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IMPORTANCE OF THE BURDEN OF ASSERTION FOR THE DEVELOPMENT OF THE ADVERSARIAL PROCESS

IMPORTÂNCIA DO ÔNUS DE AFIRMAÇÃO PARA O DESENVOLVIMENTO DO PROCESSO ADVERSARIAL

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ABSTRACT

Objectives: This article analyzes the significance of procedural burdens as they relate to the development of the adversarial process, and in particular, the burden of assertion by the plaintiff. It points out that even in positive procedural situations, there are burdens for the parties that are essential for the development of the process.

Methodology: The methodology of the paper adopts a legal-dogmatic approach that contemplates the law with epistemological self-sufficiency and works with elements that are internal to the legal system.

Results: To reiterate the importance of procedural burdens for the development of the process carried out in the adversarial process.

Contributions: The work demonstrates that the plaintiff, when presenting his claim in court, has the burden of affirming the constitutive facts of the right he claims to have.

Keywords: Procedural burdens; Burden of assertion; Procedural situations; Adversarial process.

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RESUMO

Objetivo: *Este artigo analisa a importância dos ônus processuais no que se refere ao desenvolvimento do processo realizado em contraditório e, em particular, o ônus atribuído ao autor de fazer afirmações. Salienta que, mesmo em situações processuais positivas, existem ônus para as partes, essenciais para o desenvolvimento do processo.*

Metodologia*: A metodologia do artigo adota uma abordagem jurídico-dogmática que contempla o direito com autossuficiência epistemológica e trabalha com elementos internos ao ordenamento jurídico.*

Resultados*: Reiterar a importância dos ônus processuais para o desenvolvimento do processo realizado em contraditório.*
Contribuições*: O trabalho demonstra que o autor, ao apresentar sua demanda em juízo, tem o ônus de afirmar os fatos constitutivos do direito que alega ter.*

Palavras-chave: *Ônus processuais; Ônus de afirmar; Contraditório.*

1 PRELIMINARY CONSIDERATIONS

The expression "*burden of assertion*" ["ônus de afirmar" in Portuguese] gained ground in Brazil following a prestigious study by Cândido Rangel Dinamarco, Professor at the School of Law of the University of São Paulo, as mentioned below. Few have reflected deeply on the nature of the assertions made in the proceedings from the perspective of procedural burdens. Few have made an analysis of the procedural burdens reserved to the plaintiff.

Accustomed to reflecting on the procedural burdens attributed to the defendant (in particular, the burden of contesting), adopting this perspective highlights an onerous initial situation for the plaintiff, namely, the burden of assertion.

Burdens constitute negative procedural situations, which is a concept that will be covered later.

Unlike burdens, procedural rights (the right of action, among others) constitute positive procedural situations. As paradoxical as it may be, the plaintiff exercises their right of action by fulfilling the burden of assertion: The first and the

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most important of the procedural burdens, as we will see, the structure of what is conventionally called the “discovery process” plays an important role by allowing the proof of the facts stated by the plaintiff (those that constitute the right that is claimed) to be produced to convince the judge.

As mentioned, the procedural doctrine puts a greater emphasis on the consequences resulting from absence of defense, which should be composed of statements opposed to those contained in the cause of action, composed of the statement of facts and their consequences, in other words, the set of reasons that led the plaintiff to take legal action.

Considering the claims that must necessarily be made by the plaintiff, there is a need to verify their considerable effects that affect their position in the proceedings.

We will see that these effects can be produced beyond the limits of the proceedings, influencing the substantive law disputed in particular by the plaintiff and defendant. The two sets of claims asserted by the parties, and possibly by any third parties (in the rare cases in which they are admitted), will be assessed by the judge for the substantive law provision(s) that govern(s) the case brought to trial.

Even without declining them at that time, it should be noted that the statements made in the initial petition generate considerable effects. Not just to exemplify, which should be evaluated, that this initial act opens the way for the State to exercise its jurisdictional activity, which is already extremely relevant.

The objective of this study is to emphasize that the right of action is made up of various burdens, addressing such action to the competent judge being one of them. It also aims to describe the facts that constitute the right claimed, demonstrating an interest in resolving the conflict, and to deduce the accurate and specific requests that must derive from the facts stated. Fulfilling these burdens involves going a long way, as shown in Art. 319 of Law no. 13,105, of March 16, 2015, the Brazilian Civil Procedure Code, hereinafter referred to as CPC/2015.

It is also necessary to observe the legal environment that holds the burden of assertion, ranking them among various procedural situations, which are inherent to this set of acts that aim for judicial pronouncement.

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In this task, it is important to remember what Buzaid (1982, p. 15) said[1] regarding the perpetuity of key concepts specified by the proceduralists that influenced the systematization of the Brazilian Civil Procedural Law, mainly Chiovenda and Liebman.

It will be essential to return to some concepts of the proceeding theory for the reasoning to lead to and support the conclusions. I will do that later.

2 ADVERSARIAL SYSTEM AND PARTICIPATION

Jurisdictional function is both a duty and activity of the State and can be considered fully exercised with a clear opportunity for participation of those involved in the process.

The due process clause, which is a guarantee enshrined in the Brazilian Constitution of 1988, also obviously governs civil proceedings.[2]

[1]. Alfredo Buzaid, in *Grandes processualistas*. São Paulo: Saraiva, 1982, mainly, pp. 4-11, he claims, as Calamandrei had done, in the work he mentions in a note (*Studi sul Caso Civile*), that Chiovenda systematized procedural law for all Latin countries. He says that the work of this master is not subject to time or to occasional changes in procedural laws. Liebman, says Buzaid, when he was in Brazil, outlined the science of Civil Procedure. Dare I say: We started to *scientifically* study what had been *systematized*. We still use these teachings, and there is no shortage of people who have been claiming (perhaps as a result of ignorance) and criticizing the citations of the works of these authors that appear in the courts until today. Particularly, I am still enthralled and I need to turn my thoughts to such teachings, often aiming to verify what exactly one has in a specific case to be solved. My Masters and Civil Procedure friends also do so, apparently, following a method that has "*qualcosa di religioso*", as Calamandrei said. On Liebman's time in Brazil and the legacy he left, see MARQUES, José Frederico. *Procedural Law in São Paulo*. São Paulo: Saraiva, 1977, pp. 67-75, where I highlight: "*The lessons we learned from him are still alive, and they are constantly renewed in the new works he has written"*. Cândido Rangel Dinamarco, who does not belong to the generation of Buzaid and Frederico Marques, was Liebman's greatest disciple, without any exaggeration. Just remember doing the translation of the *Manual of Civil Procedural Law*, plus important notes. It is important to highlight the "*affectionate*" message of Enrico Tullio Liebman and to verify the deep connection of Dinamarco with the Italian Master. In this acknowledgment, part of Liebman's history in Brazil and the tributes he received are told. See *Fundamentals of Modern Civil Procedure*. 3rd ed. São Paulo: Malheiros, 2000, pp. 7-10.

[2]. The term "civil procedure", as spelled out in the text, refers to the State's furisdictional activity that is exercised outside the strict scope of the application of material norms of Criminal Law codified or present in extraordinary laws. The entire exercise of non-criminal jurisdiction will be contained in that expression, whenever not accompanied by any element that may qualify it.

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Such a clause is integrated by the adversarial principle, among others, which was more recently emphasized in Art. 7 of CPC/2015, establishing judges to observe and ensure its implementation. This is the principle that guides the bilaterality of the process, marked by two aspects: *information* and *possibility of reaction*. Information about all the claims of the opposing party is essential. Also essential is information about all judicial pronouncements with decisive content. The possibility of reaction is also added to this set of information, with the granting of a reasonable period to take effect.

According to Fazzalari, (1996, p. 82) the adversarial system constitutes one of the most interesting prisms for analyzing proceedings. The author, also in another study of his own (2002, p. 19), references what he calls the *procedural module*, which allows participation of those involved, and ultimately presents itself as an element legitimizing the imposition of appropriate judicial protection in a given conflict, according to the ways and opportunities provided for in the process that must be observed in the case brought to trial ("dialectical structure of the process").[3]

Such participation is essential, resulting from the ruling issued by the competent court, democratically built by the collaboration of the parties.

[3]. About participation in the process, see Cândido Rangel Dinamarco, who affirms the need for participation to convince the judge, legitimizing his final activity: "*Of course, through the evidence, the judge's spirit is influenced, preparing a solution...But, it is not just about proving that I participate in the process. It is not just about proving that I instruct the judge, that I prepare his mind to arrive at the solution I want; also in all other activities. In the claims made in the process, there is instructional activity. (...) So, to instruct means to prepare the final judgement*". See *Fundamentals of Modern Civil Procedure*. 2nd ed., São Paulo: RT, 1987, p. 95. Antônio Carlos Marcato thus expresses himself about the importance of the adversarial process, seen from the angle of the procedure: "*The process manifests itself through external forms, acts that happen in time and are interconnected in a logical chain, that is, it manifests itself through the procedure. In reality, however, the procedure is all this and more, since the process is the adversarial procedure itself. The procedure not only represents the formal aspect of the process, but also involves the active and necessary participation of the parties in collecting evidence and reconstructing the facts that will motivate and substantiate the final judgement, a participation that materializes both in the very structural conformation of the process (that is, in the procedural legal relationship) and in the collection and preparation of evidence, as well as in the effectiveness of the contradiction established between them*". See *Special Procedures*. 8th ed. São Paulo: Malheiros, 1998, p. 34. Liebman, already taught: "*allo stesso modo sono parti del processo i soggetti del contraddittorio istituito davanti al giudice*". See *Manuale di Diritto Processuale Civile*. 4th ed. Milan: Giuffrè, 1984, p. 75.

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Collaboration is an essential and legitimizing element of jurisdictional activity. This collaboration arises from the distribution of procedural burdens between the parties. As we will see later, these lead to and motivate the participation of those involved, as a constant challenge that takes root between the parties and encourages them to keep acting in the ways and opportunities provided for in the process.

Seen in its entirety, it appears that there is an alternation of procedural situations in the process that the doctrine classifies as *positive* and *negative*. These situations reveal the existence of procedural powers, rights and capabilities, as well as any procedural burdens, duties and obligations. Such situations give rise to effective fulfillment of the procedural process until a solution is introduced to the alleged conflict.

Procedural situations promote the continuity of the process until reaching a verdict. One can observe that the rules of different procedures essentially describe the activity to be performed at that moment by one of the parties. Such activities, which consist of the expected conduct of the parties for that phase of the process, allow an assessment of their predominantly positive or negative character.

These procedural situations together promote the adversarial system, which is one of the values that govern civil proceedings, according to Art. 1 of CPC/2015.

More than that, the procedural situations must be arranged and distributed so that the end of the process is reached as soon as possible. After all, the State has a monopoly on Jurisdiction[4], and therefore, needs to deliver a final answer to the jurisdiction that, except for the rare cases in which action for rescission is appropriate, must be definitive.

[4]. Regarding the ways of resolving conflicts, please see, CASTILHO, Niceto Alcalá-Zamora in *Proceso, Autocomposición y Autodefensa*. 3rd ed., Mexico: Universidad Nacional Autónoma de México, 1991. However, it must be remembered that the author himself highlights the impossibility of the State to resolve all conflicts, which is why he admits and even encourages other types of solution, such as self-protection and self-composition, considering the impossibility of the omnipresence of the Judge-State in all conflicts. We will not make any comments on arbitration, because here, in the strict field of the judicial process, in which we do not have the flexibility necessary for that type of conflict resolution, the burdens gain the dimension we intend to analyze.

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In absolutely practical terms, it is possible to describe an alternation of situations that speed up the process. In doing so (in other words, when carrying out the commands provided for in the procedure), one of the parties performs a procedural situation that has been attributed to them, and as a consequence, creates a new procedural situation to be performed for the other. Carrying out the directives set forth leads to the most important moment in the process, represented by a negative procedural situation, which subjects the judge to pronounce a solution to the conflict.

For the purposes of this study, procedural burdens deserve greater emphasis among procedural situations, and support the development of the adversarial system.

The attribution of burdens to the parties is the factor that results in conflict resolution, as we will see later.

The procedural burdens, when analyzed well, create a “disadvantage” for the parties.

We will see that litigants have the option of not acting in view of the procedural burdens. However, the procedural rules demonstrate that inactivity may result in undesirable legal consequences, as in the case of default, in cases where its effects can be established, when the defendant fails to fulfill the burden of contesting, challenging the facts stated by the plaintiff.

3 PROCEDURAL AND ADVERSARIAL BURDENS

In the so-called *discovery* processes – as opposed to executive processes – it is the effectiveness of the adversary system that promotes this “discovery”.

Whoever is instructed (the production of proof process is known as “instruction”, at least in Brazil) is the recipient of the evidence, who will recreate in the present the facts stated by the plaintiff as those that constitute the right that they intend to see declared in the sentence.

Procedural situations enable the discovery process.

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Any procedure that fails to lead to procedural situations is a "mere" procedure. This adjective disqualifies it, as it makes it a simple succession of acts that do not always require jurisdictional activity.[5]

There is more to this to be considered. Without negative situations, we begin to observe a succession of acts that have a purpose, but fail to create the vast array of legal relations after the process ends.

Submitting to the authority of the court (and its effects) with the advent of res judicata constitutes a circumstance that is directly dependent on the effective possibility of participation, which is mainly bolstered by procedural burdens.

The authority of the res judicata and the finality it promotes depend on the implementation of the adversarial process, because as Couture (1946, p. 329) also recalls, "*it turns white into black; a square into a circle*". This brings about definitive effects, and the legal reality of those involved changes.

The immutability of the ruling, which constitutes this special quality of the sentences that evaluate requests in discovery processes, will evidently come into play, regardless of any participation of the interested parties and the quality of the final judgement, that is, regardless of whether the sentence will be upheld or whether it is unfounded, and whether the litigants took advantage of the situations to produce their evidence.

The Brazilian Federal Constitution ensures, oddly in articles placed side by side, two opposite points in the process: access to the jurisdiction and stability of the ruling, as established in items XXXV and XXXVI of Art. 5.

Given the necessary inertia of the jurisdiction that protects the judge's impartiality, access results from exercising the right of action.

It is important to note that elements of the legal action (parties, cause of claim and pleading) have very important consequences, both in individual and

[5]. The generosity of the current Civil Procedure Code allowed him to discipline "mere" procedures, as is the case of the assignment of an amount as a means of payment, described in the *caput* [main section] and §§ 1, 2 and 3 of Art. 539

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collective processes. [6] I also would highlight the establishment of the court's jurisdiction, the delimitation of the evidence to be produced, the delimitation – in view of the principle of correlation – of the content of the future ruling.

Also by pursuing legal action, the procedure to be observed becomes evident, as Art. 318 of the CPC/2015 designated the Common Procedure as the model to be observed, as it ensures a sufficient distribution of procedural situations that give rise to the adversarial process. It should be noted that its provisions can be applied in a subsidiary manner to other special procedures, and even to the execution process, as determined by the single paragraph of that article.

The procedure must provide effective conditions for participation, with sufficient information and full possibilities for reaction, even if this reaction may come later (deferred adversarial process), as in cases of emergency provisional guardianship, which is granted without hearing the other party.

Therefore, each nucleus of the rules set, each verb of the "procedural types", conveys conduct to be carried out.

[6]. As an example, the suitability of public civil action when it comes to the defense of homogeneous individual interests depends on the identity of the cause of action among the lawsuits filed by ordinary plaintiffs. I had the opportunity to consider in another study "*In effect, we were able to verify that the homogeneous individual interests have a legal nature of individual interests, which may – accidentally – merit collective judicial protection. Such guardianship, however, will be granted if and only if the innumerable causes of action of the innumerable claims that could be filed separately through the ordinary legitimation of each of the interested parties are identical*." AUTOR. Cause of action and homogeneous individual interests. In: CRUZ and TUCCI. José Rogério e BEDAQUE. José Roberto dos Santos. Cause of action and pleading in civil proceedings (controversial issues) São Paulo: Revista dos Tribunais, 2002, p. 214-215. Later, in the same study: "*But, since the admission of the conflict in court, the judge must analyze whether there is, at least in theory, the possibility of using the collective action to proceed with a molecular defense of conflicts that, in essence, are individual*." Idem, p. 215. In the same vein, Eduardo Cambi ponders that: "*Systematically, it can be said that the nature of the judicial protection to be provided will depend on examining the cause of action revealed by the concrete situation: if the damage occurred, the protection will be compensatory, but if the scope is to remove the offense or even inhibit new offenses, the protection is to remove the offense and be inhibitory*." CAMBI, Eduardo. Neo-constitutionalism and neo-processualism In: FUX, Luiz; NERY JUNIOR. Nelson; WAMBIER, Teresa Arruda Alvim. Process and Constitution. Studies in honor of Professor José Carlos Barbosa Moreira. São Paulo: Revista dos Tribunais, 2006, p.677. "*In fact, legitimacy and interest are concepts that relate to each other in such a way that sometimes – though not always – are hard to separate; those who have an interest have legitimacy and those who have legitimacy have an interest*." FREIRE, Rodrigo da Cunha Lima. Conditions of action: focus on the interest to act. 2nd ed. São Paulo: Revista dos Tribunais, 2000, p.166.

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Given the complex interaction between its subjects, who need to develop activities in active and passive legal positions, such situations are classified, by a prestigious doctrine from Comoglio, Ferri, Taruffo (1995, p. 21) into powers, capabilities, duties, subjections and procedural burdens. [7]

The doctrine, how did it Dantas (1997, p. 182), also states that the set of various existing situations represents the "dynamic aspect" of the relationship established between the parties, and that each situation, considered by itself, would represent a "static point of view" of that same relationship.

Without undermining the doctrinal work that classified procedural situations as positive or negative, based on the apparent conjuncture it creates separately, I question whether there would be a procedural situation that is not marked by the need to be disencumbered of the burden.

In view of the objective of this study, what role would procedural burdens play in the structure of the adversarial system?

The burdens, despite a contradiction of terms, would be a capability (in the sense of an opportunity to act), but "*they must be implemented for the realization of an interest*", according Cintra, Grinover, Dinamarco (2009, p. 175).

The party can choose to comply with it, by carrying out the expected act, or not. However, in any event, only the legal domain of the bearer of the burden of action is affected by a failure to carry out the procedural act.

In other words: If there is a burden, there will always be consequences. In Goldschmidt's traditional and often cited perspective, it is an "*imperative of self-interest*". Non-fulfillment, or advisably, fulfillment of this burden results either in a situation of disadvantage (if not fulfilled), or in the creation of a new perspective for the solution to the conflict when the party fulfills it, respectively. Failure to comply may lead it to benefit from inaction, [8] as occurs in the defendant's contingency to

[7]. See also: ALVIM, José Eduardo Carreira. *Elements of General Prosecution Theory.* 3rd ed., Rio de Janeiro: Forense, 1995 pp. 182-183

[8]. The reason for intervention of the Public Prosecutor in civil proceedings is not different, when this is verified by the special quality of one or both parties. In the case of a disadvantaged position, the Public Prosecutor's Office must act so that the disadvantaged is not harmed by an intentional act of a

bear the burden derived from default, which can suppress phases of the procedure and the burdens incumbent on the plaintiff, that is, to produce proof of the facts stated.

As mentioned above, these would be the most prominent burdens, as failure to comply with an onerous situation has significant consequences.

However, there is also the plaintiff's perspective. Even before the burden of proof, the plaintiff has the burden of asserting the facts to be proven.

Assertions represent a burden to those who present it, since from the beginning, they must be carried out in a way that allows the judge to analyze their claim, observing the relationship between antecedent (cause of claim) and consequent (pleading).

Dinamarco (1998, p. 201) highlights that omission, due to failure to comply with one of the procedural burdens, leads to different consequences for the litigants,[9] depending on the relative significance of the act with which they were encumbered.

Let us consider two examples to establish the diversity of procedural sanctions. In these examples that I propose, the distinction between the effects generated by non-fulfillment of burdens becomes apparent, as mentioned by the author.

I opted for two situations related to the defendant, considering varying intensities of strength for the failure to fulfill burdens: the burden of responding, and the burden of listing the maximum number of witnesses allowed to prove each fact in the hearing. The burdens derived from default will undoubtedly outweigh others in regard to disadvantageous consequences.

A lack of response (an unfulfilled burden), however, goes so far as to make other procedural situations unfeasible. It simply shortens any subsequent procedural

third party. It does so to make up for a presumed deficiency, not allowing carrying out a procedural act that will further make uneven the adversarial process, technically uneven due to – forgive me for the repetition – equally assumed position of disadvantage. I take the liberty of suggesting reading an old work that I had the opportunity to write: *The participation of the Public Ministry in the Civil Procedure*. In: Public Ministry – Institution and Process. 2nd ed. São Paulo: Atlas, 1999, pp. 162 and after.

[9]. Idem, p. 202.

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situations. The adversarial process is shortened, without due legal process being damaged.

The burden on the party represents variants of the failure to observe this situation, as seen in the two examples above. In any case, these burdens are tribulations of the process, within a greater tribulation that is, let us admit, its very existence.

At this point, and in relation to the objective of this study, it should be pointed out that the teachings of Dinamarco finds the first among the procedural burdens that presupposes all others. The most important one, therefore is the “burden of assertion”, from which the others originate.

The limits of the conflict are revealed from the moment the lawsuit is filed, even though its drafting constitutes an intellectual act that started before the procedural act called an “initial petition” (which involves choosing the assertions that will be presented). A case that is effectively brought to court, therefore, does not always reveal the conflict in its entirety, as the plaintiff's objectives may be of a lesser extent when the conflict is considered as a whole.

For the procedural reality, the burden of assertion arises from the case effectively brought to court and on which an adversarial process will develop, according to Dinamarco (1998, p. 202).

Without asserting the cause(s) of claim, revealing the facts to the extent chosen by the plaintiff, one cannot file a claim in court.

The claim must be preceded by an assertion followed by some evidence showing that it was not possible to enact the substantive law, because there is a prohibition on spontaneous compliance by the interested party with the very behavior provided for in the substantive law rule (as in the so-called “necessary cases”), or because the one who was responsible for enacting substantive law opts out of it.

And it does not stop there. Assertions must be made in the manner provided by procedural law. Such assertions require a minimum logical structure, so that the judge can assess whether the procedural assumptions and minimum conditions for

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the legitimate exercise of the right of action are in place (which today, as a whole, are accepted to be “requirements for admission to trial”).

In summary, a genuine disadvantaged situation in the life of a certain individual is not enough, considering the possibility that they had to demand compliance with a certain activity, provided for in the legal discipline of substantive law, which was not observed by those who should carry out the legal order.

Forced to affirm this situation, whether the exercise of legal action constitutes a power or a right remains in doubt (considering its classification as a positive procedural situation). The assertions that must be made have consequences for those who make them, and therefore, must be made in accordance with the procedural model.

Even though the exercise of one's own reasons is found, the cases end up being filed, and no action is taken without assertions or even with any assertions.

Assertions must be made in accordance with the legal models provided by the procedural systems, for example, following certain forms in collective cases, others in Labor Court cases, others within the scope of criminal jurisdiction, and so on. The acts may be more or less formal, and the cases more or less ritualized, but in any event, there are always legal consequences for the parties that file claims.

The ways envisaged by the legislator for achieving a universal jurisdictional control vary, revealing that access to the Judiciary is done in specific ways.

But the burdens persist in each of them, which can generate, by way of example, even criminal consequences for those who make claims. Or, to illustrate, the almost mythological peremption (a sanction for the bad habit of abandoning the assertions that generated the establishment of a procedural relationship, and its subsequent extinguishment by abandonment).

The assertions presented with the initial complaint have different consequences if they do not correspond to reality. Firstly, CPC/2015 (Art. 319, III), considering our adherence to the *substantiation* system, states that the initial petition shall contain the facts and their legal grounds. Such requirement, despite being obvious, indicates that the statement of facts that will lead to the claims is a

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requirement of the referred procedural act, allowing the judge to correct any faults before dismissing it (Art. 321 of CPC/2015).

In particular, with regard to the reasons for dismissal, I point to the content of Art. 330, § 1, item III of CPC/2015. Ratifying from a legal point of view (creating the burden of this compliance) that the claims must derive logically from the facts stated, is much of what we have been defending in this study.

In addition to this need for the exercise to be made in a logical manner (facts-claims), the so-called demand principle must be respected.

The exact extent of the facts no longer matters. If the claims logically follow, that is enough. But the parties can circumscribe the claims. Postulated jurisdictional measures (Art. 319 of CPC/2015) can multiply. But the judge must stick to the objective that was circumscribed by the plaintiff.[10]

Portanova (2008, p. 122) states that, "*no one is better than the parties (at least before the process has started) at choosing facts that will make up the procedural dispute. With the freedom to allege facts they want and be silent about those they do not intend to see investigated, the parties have a litigious purpose in the process and establish the thema decidendum [topics to be decided]*".

Arguably, this is a limitation to the exercise of judicial activity, justified by the availability of interest. Once the interest is available, the State's judicial activity would

[10]. Thus, the emphasis given by Sergio Cruz Arenhart, who states that within the scope of non-criminal jurisdiction and in the predominance of available interests, it is reasonable to grant the parties "*priority in choosing the moment when the protection of interest must be carried out, as well as the determination of the dispute that will be examined by the Judiciary*". See Reflections on the principle of demand. In: *Studies in honor of Professor José Carlos Barbosa Moreira*: São Paulo: Revista dos Tribunais, 2006, p.587-630. Cood. FUX, Luiz; NERY Jr., Nelson; WAMBIER, Teresa Arruda Alvim. Process and Constitution. This author's statement and its limitation to available interests are important. Note, just as an example, that in the actions derived from the so-called *acts of administrative improbity*, conceived by Law no. 8,429, of June 2, 1992, the request for reimbursement to the public coffers constitutes, at least, an implicit request (Art. 5 of the Law). The request for reimbursement is a necessary result of the affirmation of the fulfillment of one of the acts foreseen in its 9th and 10th articles. In fact, in these cases, the burden of assertion arises from the very subsumption of the act narrated with the conduct imputed to the public agent. But, we are now in the field of unavailability of interests. It is not up to the representatives of the community, who are given active legitimacy, to decide whether or not to reimburse them. The compensation, says the aforementioned Art. 5, shall be in full (assuming even its monetary adjustment).

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not be provoked, since the holder of the substantive right would have the option to waive that right.

In certain cases, however, the plaintiffs do not have the power to circumscribe the claim. These are exceptions derived from the nature of protected interests, which may give the magistrate the duty to consider what the plaintiff failed to convey in their claim. There was the narrative of a set of facts, but in these hypotheses, the plaintiff no longer has the power to choose to file this or that claim.[11]

Arenhart (2006, p. 602) argues that in the cases in which the party may have part of the intended legal asset, it is essential to express this option openly in order to ensure that there is no "vice of consent".

It is not possible to agree with this respectable choice since the party can file in another claim whatever it failed to file in the first one. The exercise of the right of action, that is, the power to demand that the State perform judicial activity, is neither extinguished, nor disappear by opting to file part of the possible claims. If no renouncement takes place, obviously, new claims arising from the same facts can be filed within the statute of limitations. In such cases, the mechanisms predisposed to analyze similarities of the claims (lis pendens, for example) or relations they have with others (connection, for example) must be activated. As mentioned, it may not be able to resist a confrontation of its objective and subjective elements, and thus, be extinguished by the lis pendens that may eventually be verified (Art. 485, item V, of

[11]. In the example of acts of administrative impropriety, we have to agree that the parties (especially the plaintiff) "are all". There is no longer room for doubt in Brazil about the legal nature of public assets, as well as for the exercise of Jurisdiction in these cases. Defended through the use of collective processes, from 1992 to 2014, it received, now in 2014, a recognition that, despite being unnecessary, enshrined the nature of these interests as being "diffuse interests". Fair enough. Thus qualified, due to the doctrinal work and numerous precedents of the Brazilian Courts of Justice, it was in the legislators' right to declare that social interests and public assets are *diffuse* (Law No. 13,004/2014). Said law, amends the so-called *Public Civil Action Law* (Law no. 7,347/85), and is aimed precisely at defending homogeneous, diffuse, collective and individual interests. In these collective processes, it is not us, the holders of interests, that represent the active pole of case. Our appropriate representatives do so. The interests are ours, but in court, take the name that you wish, we are "procedurally replaced" by these representatives of the community. Establishment of the purpose of the case (here understood as the claim) cannot be the exclusive responsibility of these representatives. Jurisdictional activity must remedy, as mentioned in the previous note, for full reimbursement to occur.

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CPC/2015). In this hypothesis, it can be concluded that all possible assertions and claims had already been produced.

Let us remember that, as for the theory of substantiation, it is up to the plaintiff to assert the situation that generates the close (the substantial legal relationship) and remote (constitutive legal fact) *cause petendi* [cause of action], unlike the theory of individuation that requires only indicating the substantive legal relationship.

The individuation theory recommends that all facts – even if not alleged – that serve to configure the claim(s) filed in court, be part of the cause of action, not least because the plaintiff is not prohibited from introducing constitutive facts over the course of the case.

The individuation theory goes against the adversarial principle to a certain extent and removes the burden of assertion from the plaintiff. According to this theory, the judge could know what was not presented by the parties, thus assuming the harm posed by surprising the opponent with the inclusion of issues on which there was no possibility of manifestation. Such theory may generate imbalance between the parties, since the limits of case would be constructed at the judge's discretion.

In this regard, the individuation theory was criticized[12], mainly due to the possibility that the party will be surprised by a change in the factual basis of the case.[13]

[12]. Although there are authors who defend it. They argue the possibility of knowing the facts, in addition to those brought by the parties, that completely immunizes the conflict. See PINTO. Junior Alexandre Moreira. The *causa petendi* and the adversarial process. São Paulo: Revista dos Tribunais, 2007, p.43-44.

[13]. Adversarial participation is required precisely so that there are no surprises to the parties. Basic precept of its structuring under the rule of due legal process determines that the stability of the case will be observed as a legal security pledge. Humberto Theodoro Junior recalls the expected advent of the res judicata, one of the qualities of the ruling on the discovery processes, which intend to grant immunization to the conflict, after the decision on the claims. See *Civil proceeding - purpose of the proceeding - claim and its interpretation - adherence of the judge to the claim at the trial - interpretation of the final judgment and its limits* In: Revista Dialética de Direito Processual, Porto Alegre no 62, May 2008, p. 118.

In fact, the discussion on the two theories described involve a minimum content of the cause of action that should be asserted, faced and decided. If we accept the extension intended by the individuation theory, we would arrive at an absurd need to present a history of the list of substantive rights that underlie and give cause to the process.

The issue is not purely academic, as CPC/2015 itself establishes in Art. 319, item III, the description of the facts and their legal qualification, although certain in view of the adage *Iura novit curia*, leaves no doubt that legal qualification is the least important element.

The content of the assertions made may represent the exact measure of the difference between a legal situation and any other one, possibly existing between those same parties.

Stabilization of the case is a guarantee that demonstrates, at the infra-constitutional level, that the adversarial process must be observed. The extemporaneous consideration of facts not stated at the right times can lead the conflict to last longer than allowed, creating constant and endless “news”.

The substantiation theory does not – and could not – prevent access to the Judiciary, by ensuring the universality of jurisdictional control. The facts can generate new lawsuits with different claims. Those not asserted can generate lawsuits with different claims.

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