure system is, without question, one of the single most important innovations in the quest to secure the transparency of the Justice System worldwide.

§ 1 – THE PRINCIPLE OF PUBLICITY OF PROCEDURAL ACTS AND ITS IMPORTANCE TO THE IMPLEMENTATION OF TRANSPARENT JUSTICE

A) The Principle of Publicity from a Constitutional Perspective, Including as a Product of due Process

An initial consideration when examining civil procedure is that the underlying principles of civil procedure are enshrined in the Brazilian Federal Constitution, principally following the advent of the 1988 Federal Constitution, which expounds on the subject in great detail.
In this light, the core aspects of civil procedure are today extensively regulated by the 1988 Federal Constitution. Thus, the importance of examining the principles of proceedings based on the Constitution, to the extent, as argued by Geraldo Ataliba, those principles are "at once rules and guidelines of the system which intrinsically inform the system"[1]. Or, as Celso Antônio Bandeira de Mello, teaches, the principles "are the express or

[1] A. A. GORDILLO, *Introducción al derecho administrativo*, vol. 1, p. 176, apud Geraldo Ataliba, *República e Constituição*, p. 6.

implicit disposition, categorically laid out in a given system, by which the rules implemented in a positive legal order is shaped"[2].
In this light, outlining the study of these principles based on the Constitution would, from a methodological standpoint, seem to be the most appropriate approach to ascertain how and why the various provisions prescribed in the infra-constitutional laws effectuate specific Constitutional principles, while conflicting with the scope and breadth of others.
It is to be expected that this would occur within a democratic State under the rule of law, like the one governed by the current constitutional system. In this light, an effort will be made to focus on principles, in particular the principle of publicity, in procedural acts, taking into account that these leaves a profound and indelible mark on the system, such as is the case, for example, with the core principle of due process, as evidenced by the extensive literature on the subject, a matter considered further in the pages below.
This study also reveals the profound symbiosis between civil law and constitutional law. Indeed, we have already noted that a core principle of the process was enshrined, particularly as of the promulgation of the 1988 Constitution, in the constitution text itself.
By way of example, the principle of equality, a general constitutional principle with a particularly important impact in the field of civil procedure, is expressly prescribed in article 139, I, of the Brazilian Code of Civil Procedure, which mandates equal treatment of the parties to a proceeding.
Let us first look at the principle of all principles: *due process*.
Due process can be considered, to an extent, a vague concept. That is, in specific respect of the notion of what due process means, some aspects are absolutely indisputable, while others are highly elastic and the subject of ongoing discussion – and, as such, historically have not been assigned specific definitions capable of delimiting their meaning.
That said, there is a central core that informs the principle, which cannot be violated, as it is a product of history and reiteration by various peoples, subject to a robust a body of decisions and conceptual frameworks that have generated what could be called the conceptual core of the principle. This principle has been most extensively studied and, more than this, "exercised" in the jurisdiction of the United States of America.
It is worth noting that the principle is expressly provided in the Federal Constitution, article 5, LIV, and enshrined as an individual right and guarantee, constituting, therefore an entrenchment clause, in accordance with article 60, § 4, IV, of the Brazilian Federal Constitution, meaning it is not subject to any constitutional amendment designed or with potential to suppress such right.

[2] C. A. BANDEIRA DE MELLO, Criação de secretarias municipais, in *Revista de Direito Público*, n.º15, p. 284-285.

There are, as such, criteria in place to assess whether in a given case the principle has been fulfilled or not.

It is for this reason that the principle was defined as a *core concept* from its very origin, by virtue of which there is substantial certainty as to its constituent elements. However, in regard to other less evident, aspects, the legal scholarship and case law (including the American courts) have never settled on any firm definitions.

In reality, there are norms that simply fulfill their ends, containing, at their core, ambiguous concepts, as a definitive definition of the principle would almost certainly result in excluding cases subject to consideration based on such principle and the corresponding ambiguous conceptual framework, but which such definition would have the effect of discarding altogether or, worse, cause to be disregarded in the applicable infra-constitutional legislation. This would clearly lead to the risk of infra-constitutional determinations in violation of the norm's constitutional scope.

The principle of due process is, therefore, a fundamental principle. All remaining procedural principles enshrined in the constitutional text, including the prohibition on unreasonable search and seizure, the right of a full defense, *in the strict sense*, publicity for procedural acts, etc., emanate from this basic right. As Nelson Nery Jr. argues, "It is the fundamental principle of civil procedure which we view as the basis on which all others are founded"[3]. For Humberto Theodoro Jr., due process can be understood as a "super-principle", to the extent it serves as inspiration for all other principles under the Law[4].

Paradoxically, as Nelson Nery Jr. notes, the Magna Carta was a reactionary instrument, which established the relationship between the King and the Nobles (as a guarantee thereto)[5]. Despite this, however, the fact is that the document was,

> "the first formal document in history to establish the primacy of the law over the royal prerogative, in addition to serving as the basis for the British parliamentary system and setting forth a series of rights in relation to specific groups (especially barons) vis-à-vis the government"[6].

It is precisely this idea on which the historical import of the Magna Carta rests and which informs our decision to begin the study in these pages with an examination of this formative document.

The term *due process of law* first appeared in English law in 1354 during the reign of Edward III, specifically in the *Statute of Westminster of the Liberties of London* (a term coined by "some unknown draftsman").

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[3] N. NERY JR, *Princípios do processo civil na Constituição Federal*, 8.ª ed. São Paulo: RT, 2008, p. 60.

[4] H. THEODORO JR, *Curso de direito processual civil*, vol. 1, item 22, p. 29.

[5] N. NERY JR, *Princípios do processo civilna Constituição*, p. 61-62.

[6] E. B. MOREIRA, *Processo administrativo – Princípios constitucionais e a Lei 9.784/99*, São Paulo: Malheiros, p. 161.

As Egon Bockman Moreira notes, "The expression by the law of the land points to a range of far weaker meanings than that encompassed in its successor due process of law"[7]. Over time, due process became a *condition for validating* other substantive rights.

As we have seen, the principle derived originally from England. But in the 17th century it began to assume importance in America. The 5th amendment states, "No person shall [...] be deprived of life, liberty or property, without due process of law," while through the 14th amendment of 1868, the principle was adopted as a limit not only on the central government, but on state governments as well.

Prior to the American Federal Constitution, the constitutions of Maryland, Pennsylvania, and Massachusetts had already enshrined the principle, reiterating the rule set forth in the Magna Carta and the Law during the reign of Eduardo III, as Nelson Nery Jr. notes[8].

The root of the principle is eminently procedural. It could be argued that the underlying seed of the principle is directly connected to the notion of orderly proceedings.

The concept evolved and eventually was interpreted to mean that due process did not only involve the basic guarantee of an orderly proceeding, but as the right to prior notice of a proceeding and a full defense. The interpretation was also extended to encompass the semantic principle that no one could be detained or imprisoned without cause.

The principle as initially adopted in the United States was similar to the original, and was introduced, as mentioned above, in the American Constitution through the 5th Amendment, followed by the 14th amendment, which was enacted in the 19th century with a view to extending the obligation to uphold due process to the individual states.

To be sure, as Sampaio Dória argues, "The concept of limited political power in Western political thought derives undeniably from the *Magna Carta*," it is equally true, as stated by the author, that the advent of the American nation brought with it the first in which

> "a basic law limited the power of all the branches government – legislative, executive, and judicial – and on which sovereignty of the nation rested through. The 1787 US Constitution is the synthesis of those limits with respective to the political structure of the regime (federal and republican), the separation of power into three branches, and the guarantees of individual rights (the Bill of Rights attached to the Constitution in the form of the first ten amendments)"[9].

[7] *Ibid*, p. 162.
[8] N. NERY JR, *Princípios do processo civil na Constituição Federal*, p. 62.
[9] A. R. SAMPAIO DÓRIA, *Direito constitucional tributário*, Rio de Janeiro: Forense, , pp. 23-25.

However, after enshrining the primacy of the Constitution in relation to ordinary lase (article VI, section 2), the problem of how to control legislative acts emerged, a responsibility the Constitution assigns in no uncertain terms to the judicial branch (article III, section 2, § 1). The predominance of the judicial branch over the other branches of government was consolidated in the landmark Marbury *v.* Madison decision, in which Justice Marshall[10] affirmed the critical attribution of the Judiciary as a pillar of American constitutional law. On this point, Egon Bockman Moreira notes, citing Carlos Roberto de Castro Siqueira, that "both in the colonial period and following Independence there was a clear bias in favor of the legislative branch, as reflected in the repressive metropolitan legislation emanated from the House of Westminster in London"[11].

It is in this historical context that the importance of the principle of due process stands out, for as asserted by Sampaio Dória,

> "The search for an explicit constitutional principle to serve as a guide within an undefined and indefinable body of 'natural laws' led in short order to a single, unitary Constitutional provision that was perfectly suited to this end, the due process of law clause"[12].

In other words, the due process of law clause constitutes the principal mechanism by which the Courts can control the acts of the Legislature, constituting, in this way, the most important component of the American constitution system.

Notwithstanding the importance of the principle within the American Supreme Court, to the extent, in fact, as argued with reason by Nelson Nery Jr., that "the prestige of American constitutional law is primarily due to the interpretation of the due process clause given by the Supreme Court,"[13] it is equally relevant to record the observation of Sampaio Dória that

> "in fact, it would be useless to survey the essence of the Supreme Court's decisions, in search of an unformulated principle. Unformulated because, given the assumptions of the theory of the flexible interpretation of the Constitution, 'the stratification of due process within a fixed stage of historical or intellectual evolution' would mean acknowledging that 'the most important aspect of the constitutional provision is the function of inert machines, instead of judges"[14].

Indeed, we can without any reservation, affirm that it was precisely this flexible character that has enabled the principle to survive the test of time as a core guideline of the American constitutional system.

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[10] V, a propósito, A. R. SAMPAIO DÓRIA, *Direito constitucional tributário.* Rio de Janeiro: Forense, p. 25.
[11] E. B. MOREIRA, *Processo administrativo*,cit, pp. 166-167.
[12] A. R. SAMPAIO DÓRIA, *Direito constitucional tributário*.cit, p. 30.
[13] N. NERY JR, *Princípios do processo civilna Constituição*, p. 64.
[14] A. R. SAMPAIO DÓRIA, *Direito constitucional tributário*.cit, p. 33.

Egon Bockman Moreira provides a vivid and enormously important historical example of the different characteristics the principle of due process assumed over time – in particular respect of its substantive meaning – when describing the new position adopted by the Supreme Court through Justice H. L. Black, who joined the High Court in 1937, at a time when the United States had just begun digging out of the deep depression sparked by the 1929 Crash. Through Justice Black, the clause ceased to be an obstacle to social legislation, to limits on taxation; in a sense, it could be said that the clause was no longer used to oppose regulatory action by the government[15].

The fundamental feature of due process as not only a procedural principle, but as substantive due process, was affirmed in 1798 in Calder *v.* Bull, which ruled that all normative acts, whether legislative or administrative, that violated fundamental rights contravened, *ipso facto*, due process. The case was illustrative of the fact that the principle of due process was also applicable beyond the scope of legal proceedings. Nelson Nery Jr. States, for example, that the principle of legality within administrative law is nothing more than a projection of the principle of due process within this specific sphere[16].

American case law, reflected, as well, in Brazil, has found that jurisdictional oversight of government acts is an unequivocal expression of the principle of due process. It is also reflected in private law, as, for example, fulfillment of the perfect legal act is guaranteed, in respect of which there is a separate and express provision, namely article 5, XXXVI, of the Federal Constitution (vested rights doctrine), which prohibits racial discrimination, etc.

In sum, as noted, the principle of the due process of law was eminently procedural in nature at the outset. Indeed, the its initial feature as conferred by the Magna Carta was as a protective measure centered primarily on criminal proceedings[17].

However, as seen above, the interpretation given currently is far broader. It does not only extend to the respective effects arising from proceedings, but to material law as a whole. With transferral to the United States, the substantive aspects of the due process clause took on greater importance, precisely due to the need, as described above, for a constitutional principle capable of ensuring constitutional limits on legislative acts[18]. Indeed, a passage from a 1992 Supreme Court highlights the essence of due process, which suggests that the respective constitutional pledge involves "a realm of personal liberty which the government may not enter"[19].

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15 E. B. MOREIRA, *Processo administrativo*.cit, p. 172.

16 N. NERY JR, P*rincípios do processo civilna Constituição,* cit, p. 66.

17 On this point, Egon Bockman Moreira points out that this is perfectly understandable due to the importance case law assumes as a source of fundamental rights in common law countries, such that the "*legal concept of 'right' in England derives, historically, from the idea of process*" (*Administrative process*... cit, p. 157).

18 On the substantive character of due process of law, see Ada Pellegrini Grinover, *A garantia constitucional do direito de ação e sua relevância no processo civil*, p. 35.

19 E. B. MOREIRA, *Processo administrativo*.cit., p. 166.

Egon Bockman Moreira reports that the features which characterize the principle of due process as currently defined in the United States involve "a fair and equitable legal relationship conducted with precision to ensure the citizen certainty, while respecting the citizen's moral dimension"[20].
The principle also supports the life-liberty-property triad. In this light, everything connected to the triad is covered by the due process of law principle.

B) The Principle of Publicity and Infra-Constitutional Limits

Within the infra-constitutional sphere, article 11 of the Brazilian Code Civil Procedure provides that "all judgments from bodies of the judicial branch will be public and based on all decisions rendered, subject to a nullity." Article 189 of the Brazilian Code of Civil Procedure enshrines the requirement to publish all procedural acts at the infra-constitutional level, mandating that such acts are public. Further, article 189, sub-sections I - IV, sets out specific cases of proceedings which must be conducted under court seal, specifically (I) cases of public or social interest; (II) proceedings regarding marriage, separation, provisional separation, divorce, separation, common-law marriage, kinship, alimony and support, and custody of children and adolescents; (III) proceedings involving data protected under the constitution in connection with privacy; and (IV) proceedings regarding arbitration, including performance of arbitral letters, provided the confidentiality stipulated in the arbitration is demonstrated before the Court. In these exceptional situations, the right to review records and request certificates is restricted to parties and their attorneys-in-fact, with third parties entitled to request a certificate of the respective binding judgments, in addition to the inventory and distribution of judicial separation or divorce proceedings, from the Court, demonstrating, to this end, the pertinent legal interest.
The exception in article 189 of the Brazilian Code of Civil Procedure is supported by article 5, LX, of the 1988 Federal Constitution and in the last part of article 93, sub-section IX, of the 1988 Federal Constitution. In these cases, the right of privacy of the parties and public interest justifies secret proceedings and prevail over the principle of the publicity of procedural acts, preventing, in this way, the respective proceedings from becoming fodder for malicious or sensational speculation, which often compromise conduct of such proceedings.
The principle of publicity underlies the provision in article 368 of the Brazilian Code of Civil Procedure requiring that hearings must be public, except in the pertinent legal exceptions.
Arruda Alvim argues, in regard to the principle:

[20] *Ibid*, p. 177.

> "Publicity is ensured as a guarantee to the citizenry of a 'fair' Justice System that has nothing to hide; while, at the same time, serving as a guarantee for the Courts themselves before the citizenry, as public action permits verification of the respective acts"[21].

§ 2 – THE ELECTRONIC JUDICIAL PROCEEDING AS A CONSEQUENCE OF THE PUBLICITY OF JUDICIAL ACTS

A) Advent of the Computerization of Judicial Features in Brazil

As seen above, procedural acts are public, except as otherwise expressly prescribed by Law.
The publicity of procedural acts is aimed, among other ends, at supporting the implementation of a more transparent justice system, by granting all interested parties access to case records in judicial proceedings.
To facilitate more access and incentivize the transparency of the justice system, Brazilian judicial proceeding have undergone significant technological changes, above all through the implementation of electronic proceedings in all courts and at all jurisdictional levels.
In this context, Law No. 11,419 of 2006 served as an important parameter to transform the computerization of electronic proceedings in Brazil into a reality.
According to article 1 of the Law,

> "The use of electronic platforms in judicial proceedings, notices, and transmission of procedural records will be permitted pursuant to Law," by which § 1 of the Law provides that "the provision of this Law apply indistinctly to civil, criminal, and labor proceedings, as well as special courts at any jurisdictional level."

To enter petitions electronically, claimants need only register with the Court and obtain a digital certificate.

B) Advantages of Electronic Judicial Proceeding, Above all for Implementation of Judicial Transparency

Computerization of judicial proceedings enable submission of preliminary and intermediate statements of claim on the Internet the desired Court, saving citizens the time of having to travel to Court proceedings, while facilitating access by the parties and their legal representatives to information in connection with the pertinent proceedings and jurisdictional exercise by the State, in addition to eliminating paper as of the filing stage and contributing, in this way, to a healthier and more sustainable environment.

[21] A. ALVIM, *Manual de direito processual civil*, item 52, p. 183.

Note, therefore, that the instrument not only contributes to foster access to case records, albeit safeguarding, to be sure, cases under court seal, but also serves to help preserve the environment and reduce costs to the parties and their representatives.

The electronic judicial proceeding is a reality in almost all Brazilian Courts, in respect of which Resolution 185 of 2013 of the National Justice Council- CNJ is of particular note.

Through the Resolution, the Council sought to standardize the modalities of electronic proceedings throughout Brazil.

Also of note is the New Brazilian Code of Civil Procedure – Law No. 13,105/2015 – drafted and conceived with electronic judicial proceedings in mind, by treating physical proceedings as the exception.

Currently, in day-to-day discovery attorneys are allowed to enter motions electronically and access, through the appropriate electronic certificate, case records. It is interesting to note, in addition, that some Brazilian Courts, such as those of the São Paulo State Court of Justice, do not even require the certification to access and review case records.

There is a precedent for incentivizing the use of electronic means to foster acts of procedural communication.

To be sure, not only may legally summons and notifications be issued by the legal representatives of parties, but these may be published in the Electronic Judicial Register (Diário de Justiça Eletrônico) as well.

In respect of this point, consider the following decision rendered by the Superior Court of Justice: "criminal procdure. Regulatory appeal in interlocutory appeal. Electronic publication. Article 4 and § 2 of law No. 11,419/2006. Authorized and official mechanism for publishing judicial acts by the courts. Absence of materiality. I - Article 4 of Law No. 11,419/2006 provides that publication by electronic means constitutes an authorized and official mechanism for publishing judicial and administrative acts of the Courts. In addition, § 2 of the Law above states, "Electronic publication pursuant to this article substitutes any and other means of official publications for all legal purposes, with the exception of those case, as provided for by Law, that require in-person notification or registration."(Precedent) II – Therefore, as neither of the exception above applies to the summons in the case record, publication of the decision under challenge in the Electronic Judicial Register is absolutely lawful. III – The absence of the essential and mandatory material evidence required to review the appeal (in this case a copy of the certificate of the publication of the judgment issued in respect of the motion to clarify in the request for reconsideration) renders the petition without merit (Precedent)."Regulatory appeal denied"[22].Similarly, with respect to the importance of the electronic judicial

[22] Superior Court of Justice – STJ, Regulatory Appeal – AgRg in Appeal Ag 1140539/CE, Rapporteur Minister FELIX FISCHER, QUINTA TURMA, decision of 10/13/2009, Electronic Judicial Register – DJe of 11/03/2009.

proceeding, consider the following decision of the Superior Court of Justice:

> "CIVIL PROCEDURE. MOTION TO CLARIFY IN INTERLOCUTORY APPEAL. TIMELINESS OF SPECIAL APPEAL. DEMONSTRATION THROUGH DOCUMENT DRAWN FROM THE INTERNET. MERIT. ELECTRONIC PROCESS. LAW No. 10,259/2001.
> 1. The Internet is an efficient platform for ensuring the timeliness of appeals.
> 2. "Use of the INTERNET to disseminate Court decision or publicize the status of proceedings, thereby enabling not only that claimant's attorneys, but all interested parties, have access to the STJ's rulings for purposes of filing the pertinent appeals, is no longer contingent on awaiting publication in the Judicial Register, a tool which is a far slower method for disseminating information than electronic platforms. [...] Current processes for publicizing judicial decisions are no longer compatible with the case law, which, consequently, must be updated."
> 3. As such, "Judicial decisions, whether individual or collective, may, following official disclosure by any means, be subject to appeals, irrespective of publication in the Judicial Register." (Regulatory Appeal – AgRg in Interlocutory Appeal – EREsp 492461/MG, Rapporteur of Judgment Minister Eliana Calmon, Special Court, decision of 11/17/2004, Judicial Register – DJ of 10/23/2006, p. 235)
> 4. The electronic process instituted by Law No. 10,259, dated July 12, 2001, renders the issue incontrovertible.
> 5. Motion to clarify heard for purposes of granting the interlocutory appeal to order referral of the special appeal to the higher court"[23].

Along the same line:

> "CIVIL PROCEDURE. MOTION TO CLARIFY IN INTERLOCUTORY APPEAL. TIMELINESS OF SPECIAL APPEAL, DEMNSTRATION THROUGH DOCUMENT DRAW FROM THE INTERNET. MERIT. ELECTRONIC PROCESS. LAW No. 10,259/2001.
> 1. The Internet is an efficient platform for ensuring the timeliness of appeals.
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[23] Motion to Clarify – EDcl in the Motions to Clarify – EDcl in Regulatory Appeal – AgRg, Appeal – Ag 856.148/MG, Rapporteur Minister FRANCISCO FALCÃO, Judgment Rapporteur Minister LUIZ FUX, FIRST PANEL, decision of 12/04/2007, Electronic Judicial Register – DJe 10/22/2008.

> pertinent appeals, is no longer contingent on awaiting publication in the Judicial Register, a tool which is far slower in disseminating information than electronic platforms. [...]Current processes for publicizing judicial decisions are no longer compatible with the case law, which, consequently, must be updated".
> 3. As such, "Judicial decisions, whether individual or collective, may, following official disclosure by any means, be subject to appeals, irrespective of publication in the Judicial Register." (Regulatory Appeal – AgRg in Interlocutory Appeal – EREsp 492461/MG, Rapporteur of Judgment Minister Eliana Calmon, Special Court, decision of 11/17/2004, Judicial Register – DJ of 10/23/2006, p. 235)
> 4. The electronic process instituted by Law No. 10,259, dated July 12, 2001, renders the issue incontrovertible.
> 5. Motion to clarify heard for purposes of granting the interlocutory appeal to order referral of the special appeal to the higher court."[24]

To repeat, all of these features, without question, contribute to ensuring attorneys and anyone else have full access to case records, except, evidently, in the legally prescribed exceptions.
The preceding pages provided a summary of how the electronic judicial proceeding can contribute to the quest for more transparent administration of justice in Brazil.

[24] Superior Court of Justice – STJ, Motion to Clarify – EDcl in the Motions to Clarify – EDcl in Regulatory Appeal – AgRg, Appeal – Ag 856.148/MG, Rapporteur Minister FRANCISCO FALCÃO, Judgment Rapporteur Minister LUIZ FUX, FIRST PANEL, decision of 12/04/2007, Electronic Judicial Register – DJe 10/22/2008.