

Judicialization and judges' participation in public policies in Latin America.

The need to "materialize" justice.-

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1. Introduction

Perhaps the title of this paper may still generate certain amazement. A few decades ago, talking about Judiciary's "political profile", or "political nature", or "political roles" sounded like something anomalous and even immoral. Following the pattern of Maurice HAURIOU, "politicians" were the Executive and Legislative Powers, as well as the constituent, formed by individuals who "made" politics and created the law. The Judiciary, however, vested with the "justice administration" or at most, with a more professional and neutral power, only had to take "legal" roles without creating any regulation¹.

These concepts and ideas were not accident of fate, but a product of historical evolution that each country had in relation to the legal *tradition* gained. Even in countries where the Judiciary took control of the constitutionality (sometimes without a constitutional text so authorized, as happened in the U.S.), and with it, took upon themselves the competency to block rules and acts issued by the Executive or Parliament, those same judges created a self restraint pattern, by clarifying that if an issue emerged as a political one, it did not have to be treated by the courts. In other words, it was a "nonjusticiable" issue, whose treatment ended up in charge of the Presidency or the Congress².

The importance of recognizing the value of Human Rights, born after World War II, gave rise to, generically referred to as, the international law of human rights, as well as the proliferation through laws, treaties and specific courts in order to secure and defend its application, along with the importance of upholding the democratic and republican system of government –which is essential for the effectuation of fundamental rights – has gradually been eroding the prejudiced notion of the apolitical Judiciary.

¹ HAURIOU, Maurice, *Principios de derecho público y constitucional*, 2^a ed., trad, por Carlos RUIZ DEL CASTILLO, Reus, Madrid, ps. 336 y ss. Cited in SAGÜÉS, Néstor P., *El Tercer Poder – Notas sobre el perfil político del Poder Judicial*, LexisNexis, Buenos Aires, 2005, ps. XIX.

² SAGÜÉS, Néstor P., *El Tercer Poder...*, ob. cit. ps. XIX.

Furthermore, due to the uncontrollable phenomenon of globalization, many of these ideas were spread through Latin America, where to the damage caused by tyrants and dictatorships that sowed terror in a rule of man system (de facto state) - as in many European countries – it should be added the factor of economic underdevelopment and poverty.

Therefore, in these latitudes, the "third world" needs, more than elsewhere, "the third power" to break away from the systems, models and traditions. The consolidation of democratic and republican system of government in Latin America must be a specific goal for each one of its states. Fortunately, this has been well understood. We cannot arrive to any other conclusion when looking at internal and external commitments that Latin American states have made, through their national constitutional reforms and the implementation and adherence to international treaties to respect fundamental rights such as equality, freedom, life, democracy, dignity, identity, to name a few.

This is evidenced by the "constitutionalization of guarantees" or "*procesalización del derecho constitucional*"³, with the amended constitutions of Brazil (1988), Colombia (1991), Paraguay (1992), Peru (1993), Argentina (1994), Mexico (1994 and later) and Venezuela (1999), among others, and in parallel, covenants and conventions on Human Rights became operative, particularly the American Convention on Human Rights (ACHR) in 1969, which are generally awarded constitutional status in the States themselves, either explicitly (Colombia, art. 93 CP, Brazil, art. 5 ° § 3 incorporated by EC 45/04, Argentina, Art. 75 inc. 22, CN, Venezuela, art. 23 ; Paraguay art. 141) or, otherwise, in a tacit manner⁴.

Now, after consolidating republican and representative democracies in Latin American countries, as it is the case with Argentina, which in 2013 will have had the protection of constitutional government for 30 consecutive years, it comes to light that the structure of the articulated model is not sufficient to meet its commitments, and that the fundamental rights need more than a simple abstract statement on a rule or treaty, to be effectively respected.

Given the crisis of representativeness of the Legislative Power, the discredit brought on many executive power officials, as well as the current social demands that

³ BEJARANO GUZMÁN R., *La procesalización del derecho constitucional en Colombia*, in *La ciencia del Derecho Procesal Constitucional, Estudios en homenaje a Héctor FIX-ZAMUDIO en sus 50 años como investigador del derecho*, E. FERRER MAC-GREGOR y A.Z. Lelo DE LARREA (coord.), UNAM, México, 2008, V. VI, p. 173.

⁴ BERIZONCE, Roberto O., *Los conflictos de interés público*, in press, to be published in Argentine in Revista de Derecho Procesal, Rubinzel-Culzoni, T. 2011-2. Santa Fe. 2011

cannot tolerate today what, previously, was accepted with resignation or fatalism (such as dissatisfaction with constitutional promises, or arbitrary stances from the Executive or Legislative that were judicially unreviewable), finally translated into a strong community pressure on Justice to resolve them, all those reasons have definitely caused that many issues⁵ become “judicialized” on a daily basis, which in another time would have been impossible to bring to justice⁶.

Under such a situation, the Judiciary emerges with a strong judicial activism by its members, who as guardians of fundamental rights protected by constitutional provisions and international treaties, seek the "materialization" of justice, so that it acquires the form of a housing, a meal, a healthy environment, a decent prison, among the many (and infinite) examples we can give⁷. In this sense, Marcelo ALEGRE has said the following; "los jueces tienen un papel importante a cumplir... un creciente activismo judicial en defensa de aquellos derechos sociales y económicos mínimos alcanzados por el primer principio [la necesidad de alcanzar en forma urgente un mínimo de protección en el plano social y económico], tendencia que aliento, no conspira contra el valor democracia, sino que lo fortalece, al robustecer la pertenencia ciudadana de amplios sectores actualmente excluidos de hecho del proceso político"⁸.

2. Globalization and transfer of legal models and juridical traditions

The transnationalization of law is an unstoppable phenomenon that has implications for every nation and people of the world. The origin, formation and maturation of every legal system in each country are daily challenged by the constant bombardment of institutions and mechanisms born and used in others latitudes.

⁵ About the phenomenon of “judicialization” of conflicts, see BERIZONCE, Roberto O., *Activismo judicial y participación en la construcción de las políticas públicas*, Revista de Derecho Procesal, Rubinzal-Culzoni, Número extraordinario Bicentenario, Santa Fe, 2010, ps. 169 y ss.

⁶ SAGÜÉS, Néstor P., *El Tercer Poder...*, ob. cit., ps XXII. This dynamic analysis, we mean, not in the abstract division of roles and assumptions on the part of institutions that historically were not created for this purpose is essential to understand the new role of the Judiciary. To this end, the brilliant work of Christian COURTIS *Reyes desnudos. Algunos ejes de caracterización de la actividad política de los tribunales*, in *Filosofía, política, derecho. Homenaje a Enrique MARÍ*. Prometeo. Buenos Aires. 2003. Págs. 305/329, especially 321, is particularly enlightening. For its part, Ciuro CALDANI see a shift, a loss of land by the Legislature to the Executive and the Judiciary. See "El juez en el cambio histórico". L.L. 2001-D, 1152 et seq. Of course it is not disturbing the progress of the judges. The great abuses, tyrannies, have historically come from the Executive.

⁷ BERIZONCE, Roberto. *El activismo de los jueces*, LL 1990-E, 920 y ss.

⁸ ALEGRE, Marcelo. *Igualitarismo, democracia y activismo judicial*, in SELA –Seminario Latinoamericano de Teoría Constitucional y Política- 2001 “Los derechos fundamentales”. Editores del Puerto. Buenos Aires. 2.003. P. 105.

It is understood, that making a definitive classification of world legal systems in legal cultures is almost impossible, according to what Professor STÜRNER stated in the inaugural speech of the XII World Congress⁹, and ultimately, the classical classifications of Roman, Germanic and Anglo-American processal law are not relevant today because of recent developments within these different branches of law¹⁰. In order to delve into this topic, and under the premises of Professor Mirjan DAMAŠKA, using ideal types to perform suitable comparative studies on the procedural issue addressed¹¹. In that sense, it is clear that Latin America has received the legal tradition of the Continental European Common Law¹², but in cases such as Argentina, it had to fit into the constitutional model received from the United States¹³.

In this regard, it is questionable whether this (complex) legal tradition received, influences or has influenced on the possibility that the judicial performance gets involved in the implementation, control or participation in public policies.

To that effect, it can be seen as a problem what DAMAŠKA describes as characteristic of the judicial process of the reactive State, since he finds the very concept of procedural justice focusing its instrumentality, as the decisions are justified more in terms of the used procedures in the justice system than in the proper acquired results, in contrast to the active model, where the process takes a back seat to the importance of obtaining a substantially correct decision.¹⁴

The understanding of the due process as a dogmatic compliance of procedural rules is supposed to crack the principle of effective judicial protection. It is worse when one does not even have the type of procedure or standard to make possible the defense of a substantial right in court. This feature of the exaltation of the law and the legal

⁹ STÜRNER, R., *Procédure civile et cultura juridique*, RIDC 2004-4, p. 798.

¹⁰ For maintenance of the distinction between common law and civil law, but not only in the context of the process, v. BULLIER A. J., *The Common Law*, Dalloz, 2007, although no changes in the different countries of Common Law, particularly the United States of America, the United Kingdom, Canada, Australia, New Zealand. V. also V. Murray P., “Reception and Transmission of Procedural Law in the United States: a two-way Street?”, en Deguchi M. et Storme M., *The Reception and Transmission of Civil Procedural Law in the Global Society*, Maklu éd., Anvers/Apeldoorn, 2008, ps. 236 y 331, cited in footnote n ° 9, BERIZONCE, Roberto O. y FERRAND, Frédérique, *Leyes modelos y Tradiciones nacionales, Relatorio General*, IAPL, XIV World Congress, Heidelberg, 2011.

¹¹ DAMAŠKA, Mirjan R., *Las caras de la justicia y el poder del Estado. Análisis comparado del proceso legal*, trad. de Morales Vidal, Santiago de Chile, 2000, ps. 415 y 416.

¹² See MERRYMAN, John Henry, *La tradición Jurídica Románo-Canónica*, FCE, 2^a Ed. Corregida, 1989, Undécima impresión, 2008. México.

¹³ CIURO CALDANI, Miguel A. *Las garantías constitucionales y su problemática cultural en la Argentina, in Defensa de la Constitución. Libro en reconocimiento de Germán BIDART CAMPOS*. Victor BAZÁN (coordinador). Ediar. Buenos Aires. 2003.

¹⁴ DAMAŠKA, Mirjan R., *Las caras...*, ob. cit. p. 255.

regime, as ultimate source of law, is a significant remnant of the European civil law tradition¹⁵ in Iberoamerica.

Faced with such a scenario, the concept of "differential procedural protection" [“tutela procesal diferenciada”]¹⁶ has been essential in order to find its own process parameters in relation to the type of law and substantial values, at stake in a particular case, beyond the legal procedural text. On the other hand, the Supreme Court of Justice of Argentina stated that: "Donde hay un derecho, hay un remedio legal para hacerlo valer" [Where there is a right, there is a remedy to enforce it]¹⁷. Thus, the legal dispute focuses on the lawsuit substantial outcome, seeking proper procedural paths for this purpose.

In our view, another key point is the trial judge's position and function. On the basis of analysis of MERRYMAN, as regards the orthodox civil law tradition, the judge is assigned a comparatively minor, inglorious role, as a mere operator of a machine designed and built by academics and legislators, the judge "no es un héroe cultural ni una figura paternal... Su imagen es la de un empleado público que desempeña funciones importantes pero que resultan esencialmente poco creativas"¹⁸.

This stance, although rather tough, is ratified, even today, by professors BERIZONCE and FERRAND for Latin American/ Iberoamerica procedural law,¹⁹ where there is no consolidation for the Judiciary's primordial points yet, such as its independence and impartiality, lack of cooperation or lack of interdisciplinary cabinets underpinning the judicial decision, training and specialization in specific cases, which demonstrates the necessary and sufficient experience to meet public interest litigations, among others. Thus, it is essential to make this clear respecting the questionable matter of the appropriateness of submitting to the understanding of judges, certain issues in relation to the social rights and as Courties y Abramovich state, “en este sentido se alegan problemas vinculados a la división de poderes, a la falta de representatividad de

¹⁵ BERIZONCE, Roberto O. y FERRAND, Frédérique, *Leyes modelos...*, ob. cit. p. 43.

¹⁶ To see more about this: *Tutelas procesales diferenciadas*. Tomo I y II, Rubinzal Culzoni, T. 2008.2 y 2009.1. Santa Fe 2008 – 2009.-

¹⁷ Argentina. CSJN “Halabi, Ernesto c/ PEN Ley 25.873 DTO. 1563/04”. 24/02/2009. Considerando 12º: “...Esta Corte ha dicho que donde hay un derecho hay un remedio legal para hacerlo valer toda vez que sea desconocido; principio del que ha nacido la acción de amparo, pues las garantías constitucionales existen y protegen a los individuos por el solo hecho de estar en la Constitución e independientemente de sus leyes reglamentarias, cuyas limitaciones no pueden constituir obstáculo para la vi-gencia efectiva de dichas garantías (Fallos: 239:459; 241:291 y 315:1492)...”.

¹⁸ MERRYMAN, John Henry, *La tradición...*, ob. cit. ps. 77 y 95.

¹⁹ BERIZONCE, Roberto O. y FERRAND, Frédérique, *Leyes modelos...*, ob. cit., p. 43.

los jueces o a las dificultades que causaría inmiscuir a los jueces en materias de política pública o de impacto presupuestario. Cabe señalar desde ya que de lo que se trata no es de someter a los poderes políticos a una discusión política sobre la conveniencia o inconveniencia de su gestión ante los tribunales, sino del control jurisdiccional del cumplimiento de sus obligaciones jurídicas –constitucionales o legales".²⁰

Within this topic, a discussion that deserves to be staged for the purpose of discussing procedural models for implementing public policies is that relating to the judges' control of the constitutionality. That is, is it better the typical fuzzy control of U.S. jurisdiction, adopted by some countries that have followed the continental European law?, or otherwise, in order to solve and participate in public policies, Is the Judiciary better positioned from constitutional courts or tribunals?²¹

To delve deeply into the subject, we can mention the words written by ZAGREBELSKY, whose opinion is that although "relevantes distancias entre los sistemas de garantía jurisdiccional de la Constitución: Judicial review o justicia constitucional; tradiciones de common o civil law; control abstracto o concreto, preventivo o subsecuente; tutela de los derechos constitucionales o control de las leyes, etc., el Estado de Derecho no siempre es la misma cosa en cuanto État de Droit, rechtsstaat o rule of law. La noción de Estado constitucional, por consiguiente, no coincide en todas partes. La misma Constitución no es norma suprema en la misma medida, en donde cambian las relaciones entre Cortes y poderes legislativos. Son diferencias relevantes. Pero justo por eso se destacan las tendencias comunes que se hallan en el 'juzgar en derecho constitucional'. El Estado constitucional, que deriva de las diversas nociones de Estado de Derecho, parece convertirse en una perspectiva común".²²

The aforementioned reflects the difficulty in establishing what system of constitutional control system is better for the Judiciary's participation in public policies,

²⁰ ABRAMOVICH, Víctor y COURTIS, Christian. *El umbral de la ciudadanía. El significado de los derechos sociales en el Estado social constitucional*. Editores del Puerto. Buenos Aires. 2.006. Pág. 82.

²¹ Shows a classification of the organs of constitutional jurisdiction in Comparative Law in NIEVA FENOLL, Jordi, *La jurisdicción constitucional: ¿un problema?*, Revista de Derecho Procesal, Rubinzel-Culzoni, T. 2011-1, Santa Fe, 2011, p. 459.

²² Conf. ZAGREBELSKY, Gustavo, *El juez constitucional en el siglo XXI*, trad. Eduardo FERRER MAC-GREGOR written text of the lecture delivered at the I Congreso Internacional de Justicia Constitucional and V Encuentro Iberoamericano de Derecho Procesal Constitucional, Suprema Corte de Justicia de México e Instituto Iberoamericano de Derecho Procesal Constitucional, Cancún, 14 al 17/07/2008. ZAGREBELSKY teaches on other texts that in the United States, whose constitution has a deep descent into ours, the rights have a pre state, subjective and jurisdictional origin, while in Europe and more specifically in France, the rights have a state, objective and legislative origin. *El derecho dúctil*. Editorial Trotta. 6ta. Edición. Madrid. 2005. p. 58.

which is an issue that merits a much further and deeper analysis than the one provided in this work.

Nevertheless, we follow the ideas of the great master Mauro CAPPELLETTI, to whom the courts are the ones that find proper legitimization, since they are less likely to be captured or influenced by selfish group interests, and, therefore, they are in the best conditions for controlling and making other government institutions, which suffer from a chronic lack of performance, responsible for adjusting to higher legal standards²³

In respect to this matter, we can add that a system like for instance the one that Brazil has, is focused, *prima facie*, as the most suitable for those Judiciary's "new objectives". First, because the control of constitutionality of laws is always performed through the jurisdictional organs, without any administrative jurisdiction or jurisdiction entrusted to political organs such as the French Conseil Constitutionnel²⁴. In our view, this strengthens the requirement of impartiality and independence of powers, essential to the Judiciary's proper control of public interest conflicts, which are those that generally allow the judiciary to interfere in matters of public policies.²⁵

But the most significant of our Latin American neighbor, is the mixed control of constitutionality that it possesses. On the one hand, it adopts the American constitutionality fuzzy control system (exception via), that is, the control is exercised by all the judges and courts that can and should reject the application of a violating or contrary rule to the purpose of the Constitution in a specific case. Parallelly, Brazil also adopts the Austrian control concentrate system, as well as the privative jurisdiction of

²³ CAPPELLETTI, Mauro, *Vindicating the Public Interes Though the Courts: A Comparativist's Contribution*, 25 Buffalo L. Rev., 643, 1976. Asimismo: CAPPELLETTI, Mauro y GARTH B., *El acceso a la Justicia*, Rev. Col. Abog. La Plata, Argentina, 1983, trad. S. Amaral, ps. 58 y ss.; CAPPELLETTI, Mauro. *Proceso, ideología y sociedad*. EJEA. Trad. de Santiago SENTÍS MELENDO y Tomás A. BANZHAF. Buenos Aires. 1974. Pág. 453 y ss. This does not mean ignoring the serious problems, maximized in our country, about the composition and appointment of judges of the Supreme Court of Justice of the Nation, as it has made clear, among others, Professor OTEIZA (cfr. OTEIZA, Eduardo. *La Corte Suprema. Entre la justicia sin política y la política sin justicia*. Librería Editora Platense. La Plata. 1994).

²⁴ ZANETI JUNIOR, Hermes, *Processo Constitucional: O Modelo Constitucional do Processo Civil Brasileiro*, ed. Lumen Juris, R. de Janeiro, 2007. The example of the French Constitutional Council can clearly see the different idiosyncrasies and political traditions, social and cultural rights, as a body of clear political composition as that would be disastrous in societies as unstable as ours (Latin America). However, in the Gallic country the model works, because there is a just respect for fundamental rights. Cf. TORICELLI, Maximiliano. *El sistema de control constitucional argentino*. LexisNexis. Buenos Aires. 2002 (reimpresión). P. 46.

²⁵ BERIZONCE, Roberto O., *Los conflictos de interés público*, in press, to be published in Argentine in Revista de Derecho Procesal, Rubinzel-Culzoni, T. 2011-2. Santa Fe. 2011

the Supreme Federal Tribunal (direct actions of unconstitutionality, declaration of constitutionality and of fundamental precept of non-compliance).²⁶

Well then ZANETI JR. explained that “de la relación entre un sistema de la legalidad (L’État légal o el Estado de Derecho alemán – códigos) y un sistema de la creación judicial (rule of law – control de los poderes y vinculatividad de las decisiones judiciales) surge la particularidad híbrida del sistema brasileño. En derivación de la influencia norteamericana, también fue incorporado el sistema inglés de unidad de la jurisdicción. Ocurre, de ese modo y como consecuencia, la plenitud del acceso a la jurisdicción, como garantía primera de la Constitución, en la protección del ciudadano contra lesión o amenaza de lesión a derecho. Esa plenitud queda potencializada por el monopolio que el Poder Judicial ejerce sobre la Jurisdicción. Se trata por tanto de una riqueza sin igual para la potencialidad institucional del Poder Judicial: como el Judicial no se mueve ex officio, una vez que debe ser impelido y provocado por los legitimados, se torna un espacio privilegiado para el discurso democrático, un “motor de democracia” participativa. Por esa razón, algunos juristas brasileños defienden esa característica como muy superior a la posibilidad de control en la matriz americana. En ese sentido, después de enumerar los aspectos de limitación del sistema de la common law frente al sistema nacional destaca Alvaro DE OLIVEIRA los beneficios de la mayor amplitud de la jurisdicción brasileña, de los cuales resalta ‘la ilimitada posibilidad de revisión judicial del acto practicado por la Administración, sea cual fuere la autoridad responsable’. El ciudadano brasileño (y ahora con la ampliación de los instrumentos, también la sociedad civil, por medio de los procesos colectivos) está más preparado para el fortalecimiento de la democracia derivante del control del Poder Público, por medio de la revisión judicial y de las tutelas específicas que están a su disponibilidad. Esa lección se complementa con la exhortación de que “el punto es muy importante y debe servir de estímulo para que el Poder Judicial brasileño, imbuido del espíritu de defender los derechos del ciudadano y no vagos intereses llamados públicos, pase a controlar efectivamente y cohibir los eventuales excesos de la Administración pública”.²⁷

²⁶ ZANETI JUNIOR, Hermes, *Processo Constitucional: O Modelo Constitucional do Processo Civil Brasileiro*, ed. Lumen Juris, R. de Janeiro, 2007

²⁷ Ibid. In contrast, occurs in the United States a very marked decrease of control to the administration in general, the role displayed by the "Rehnquist Court", particularly the role in this regard stellar Justice Antonin Scalia, and specifically, the discretion granted in the case "Chevron" -1985. Cf. GARCÍA DE ENTERRÍA, duardo. *Democracia, jueces y control de la administración*. 6^a edición. Civitas. España. 2.009. Págs. 181/218.

The findings of the Brazilian professor are unobjectionable and even healthy enviable. However, when we talk about conflicts of public interest related to the possibility of intervention by the Judiciary, public administration in general, either from the regulatory powers of the executive branch or executive, or the lawmaker powers of the Legislature, not is in a situation of "excesses", but quite the contrary, it speaks about a situation of failure of performance, and even of non-activity due under mandates constitutional or fundamental rights.

Under such circumstances, the constitutional court control by other ways appears in the issue raised in a more harmonious and with greater accuracy and sensitivity, after all, since the premise remains the same: the repeal of the rule unconstitutional should be the last decision to take.

First among those means, it is possible to mention the so-called "atypical judgment" [sentencia atípica] or "intermediate judgment" [sentencias intermedias]. Quite useful at one time, the scheme initially designed by KELSEN was reduced to distinguish only two types of judgments: favoring or rejecting judgments [sentencias estimatorias o desestimatorias], and to consider the Constitutional Court as a mere negative legislator whose decisions could not entail more creation of Law than the simple annulment of the law. Kelsen's principle, indeed, was long overwhelmed by the functional reality of the bodies of closure of the constitutional jurisdiction and the requirements of the State Constitutional Law²⁸. Likewise and according to Victor BAZAN, the constitutional-unconstitutional alternative is insufficient to cover the entire quality spectrum of cases presented before them, situation requiring the generation of active judicial positions to model variants when procuring judgment or sentences that would allow the courts to fulfill the role they are called to carry out in a more appropriate and relevant way²⁹. Along the same line, another role is the one described by ABRAMOVICH when he says "...lo que caracteriza estas acciones indirectas o complementarias es que las vías judiciales están lejos de ser el centro de la estrategia de exigibilidad de los derechos, pero sirven para apuntalar el resto de las acciones políticas que se emprender para canalizar las demandas de derechos en el marco de un conflicto

²⁸ Conf. GARRORENA MORALES, Ángel, *Opacidad y desestimación de la inconstitucionalidad en el fallo de las sentencias interpretativas*, en AA.VV., *La democracia constitucional. Estudios en homenaje al profesor Francisco RUBIO LLORENTE*, vol. 2, Congreso de los Diputados, Tribunal Constitucional, Universidad Complutense de Madrid, Fundación Ortega y Gasset, Centro de Estudio Políticos y Constitucionales, Madrid, 2002, ps. 1844/1845; cited en BAZÁN, Víctor, *Acerca de ciertos desafíos temáticos de la justicia constitucional en Latinoamérica*, Jurisprudencia Argentina, 2010 – I, ps. 3 y ss.

²⁹ BAZÁN, Víctor, Acerca de ciertos desafíos..., ob. cit., p. 3.

colectivo, ya sea que se trate de reclamos directos a la Administración o del desarrollo de vías de negociación, o incluso de cabildeo sobre los funcionarios, el Congreso o empresas privadas. El proceso judicial sirve de punto de apoyo para la acción de incidencia de los actores de procesos sociales o políticos más amplios y complejos”.³⁰

The aforementioned problematic of interpretation in accordance with the Constitution (Verfassungskonforme Auslegung in German terminology), has a lot to do with the birth and multiplication of these instruments of judgment or sentence.³¹ As said by GROPPY, the idea falls within the framework of the ‘... la idea se inscribe en el marco de la ‘minimización’ del impacto de las decisiones de inconstitucionalidad sobre el sistema, a fin de evitar vacíos y de buscar un equilibrio entre la necesidad de eliminar normas inconstitucionales y la de no crear lagunas o discontinuidades que pondrían en duda el carácter de ordenamiento jurídico...Con las sentencias interpretativas el juez constitucional hace propia una de las interpretaciones posibles de la disposición censurada, escogiendo la que es conforme (sentencia interpretativa de rechazo) o la contraria (sentencia interpretativa estimatorio) a la Constitución”.³²

Along such logic, the jurisprudential construction of these sentences were been expressed mainly in Europe (for example, the German, the Austrian, and the Spanish Constitutional Courts together with the Italian Constitutional Court), although with repercussion throughout the Latin American region (vgr. the Constitutional Court of Colombia, the Constitutional Court of Peru, the Supreme Court of Argentina, the Constitutional Halls of the Supreme Court of Justice of Costa Rica and the Supreme Court of Justice of Venezuela). They were acting as outlets to the rigid mold that Kelsen projected originally encompassed by encapsulating the constitutional courts in the exclusive role of "negative legislator".³³

In short and starting from the assumption of the distinction between rules and standards, or between policy wording and policy rule, “interpretative judgments” [sentencias interpretativas] are linked to a consistent interpretation that is inferred through the constitutional interpretation. RUBIO LLORENTE understands them as those that issue a statement, not on the engrossment of the law, but as a rule that can be

³⁰ ABRAMOVICH, Víctor. *Acceso a la justicia y nuevas formas de participación en la esfera política*. JA-II-1177.

³¹ Ibid.

³² GROPPY, Tania, *¿Hacia una justicia constitucional “dúctil”? Tendencias recientes de las relaciones entre Corte Constitucional y jueces comunes en la experiencia italiana*, in FERRER MAC-GREGOR, Eduardo (coord.), Derecho Procesal Constitucional, t. I, 4^a ed., Colegio de Secretarios de la Corte Suprema de Justicia de la Nación, Ed. Porrúa, México DF, 2003, p. 355.

³³ BAZÁN, Víctor, *Acerca de ciertos desafíos...* cit. p. 5

inferred from such statement by the usual means of interpretation³⁴. To our understanding, after years of applying the traditional cassation derived from the French and Spanish law, the ruling "Casal"³⁵ of the Supreme Court of Argentina is a clear example of interpretative judgments as "atypical" or "intermediate". It was possible indeed, to articulate a new interpretation of exactly the same articles considered in the National Code of Criminal Procedure. Consequently, the option of a comprehensive review of the articles was possible, thus, allowing the consideration of *fait accompli* and proof of evidence without reaching the declaration of unconstitutionality of the legislation.

This mechanism together with the one from the judiciary power by means of the constitutionality control appears as a tool of peculiar significance to consider when enforcing public policies since it permits to disregard the explicit control of the regulations that the Legislative Power has not enacted yet due to omission or failure to execute.

Another suitable means to fight the lack of performance and/or inactivity of the executive and legislative bodies is the judiciary control of *unconstitutionality by omission* [inconstitucionalidad por omisión], which is conformed when related to a specific constitutional mandate, it is not acted despite its expressed provision or when it is regulated in a deficient way explaining an insufficient or discriminating regulation.

Among the requirements that could configure such situation, among others, BAZÁN enumerates regulation and preeminence of the Constitution, axiological connotations from the alleged law or, the juridical situation opposing the Constitution because of omission. He also names the time lapse by which the inaction of the deferred body is maintained, the legislator's leeway (or inaction) of the committed public authority, the possibilities within reach of the judiciary to apply the effectiveness of possible material and financial solutions. BAZAN also expresses that such jurisdictional practice naturally supposes having always present the obligation of generating a balanced solution, but this does not mean a reckless invasion of sectors that make their own the power that belongs to other state bodies, neither to enervate the judiciary

³⁴ RUBIO LLORENTE, Francisco, *La jurisdicción constitucional como forma de creación del derecho*, in *La forma del poder. Estudios sobre la Constitución*, 2^a. Ed., Centro de Estudio Constitucionales, Madrid, 1997, p. 484; citado en BAZÁN, Víctor, *Acerca de ciertos desafíos...ob. cit. ps. 6*. Also, *Aproximación a ciertas técnicas previstas normativamente y dispensas jurisprudencialmente en el derecho comparado para corregir omisiones inconstitucionales*, en Defensa de la Constitución. Libro en reconocimiento de Germán BIDART CAMPOS. Victor BAZÁN (coordinador). Ediar. Buenos Aires. 2003.

³⁵ "Casal", Supreme Court of the Nation (328:3399).-

acting if the competent authority arbitrary shutters the validity of the constitutional supremacy when omitting *sine die* the compliance of the constitutional mandates nor when the already *in tara* of constitutional development, in an unreasonably and discriminatorily way, excludes something from someone and it gives to others in circumstances that are equal or equivalent.³⁶

Under such premises, the described assumption penetrates directly in the controverted relationship between jurisdiction and legislation, requiring a thorough care by judicial political activity in order not to infringe those competencies that are within the legislator's field.

Nonetheless, ABRAMOVICH says "...lo que caracteriza estas acciones indirectas o complementarias es que las vías judiciales están lejos de ser el centro de la estrategia de exigibilidad de los derechos, pero sirven para apuntalar el resto de las acciones políticas que se emprender para canalizar las demandas de derechos en el marco de un conflicto colectivo, ya sea que se trate de reclamos directos a la Administración o del desarrollo de vías de negociación, o incluso de cabildeo sobre los funcionarios, el Congreso o empresas privadas. El proceso judicial sirve de punto de apoyo para la acción de incidencia de los actores de procesos sociales o políticos más amplios y complejos".³⁷

Among Latin American examples that have taken such stance we can name: a) Costa Rica, by Law 7135, dated 10/11/1989; b) Brazil, Mexico and Argentina, by means of their local Constitutions because of the federal governmental structure, and specifically in Argentina, by the Supreme Court of Justice through the judicial pronouncements in the cases "Badaro, Adolfo V. v. ANSeS s/ reajustes varios"³⁸, and "Halabi, Ernesto v. Poder Ejecutivo Nacional s/ Ley 25873 – decreto 1563/2004 s/ amparo ley 16986"³⁹; c) Colombia, by the judicial pronouncements of the Constitutional Cort, judgments C-073/96, C-543/96, C-540/97, C-080/99, C-956/99, C-427/00, C-1433/00, C-006/01, C-1064/01, C-041/02, C-185/02, C-871/02, C-402/03 and C-858/06; d) Bolivia: by the already extint Costititional Court with the constitutional declaration 6/2000 and constitutional judgments 9/2004 and 18/2004); e) Dominican Republic, by judgements pronounced in civil proceedings in "Productos Avon S.A.",

³⁶ BAZÁN, Víctor, *Acerca de ciertos desafíos...* ob. cit. ps. 9.

³⁷ ABRAMOVICH, Víctor. "Acceso a la justicia y nuevas formas..." ob. cit., says "el Poder Judicial incide en los procesos de formulación de las políticas públicas abriendo espacios de participación, o condicionando a determinados requisitos las políticas que en definitiva se adopten".

³⁸ Causa B.675.XLI (Fallos 329:3089).

³⁹ Causa H.270.XLII

ated 2/24/1999; f) Mexico, by means of constitutional controversies 46/2002, dated 03/10/2005, and 14/2005, dated 10/3/2005.⁴⁰

Within the strictly local outlook of the Province of Santa Fe, Argentina, it is possible to mention like examples of unconstitutionality by omission two cases that have been paradigmatic and with a social and institutional relevance.

The first one of the cases refers to the penal sphere, and to the provincial legislator's indolence to adapt the investigation system and the crime prosecution to the constitutional framework. That is, starting from the premise that it is possible to punish a crime but only after having processed a due proceeding, a fair proceeding when the constitutional rights enshrined in the Magna Carta are dully respected. On August 8th, 2006, the National Supreme Court of Justice said to the Province of Santa Fe that up to that moment, its procedural penal system had a net inquisitive nature, but it did not adapt to those norms. It did indeed in the "Dieser, María G. y Fraticelli, Carlos A."⁴¹, at the moment of reviewing the final judgment it was discussed that the participation of the judges who had examined the cause at the trial proceedings – appeal of the court order to try a person- was an act of violation of the right to trial *de novo*, and of the judges impartiality. Therefore, it is difficult to think that the one who advocated before that there were enough evidences indicating to bring to trial could go back freely on his word later. The right to have a sentence review [trial *de novo*] by a higher court, mentioned explicitly in Article 8 of the American Convention of Human Rights, and in Article 14 of the International Pact on Civil and Political Rights, requires that the one who reviews the sentence be free of commitments from both, the parts and he.

Starting from the ruling of the Argentinean highest court, the Supreme Court of Justice of the Province of Santa Fe, had to issue the Acta N° 32, dated August 23, 2006 that says:

"...FUERO PENAL DE LA PROVINCIA DE SANTA FE - REGLAMENTACIÓN DE SU FUNCIONAMIENTO. VISTO: Que la Corte Suprema de Justicia de la Nación se ha expedido el día 8 de agosto del corriente año en la causa "Dieser, María Graciela y Fraticcelli, Carlos Andrés s. Homicidio Calificado por el vínculo y por alevosía - Causa N° 120/02"; y CONSIDERANDO que en el referido fallo el Máximo Tribunal de la Nación hizo aplicación al sistema procesal penal santafesino de las pautas que sentó en el precedente "Llerena" (del 17 de mayo de 2005), que allí la Corte Suprema de Justicia de la Nación ha tenido oportunidad de precisar el alcance de la garantía del juez imparcial en el marco de un proceso penal, reconocida como un derecho implícito en la forma republicana de gobierno y, por otro lado, derivada de las garantías del debido proceso y de la defensa en juicio (arts. 33 y 18, respectivamente C.N.), además de haber sido consagrada expresamente en diversos tratados incorporados a la Ley Suprema por su art. 75, inc. 22...Que en función

⁴⁰ BAZÁN, Víctor, *Acerca de ciertos desafíos...* ob. cit. ps. 10.

⁴¹ CSJN 18/08/2006.

de ello, y con el fin de preservar la validez de los procesos futuros y en trámite, asegurando el debido respeto de garantías constitucionales dictó la Acordada N° 23 (del 1.11.2005), en la que procedió a reasignar la competencia de los Tribunales Orales en lo Criminal Federal y de las Cámaras Federales de Apelación cabeceras de Distrito. Que por su parte, el Consejo de la Magistratura del Poder Judicial de la Nación, mediante Resolución N° 152 (del 23.3.2006) dispuso ‘recomendar a la Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal, a la Cámara Nacional de Casación Penal y a todas las Cámaras Federales de Apelaciones y Tribunales Orales del interior del País la adopción de un criterio similar al fundamentado en el fallo Llerena’...Que atento a los fundamentos dados en la decisión aludida, se hace imperioso revisar las normas sobre atribución de competencia de los tribunales de segunda instancia en el fuero penal, ya que se ha puesto en crisis la constitucionalidad de la asignación de competencia al órgano judicial de alzada que, en función del artículo número 34 de la Ley Orgánica del Poder Judicial, hubiera intervenido revisando resoluciones sobre la verosimilitud de la culpabilidad dictadas por jueces de primera instancia antes del dictado de la sentencia de mérito para efectuar la revisión de esta última...*Que este Cuerpo es consciente de que la medida aquí adoptada no constituye la solución definitiva a la problemática planteada por los recientes pronunciamientos nacionales, la que requiere de una respuesta legislativa. Que por ello, y como expresión del principio de colaboración entre los poderes del Estado, se estima conveniente poner en conocimiento de la Legislatura de la Provincia lo que aquí se dispone, a sus efectos. Que asimismo, lo aquí dispuesto lo es sin perjuicio de los resultados a los que se arribe en la ejecución del Plan Estratégico del Estado Provincial para la Justicia Santafesina, firmado el 10 de mayo del corriente año por los tres poderes del Estado, los Colegios Profesionales, las Facultades de Derecho, y la Asociación Tribunales, el que persigue entre sus objetivos la reforma del sistema procesal penal...* (highlighted done by the authors).

After such pronouncement by the Provincial Highest Court, the sanction of a new Criminal Procesal Code of the Province of Santa Fe would arrive by Law N° 12.374, dated August 16, 2007, that is, less than one year after that judicial pronouncement that will exhort the local legislator to safeguard the criminal procedure of the whole province.

On the other hand, and always within the civil jurisdiction, the Court I of the Civil and Commercial Court of Appeals of Santa Fe has expressly manifested the need to deal with damage proceeding due to flooding to more than 5.000 citizens against the Province of Santa Fe and the local Municipality, by means of class actions, even though such figure was not provided by law yet. In such sense, the court of appeals expressed, after quoting several antecedents that had been solved by the principles and guidelines of collective proceedings:

“No puedo cerrar este elemental muestreo con la referencia a un precedente que es de obligada presencia cuando se habla del tema de los procesos colectivos, ya que, de “lege ferenda”, admitidamente representa “el Derecho que viene”, y ha sido reiteradamente tomado como paradigma de esa regulación instrumental hasta hoy lamentablemente ausente. Me refiero al “Proyecto de Código Modelo de Procesos Colectivos para Iberoamérica”, elaborado por el “Instituto Iberoamericano de Derecho Procesal” en el año 2004, y entre cuyos autores figuran destacados procesalistas connacionales, como Enrique Falcón y Roberto Berizone, habiendo sido la redacción revisada por Ángel Landoni Sosa. No cabe abundar en sus pormenores, pero hay algunos datos que por sí imponen la necesidad de resaltarlos...No se me escapa que lo que estoy poniendo de resalto implica no sólo generar un proceso inexistente en la norma -con los riesgos que ello implica-, sino también prever una serie de matices que le serían inherentes, y que quizás debieran ser

anticipados de tal modo de si se arriba a la materialización -por vía de consensos, no imagino otra- de dicho proceso colectivo, estén incluidos dentro del marco de aquellas actas-acuerdos en las que se sustente la operatividad del mecanismo...Como fuere, lo que quizás tengo también en claro es que la decisión de encarar la eventual materialización de lo así reseñado excede el marco de atribuciones funcionales de esta Sala, e incluso exorbita también el ámbito del decisorio que puntualmente genera el arribo de este proceso a la misma. Asumo que es una cuestión que mas allá de lo puramente jurídico involucra matices de rango político, y que como tal incumbe quizás a la Corte Suprema de Justicia de la Provincia (Constitución Provincial, art. 92 inciso 1º)...”.

Unfortunately, the Highest Provincial Court would not accompany such jury's verdict.⁴² Indeed, the Santafesinian Supreme Court decided to ignore the conflict, leaving aside everything positive and healthy pretentious the jury's verdict of the Court of Appeals had. To solve there, the judges manifested by three concurrent votes that the judgment in Court has been limited to give, as the public prosecutor [district attorney] had stated when inferring the provincial extraordinary appeal, to mere and legitimate concern, expressions of good will, *lege ferenda* opinions but not to a resolution that could be “juridical” attackable. Consequently, they declare as inadmissible to lodge an appeal by the defendant.

Instead of being at the head of the socio-economic-political-cultural conflicts as a consequence of the flooding of a large area of the capital city of the province during two months, when almost one quart of the population had to be evacuated, the Provincial Court chose to adopt the ostrich tactic, that is “burying the head in the sand”, shielded behind a fierce formalism. It is understood that such formalism, does not reconcile with the authentic claims and complains from the neighbors, who were the victims.⁴³

3. Some situations of reference in Latin America

3.1 Brazil

The situation in the neighboring Federate Republic of Brazil is different as the way of dealing with collective actions dates back to many years ago. That is, the

⁴² A y S, t. 240 p. 98-102.

⁴³ Commenting about Court of Appeal's ruling, GALDÓS said “confiamos en que la inquietud elevada la Sala Primera de la Cámara de Apelaciones de la ciudad de Santa Fe a la Corte Suprema de Justicia de esa Provincia se cristalice en realizaciones positivas, sea en el ámbito de la funciones institucionales, sea en el de las atribuciones jurisdiccionales del Alto Cuerpo, porque las acciones colectivas facilitan el acceso del ciudadano a la jurisdicción. Se trata de hacer realidad el anhelo del recordado y querido maestro platense Augusto Mario Morello –precursor también en este tema- quien sostenía `la nueva base de energía del servicio de justicia radica en la adhesión participativa de la gente, que cree en ella’”. Galdós, Jorge Mario. “*Los daños masivos y el proceso colectivo (repercusiones de Halabi)*”. RCyS 2010-IV, 71 y ss. Sadly the aspirations and hopes of the author have been truncated, and together with them, the possibility of thousands of people to access to justice.-

citizens' participation has been allowed as far as it concerns the control of public politics since yesteryear, and it has been shaped by the sanction of different laws, a sophisticated protection system of the so-called rights of collective incidence [derechos de incidencia colectiva].⁴⁴ The crux of the two regulations is the Public Civil Action Law N° 7347 of 1985 [Ley de Acción Civil Pública N° 7347] (though it acknowledges a background that started in 1934), and the Code of the Consumer's Defense (Law N° 8078, from 1990).

Yet, the qualitative step came with the 1998 Constitutional Reform, when the Article 5º, LXXIII states that “cualquier ciudadano es parte legítima para proponer acción popular que vise a anular acto lesivo al patrimonio público o de entidad de que el Estado participe, a la moralidad administrativa, al medio ambiente y al patrimonio histórico y cultural, quedando el autor, salvo comprobada mala fe, exento de costas judiciales y de la carga de sucumbencia”.

Indeed, what was trully revolutionary as PELLEGRINI GRINOVER says is that “ahora, el control, por vía de la acción popular, de la moralidad administrativa no puede ser hecho sin el examen del mérito del acto lidiado. Se trata, aquí, de mera lesividad, sin el requisito de ilegalidad”⁴⁵. That is, if we compare to the traditional administrative system, the faculties of control grow exponentially when they are on the hands of the citizens.

3.2 Colombia

The situation is not entirely different in the Republic of Colombia. This is so because the Colombian model of collective actions established a popular action more than one hundred years ago. Nowadays, the claims are channel through the proceedings provided by the Law 472 from the year 1998. Two actions are foreseen, one is a popular one and the other in groups, being the last one more precise as for the subjects entitled to give notice of appeal. Through the popular action, it is possible to commence legal contingency plans of prevention, restitution or cessation of danger.⁴⁶

⁴⁴ VERBIC says that there is a striking similarity between Brazilian and North American models in collective action. Especially since both have dissimilar political, social origins, and respond to cultural guidelines markedly different. VERBIC, Francisco. *Procesos Colectivos*. Astrea. Buenos Aires. 2.007. Págs. 23/24.

⁴⁵ PELLEGRINI GRINOVER, Ada. *El control de políticas públicas por el Poder Judicial*. RePro, nº 164, octubre 2.008. Págs. 9 y ss.

⁴⁶ Cf. GIANNINI, Leandro. *La tutela colectiva de derechos individuales homogéneos*. Librería Editora Platense. La Plata. 2.007. Pág. 123/133.

4. Conclusion

Maurizio FIORAVANTI states that historically there exist two wide forms of understanding the present constitutions: as a guarantee, as a limit to the (suppose) irrepressible advance of the state, subjugating in such a way the human being freedom, and the other form is as a charter that promotes rights. The first model has a British/North American background, the second one, continental European.⁴⁷.

If one observes the institutional stability and continuity of the United States of North America and England, one can be easily seduced by such political-constitutional model. Nonetheless, any review throughout our history or daily reality gives us a different image. Except for brief periods, in our territory what is usual was the exception, the crisis, the constitutional breeches, poverty, lack of access to essential goods. The idea of having a Constitution that ensures something else than limits and guarantees, is also a hope. In Argentina, it is only possible to speak of the institutional-political role of the Supreme Court since the return of democracy.⁴⁸

The active role of the judges in general and the supreme courts in particular is nothing other than encouraging. Our rights as citizens were rarely overwhelmed by the judiciary power, but, instead, as a rule, we find in it the necessary responses that may be useful as a dam, mainly in the executive branch. It is clear that now one more step is expected. And, this is that the space that the traditional political powers have not taken before should be taken now, and that they control the observance of the public policies designed by the Magna Charta in a highly effective way, or directly make them effective before the inactions or omissions of the legislator and the administrator.⁴⁹ The structural lawsuit or of public interest, new in the places we live in but with long ancestry in the United States of North America, give the parties and judges the possibility to be part of the decision making on public policies.

The first effort a judge must make is to litigate when there is an absence of procedural practices adequate to deal with complex collective issues. COURTIS so has

⁴⁷ FIORAVANTI, Maurizio, *Los derechos fundamentales* (trad. Manuel Martínez Neira). 6^a edición. Trotta. Madrid, España. 2.009. Pags. 131/134.

⁴⁸ Cf. PETRACCHI, Enrique S, *Control judicial en la Argentina*. LL 1987-E-sec. Doctrina-731 y ss. And even in this period is necessary to put aside years of so-called "automatic majority".

⁴⁹ In this regard, our Supreme Court has said "que reconoce la actora que la actuación judicial tiene sus límites y que en materias tales como la presente no puede imponer estrategias específicas, sino sólo exigir que se tengan en cuenta las necesidades ignoradas en el diseño de la política llevada a cabo. En consonancia, acepta que no se trata de que la Corte Suprema defina de qué modo debe subsanarse el problema pues ésta es una competencia de la Administración, en tanto una Corte Constitucional fija pautas y establece estándares jurídicos a partir de los cuales se elabora la política en cuestión". "Verbitsky", Fallos: 328:1146.-

said that “el panorama actual, sin embargo, ha sido signado por el justificado activismo de los jueces, ante el incumplimiento por parte del legislador del mandato constitucional de regulación del amparo colectivo –y del mandato de la Convención Americana y del Pacto de Derechos Civiles y Políticos de establecimiento de acciones adecuadas a las violaciones colectivas de derechos humanos.”⁵⁰ And even when there are no possibilities to give an effective answer, it will always be “especialmente relevante a este respecto que sea el propio Poder Judicial el que ‘comunique’ a los poderes políticos el incumplimiento de sus obligaciones”.⁵¹

The North American professor, Owen FISS, teaches that “todos los órganos estatales pueden dar significado a los valores establecidos en la Constitución. La teoría de la reforma estructural [a través de la cual se discuten usualmente en el plano judicial las políticas públicas] –como toda otra forma de litigio constitucional- no requiere que los tribunales tengan la única palabra, ni siquiera la última, sino que les sea posible hablar con una autoridad cuya medida es el proceso”.⁵² It is convenient to remember and to highlight that the access to justice is neither easy nor economic. Moreover, when this mean is used it is because the others are useless or blocked. That is, the concurrence before the judge is only the last instance, and to take care of urgente problems that the “political” powers were not able to, did not how, or did not want to solve. A complain is not initiated just only to soothe an uneasiness, it is initiated when a child needs medical treatment, when the overpopulation imprisoned exceeds any framework of democratic tolerance, when pharmaceutical laboratories do not produce the vaccines needed because they considered it is unprofitable, when after more than one hundred years of indolence we want to put an end to the degrading level of a river contamination. We want the jurisdictional guardianship not only to say that one is right but also for the judge tell us that the law exists, and besides, it is useful.

Last but not less, within all the described panorama we should have to study and analyze the consequences and realities of each national procedural system in accordance to footprints left by tradition or legal system from where it comes. Such

⁵⁰ COURTIS Christian. *Tutela judicial efectiva y afectaciones colectivas de derechos humanos*. JA-II-1215. In this way, COURTIS y ABRAMOVICH: “la falta de mecanismos o garantías judiciales adecuadas no dice nada acerca de la imposibilidad conceptual de hacer justiciables los derechos económicos, sociales y culturales, sino que –como se ha dicho- más bien exige imaginar y crear instrumentos procesales aptos para llevar a cabo estos reclamos”. ABRAMOVICH, Víctor y COURTIS, Christian. *Los derechos sociales como derechos exigibles*. 2^a edición. Trotta. Madrid. España. 2.004. Pág. 46.

⁵¹ Ibidem. P. 45.

⁵² FISS, Owen. *El derecho como razón pública* (trad. Esteban Restrepo Saldarriaga). Marcial Pons. Madrid, España. 2.007. Pág. 36.

analysis- whether it is from the perspective of ideal types or particular cases- should be focused to verify the different tools the system or adopted tradition provide, and if indeed, such tools are useful from the logical and systemic perspective for which they were introduced. Otherwise, we should change or reinterpret them.

Latin America should start to prop up its “own” legal tradition, given that it is far from those effective and successful archetypes belonging to the European or anglo-northamerican models. As said by Professor TARUFFO: “...A procedural code is not just a set of rules of thumb that could be applied everywhere all around the world with just a few technical adaptations. The systems of justice are the historical outcomes of complex evolutions involving different social, ethical, economic and even religious factors and values...”⁵³ Under certain circumstances, the lights coming from other latitudes may light the path, but others may dazzle our eyes.

⁵³ TARUFFO, Michele, *Globalizing Procedural Justice. Some General Remarks*, keynote speech IAPL 2011. Heidelberg.