THE NEW BRAZILIAN CIVIL PROCEDURE CODE PROJECT: BRIEF ANALYSIS

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The Brazilian Civil Procedure Code was enacted in 1973, and implemented on 1 January, 1974. It has since been modified on several occasions. In 2010 proposals for a new code were presented to the Brazilian Parliament. These proposals have been approved by the Brazilian Senate, and the next step will be to gain the approval of the House of Representatives. The project is divided into five books: General Rules (book 1), Cognitive proceedings and judgment enforcement (book 2), Other titles enforcement (book 3), Appeals and other proceedings in Superior Courts (book 4), Final dispositions (book 5). The purpose of this paper is to present a brief analysis of this project.

The existence of a book with general rules is highly desirable and an innovation within Brazilian civil procedure. The first book contains several procedural principles that must be observed throughout all civil proceedings. Among these principles, some are constitutional – such as the `contradiction principle' – and some are not, such as the `inertia principle'. Together these principles will establish the framework for the Brazilian Civil Procedure Model.

The project gives much importance to the `contradiction principle'. It establishes that the judge (or the Court), at any level of jurisdiction, must hear the parties before deciding any question, even when applying substantive rules, if they have not been discussed before during the proceedings. It minimizes the *iura novit curia* dogma, and contributes to a more democratic civil procedure, where the final result is achieved by communication between the judge and the parties.

Another important consideration is that the General Part of the project adopts rules about the expeditious proceedings. It does not accept the principle *tempus regit processus* (proposed by Professor Remo Caponi), but adopts the traditional principle of the independence of the proceeding acts. According to this principle, each

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procedural step or event is governed by the law of the time when the relevant step or events takes place. So, if a new procedural law comes into effect, it will be immediately applicable to the already started proceedings.

Another important rule in the General Part establishes that if the defendant is a company, it must have an electronic address to which official notices can be sent. So it will be easier to serve an initial electronic notice of the existence of the proceeding. I remember that this idea was presented by Professor Fernando Gascón Inchausti in Pécs Colloquium, in 2010. It is a very good example of Brazilian Civil Procedure's tendency to be up-to-date.

A chapter within book 1 governs the way Brazilian civil procedure law treats void procedural acts. It preserves the traditional Brazilian rule according to which void acts will not be avoided if there is no disadvantage to the parties. For instance, article 244, § 2 of the project says that legal notices shall be directed to the lawyers with their names and Bar inscription numbers on them. If a legal notice is made without this data, but the party can do the expected proceeding act before its term, the legal notice will not be considered void.

In book 1 there are some provisions concerning urgent judgments. These can be protective reliefs or accelerated judgments. Both are provisional measures, and they do not stop the proceeding, which will instead continue until final judgment, at which point the relevant matter will become *res judicata*.

The second book of the project governs both rules cognitive proceedings and the enforcement of judgments. There will be an ordinary mode of cognitive proceedings. This will apply unless there is a special procedure applicable to the case.

In this common cognitive proceeding the declaration will be served and the judge will appoint a date for a conciliation hearing. That hearing will be presided over by a judge, a conciliator or a mediator.

If an agreement is possible, the judge will render a consent order. If there is no agreement, the proceeding will develop normally. In this situation, the defendant will have fifteen days to present its plea.

The pleadings phase is followed by the evidence presenting phase. Both parties can present evidence, and the judge is authorized to determine the presentation of evidence *ex officio*. The burden of proof is determined by law, but it is possible for the judge to shift it according the circumstances of the case.

The final stage of the evidence phase is the trial, where the oral evidence is presented, and the lawyers can present their final speeches. After that judgment will be rendered. This will necessarily contain a recital in which the judge must present the reasoning of his decision.

The judgment becomes *res judicata* when there is no further possibility of an appeal. *Res judicata* renders the decision final, but there is an extraordinary remedy against void *res judicata*, that can be used within one year, called *ação rescisória*.

This same book also contains rules about interventions. There are some different kinds of intervention, but one of them is new in Brazilian civil procedural law code: the *amicus curiæ* intervention.

When the judgment condemns the party to pay an amount that is not determined, there will be a complementary phase of the proceeding in which the aim will be to fix the amount to be paid, thus quantifying it.

Once judgment is quantified, the judgment enforcement phase can start. In this phase, the defendant will receive a legal notice to pay the amount he owes within fifteen days. If he fails to do so, there will be a ten per cent fine.

If no payment is made within this period, execution proceedings can take place, involving the seizing and selling debtor's properties. The same proceeding will be used when the enforcement title is an arbitration award. There are special rules about alimony execution, as well as rules about execution against Public Treasury.

After that, the reform proposals contain many rules concerning special cognitive proceedings, for example, proceedings in possessory actions and in respect of probate. These rules include provisions relating to non-contentious proceedings, such as consensual divorce.

The third book of the project has rules about execution based on titles other than condemnatory sentence. To start the execution process an enforcement title is

necessary, such as a promissory note, a cheque, a letter of exchange, a debenture, an extra-judicial debt admission *etc*.

Foreign extra-judicial enforcement titles can be executed in Brazil, with no need of homologation, if Brazil is the place of payment.

During the execution process it is possible to seize and sell the debtor's properties. Some assets, however, are protected, and cannot be attached. Among them are corporeal personal properties and the tools that are used in the debtor's work.

When there is a money enforcement proceeding, the defendant has three days to pay the amount. If he fails to do so, some of his assets will be seized and judicially sold. The attachment of money is preferably made by electronic means. This form of execution will be quick because here the judge need only order the seized money to be transferred to the creditor.

If the debtor is a company, it is possible to seize a percentage of its incomes. In this case the judge will nominate an administrator to the company who will work until the payment is complete.

When the seized asset is not money, it will be necessary to value it. In the judicial sale it is possible to purchase it for less than the amount of that valuation, but never for less than half of it. If the money obtained from a judicial sale is enough to pay the creditor, the execution is over. Any balance, exceeding the debt, will be given to the defendant.

Judicial sale is not the only way to expropriate debtors' assets. It is also possible for the creditor to take the seized assets in payment. In this case, if the assets are more valuable than the value of the debt, the creditor must pay the excess to the debtor. It is also possible for a nominated private real estate broker (or a merchandise broker) to sell the seized assets. In this case it is not possible to sell the attached assets at a price less than the amount of the valuation, unless all parties agree with that.

The defendant can present a stay of execution to enable discussions to take place concerning the debt. However, this application does not usually halt the

execution proceeding. If the defendant's assets have been sold, but there is later a judicial decision in favour of the defendant, it will become necessary to assess damages which the plaintiff must pay to the defendant.

Book 4 of the project governs appeals and other proceedings before Superior Courts. In Brazil there are ordinarily two levels of jurisdiction. In the first level there is only one judge per court. In the second level there are the Appeal Courts, where judgments can be held by a single judge, or three or more judges.

There are also two Extraordinary Courts: the Supreme Court and the Superior Court of Justice. These are National Courts, located in the Federal Capital of the Country.

The Supreme Court is competent to decide constitutional matters, and the Superior Court of Justice is competent to federal matters. They are superior to both federal and state courts.

The project of Brazilian new civil procedure code adopts a new system concerning precedents. Formerly, as it was common within civil law countries, court precedents were only persuasive and not binding. But, as the next step of a long evolution, the project creates a certain number of cases in which the superior courts' precedents will be binding to inferior courts. By this system, the intention of the authors of the project is to guarantee consistency of decision-making and compliance with the law. All courts are authorized to publish case law 'summula'. To secure consistency in this field, the courts will be obliged to make clear any decision to overrule other decisions. It is possible that this new legal approach will operate *ex nunc*. The proposed new system will operate as follows. In courts any proceeding will have a judge chosen to formulate the judgment (and, if the majority opinion is his, to state the majority decision). This judge will be called the *relator*. Whenever the case can be decided by the appliance of an opinion that is already in the 'summula of case law', the *relator* can act without further assistance, applying the precedent to the new case. It is always possible to appeal against the decision rendered by the *relator:* and then a new judgment will be rendered by three judges of the Court (one of them will be the *relator* himself).

When it is not possible for the *relator* to judge the case alone, there will be a hearing in which he will state the case. After that lawyers of the parties can present their speeches for fifteen minutes and then judges will vote. Usually three judges vote in each case before the superior courts. Opinions are presented publicly, before the attendance. If there is any dissenting opinion it will be written and form part of the judgment.

The proposed procedural Code introduces a new process to deal with repetitive cases. It is called *incidente de resolução de demandas repetitivas*.

This is an incidental proceeding that will be used whenever a judge or a court considers that there are repetitive cases raising the same legal issue. In that context, the relevant incident will be used to define the subject-matter of the legal issue to be considered. That `test case' decision will be a binding precedent for all judges in the lower courts. In such a procedure, intervention by *amici curiæ* will be extremely important because they might help the court to reach a sound decision.

Book 4 of the project also governs appeals. There are various kinds of appeal. Here is a summary.

The first kind of appeal is appellate review. This is an appeal against final judgments of first instance judges. The appeal must be lodged within fifteen days. The appeal decision will be rendered by the Appellate Courts (either Federal or State Courts).

The second type of appeal is called *agravo de instrumento*. This is a traditional kind of appeal in Brazilian Law and, according to the project, it will be used against some interlocutory decisions, as listed by law. When an interlocutory decision is rendered – under the proposed new Code – it will be necessary to verify if it is open to appeal or not: if it is, the *agravo de instrumento* must be presented in fifteen days; if the interlocutory decision is not open to appeal, the main proceeding will continue, but the matters decided in that interlocution can be object of the appellate review. The *agravo de instrumento* is also judged by the Appellate Courts.

There is a special appeal that can be used against any kind of judicial decision, at any level of jurisdiction. This type of appeal is called *embargos de declaração*. It is a request for amendment of a judgment. This request can be used

whenever a decision is rendered and the party considers it unintelligible, contradictory, or defective. This request must be presented within five days and the lodging of such an application extends the time to present any other appeal against the same decision.

Another kind of appeal is the so-called Special Appeal. It is presented to the Superior Court of Justice against the judgments of Local Courts (Federal or State courts). In a Special Appeal it is not possible to discuss factual matters. Attention is confined to questions of law. This is because the Superior Court of Justice is not allowed to examine evidence. Such a Special Appeal must be presented within fifteen days to the Local Court, which is responsible for transmitting the records to the Superior Court.

There is also an Extraordinary Appeal which can be heard by the Supreme Court. It can be presented against any judgment of the Local Courts or of the Superior Court of Justice. Only constitutional matters can be examined in an Extraordinary Appeal. There will be no examination of evidence. This appeal has to be presented within fifteen days to the Court (either the Local or the Superior Court) and the records will be sent to the Supreme Court. But such an appeal requires a preliminary decision that the suggested matter is of constitutional importance, and that preliminary determination is made by the Supreme Court. A decision that the matter is not appropriate for such an appeal can only be made by eight members of the eleven-judge panel of that Court.

There are special rules about serial Special or Extraordinary Appeals. When the Superior Court of Justice or the Supreme Court identifies a serial case, with repetitive appeals with the same law matter, one of them is chosen to be judged, and the exegesis of the law matter established in this one will be applicable to any other case in which the same law matter is involved.

Those are the most important appeals in the project. There are some others, of less importance, such as the *embargos de divergência* and the *agravo de admissão*.

Finally, the last book (book 5) of the project contains concluding matters. The most important is that new Code will come into operation one year after the enactment of the approved law.

In this brief analysis of the proposed new Code, addressed to the international community of proceduralists, my main aim has been explain how Brazil is trying to deal with challenges which are probably not peculiar to Brazil, notably, the terrible problem of repetitive cases. This is indeed the main problem of Brazilian procedural system nowadays. We have currently, in Brazil, circa eighty million pending civil actions. Many of them are repetitive, raising the same or very similar legal issues. If we can devise a way to deal with them without offending the principle of due process, then Brazilian law will have achieved a greater and superior level of access to justice. And – as we all know – securing effective (and properly regulated) access to justice must be the goal of any procedural system. In conclusion: unless the Brazilian nation succeeds in resolving the real problems of the procedural system, Brazilians will not enjoy true civil justice.