The new rules of the new code of Civil procedure

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SUMMARY

The aim of this study is to bring the discussion involving the new rules relating to the reasoning of judicial decisions provided for in the new code of Civil Procedure (Act No. 13,105 of 2015), the arguments in favour and against it concerning and the constitutional basis of such innovation. To this end, the present work is founded in the works, scientific articles of similar topics and on constitutional law, and Civil procedure codes, the previous and the new. As a result, the analysis identified the need to sobrepesar the conflicting legal principles in order to find the one that should prevail, in sacrifice on the other, to make the right to benefit from such a debate.

Keywords: grounded. New code of Civil procedure. Duty.

INTRODUCTION
The new Civil Procedure Code[3] brought numerous changes in relation to the above, among them, we highlight the object of this work, which is in relation to the reasoning of judicial decisions in civil procedural law.

The objective of this paper is to bring the new requirements listed in the new code of Civil procedure to be observed by judges in their arguments to decide procedural conflicts.

For better analysis of the proposal of this work, will be demonstrated, first, in a general way the character of legal arguments, which is provided for constitutionally[4].

Furthermore, the code of Civil procedure used to bring about the rules already previous reasoning the Court judges must follow. However, the new code of Civil procedure has brought new rules that are causing controversy among law practitioners, manifesting itself for or against using concrete arguments, as will be demonstrated.

Thus, this work will bring the positives and negatives about the legal grounds provided for in the new code of Civil procedure, and its probable consequences in the daily life of the judiciary.

1. OF JUDICIAL REASONING

First, it is worth mentioning that is laid down in the Constitution of the Federative Republic of Brazil of 1988, in its article 93, item IX, the Court decision should be based, under penalty of nullity. This forecast serves for the constitutional judge demonstrate to the parts of the process, your motivation to decide the case.

In this sense, extract of the Magna Carta, in its article 93, item IX:

all judgments of the organs of the Judiciary will be public, and reasoned decisions, on pain of nullity, and the law limit the presence, in certain acts, the parties and their lawyers, or only to those in cases in which the preservation of the right to privacy of interested in secrecy does not harm the public interest to information; (Wording by constitutional amendment No. 45, 2004)

Registers that the Superior Court of Justice has several decisions concerning the interpretation of art. 93, IX of the Federal Constitution:

This is idea-force, focused on the prestige of the democratic State of law: the decisions of the judiciary should be motivated (art. 93, IX, CF). This mister, is provided to the Court relate to the ministerial opinion or to the terms of the Act, however, the right to honor the dialeticidade, expression of the
contradictory, add rationale to be of his authorship. Order granted to recognize the invalidity of the done, and redo the trial judgment, promoting the grounds for decisum, in order to face the opposing arguments in the appeal (Superior Court of Justice – 6th t.-Habeas Corpus nº. 90,684-Rapporteur Minister Maria Thereza de Assis Moura).

The demonstration of the motivation of the judge is indispensable so that the decision does not have any type of nullity, since they must be examined all the arguments brought by the parties as a means of response by the magistrate.

In this way, as in the case of constitutional rule, the statement also demonstrates the democratic character of the jurisdiction, since only the jurisdictional control, either by the parties, or even by the Judiciary, through the analysis of the reasons of decision-making, which should demonstrate clearly the motivation for deciding conflicts.

The statement means what was the reason that led the judge to decide a given case, that is demonstrated and other involved parties the justification of his decision, and must be clear and objective way.

According to Nelson Nery Junior (1999):

Support means the magistrate to give the reasons in fact and law, that convinced him to decide the issue. The rationale has substantial involvement and not merely formal, where may conclude that the judge should examine the issues put to the trial, externalizing the fundamental basis of his decision. Do not consider themselves "substantially" reasoned decisions that say "according to the documents and witnesses heard in the process, the author is right, that upheld the request". That decision is void because he lacked justification.

As will be seen along the present work, the code of Civil procedure of 1973 anticipated legal enforcement that the judges have, in all the areas of the judiciary, as well as in all judicial proceedings, to properly support their decisions, whether they are interlocutory in nature or terminative.

Still, there's no way to speak on legal grounds without relate it to the principle of free belief motivated the judges in our legal system. This principle States that the magistrate is free to decide the cases in a non-linked, and should support their motives as the existing legislation and jurisprudence.

However, the new code of Civil procedure brings the legal reasoning of a more rigorous way to magistrates as we shall see in the course of this study.

2. OF JUSTIFICATION AS THE OLD CODE OF CIVIL PROCEDURE
The previous code of Civil procedure, already treated as duty the reasoning of judicial decisions by the magistrates, in view of the above reasons in the present work.

In this sense, first provides your article 131, which provides that "the judge shall assess evidence freely, taking into account the facts and circumstances contained in the file, even if not alleged by the parties; but should indicate, in sentencing, the reasons that you formed the convincer ".

In this way, although the judge has called lobby free evaluation of the evidence brought by the parties during the proceedings, this shall motivate in your sentence which was the motivation for it was decided as their understanding and consequently bringing greater legal certainty for those involved in the process.

More specifically, article 458 of the code of Civil procedure before, predicted as essential requirements of sentence:

I-report, which will contain the names of the parties, the summary of the application and the reply of the defendant, as well as the record of the major events undertaken in progress; II-statement of reasons on which the judge will consider the issues of fact and of law; III-device, in which the judge will resolve the issues, the parties You submit.

Still, the art. 165 the same diploma supplements: "The judgments and judgments will be delivered with observance of the provisions of art. 458; other decisions will be based, albeit concise mode. "

On reading the article above, it appears that the statement is an essential part in the sentence or in any other court decision, in which the judge will demonstrate the factual issues as the law presented in a given case.

So, in summary, it can be said that support means giving the reasons of fact and law, which led the magistrate to that decision.

The reasoning in judicial decisions is so important that its absence can make the relevant judicial act, as expressed in the aforementioned article 93, IX, of the CRFB/88, on pain of being considered citra petita, i.e. will be considered a trial which gives less than requested by the plaintiff, without justifiable reason.

However, for the understanding of this work, the code of Civil procedure of 1973, is it necessary to call attention to a feature that differentiates a lot to state reasons in relation to the new code of Civil procedure.

This previously scheduled feature was about no obligation of the judge to comment on all the arguments
set out in the application and in defensive play, which won't be possible in the new civil procedural legislation as will be discussed later.

In this sense, explain the author Marcus Vinícius Rivers Gonçalves (2013):

Will not always be necessary for the judge to comment on all the causes of action and defence fundamentals. If one of the causes of action be immediately demonstrated and is, by itself, enough for the reception of the request, the judge shall sentence of origin, without having to look at the other. For example: If one postulates the annulment of contract because signed by unable without assistance, and because it was coerced to sign it, there will be one request, but two causes of action, each sufficient by itself, for the reception of the request. If a be demonstrated immediately, the judge can judge, without examining the other: the same in relation to the fundamentals of Defense: If a be proven, and is sufficient to lead to refusing the application, the judge may sentence, away from the initial claim, without examining the other.

Register that is sealed to the judge to reject the request of the author, without examining all the pleas of fact and of law alleged, or host without examining all the basics of Defense, because they would be violating a constitutional provision, along the lines discussed above.

Thus, demonstrated how the previous code of Civil Procedure deals with the constitutional law of the reasoning of judicial decisions, the next topic brings the rationale in the new code of Civil procedure, in order to demonstrate the main differences.

3. THE NEW RATIONALE PROVIDED FOR IN THE NEW CODE OF CIVIL PROCEDURE

The new code of Civil procedure, in his Art. 489, § 1, provides a number of features that, once submitted by a court decision, will not be in this the statement demonstrated:

"(1) it is not considered justified any judgment, whether interlocutory or judgment, sentence, that:

(I) be limited to, the reproduction, or to paraphrase of normative act, without explaining his relationship with the cause or the question decided;

II-hire indeterminate legal concepts, without explaining the reason of its incidence in the case;

III-involve grounds would justify any other decision;

IV-no face all arguments deduced in the process able to, in theory, to rebut the conclusion adopted by the
judge;

V-limited to invoke precedent or utterance of the scoresheet, without identifying their determinants fundamentals or demonstrate that the case under trial fits those fundamentals;

Saw stop set out below of the scoresheet, jurisprudence or precedent invoked by the party, without showing the existence of a distinction in the case on trial or the overcoming of the understanding. ”

According to this new Law, so should the ruling exposed the relationship between normative acts and legal concepts used and the case. In addition to invoke reasons that only suit the ruling, as well as answer the arguments made by the parties to counter the resolution of merit.

In addition, the new device brought greater filling regulatory precedents and jurisprudence. The judge, in making its decision, must follow the precedents, jurisprudence or precedent that is accused in the process and to justify the invocation of that, if appropriate to the case. Otherwise, should point the reason is not possible.

Such provision is consistent with the prediction of the Art. 93, IX of the Magna Carta, which discusses the motivation for the Court's ruling as an essential element of the Act. As José Tadeu Neves Xavier says in the new code of Civil procedure Noted of OAB of Rio Grande do Sul (2015):

The importance of reasoning of judicial decisions has led the legislature to set a number of parameters to be observed in the performance of the activity of motivation of the sentence, they all scoped to ensure the effectiveness of this warranty that is presented with constitutional bias (art. 93, CF), being inherent in the design of rule of law.

He goes on to explain the relevance of the decision be motivated:

The motivation of judicial decisions, as well as serve to provide control of the reasoning adopted by the legislature, allows the part to develop its activities in a dialeticidade system of appellate, leading intellectual activity developed by the judge and expressed in the rationale for analysis of the higher instance. The absence of reasoning, therefore, hurts the adversarial principle.

Notice that the new code of Civil procedure requires a more thorough decision, to keep the generic arguments and worry about all the relevant issues in the process, which should be enjoyed by the magistrate. This is idealized, but that decision constitutionally sometimes is not applied in practice.

4. CRITICISM ABOUT THE NEW "MODE" OF JUSTIFICATION
In analysis of the changes that the new code of Civil procedure, it can be said that it was on those related to the rationale of judicial decisions that more discussions have occurred, mainly about its admissibility.

These changes, demonstrated in this study were not very well seen by experts, considering that this new "mode" to state reasons will require a lot of judges, which may impair the principle of procedural economy and speed.

Join the Association of federal judges of Brazil (Ajufe), Brazilian Magistrates Association (AMB) and the National Association of Magistrates of the labour courts (Anamatra), in this year of 2015, have applied the veto to article 489 of the new code of Civil procedure.

In this sense, criticized the lawyer and professor Padman Streck:

Who do they think? Them or in Brazil? Require that the judges examined Petitions often is too much to ask? It is indeed worrying that entities linked to the judiciary are precisely seeking vetoes the devices that bring them more obligations.

Yet, it is argued by critics on the articles concerning these topics:

have severe impacts, negatively, in the management of the processes, in personal and functional independence of the judges and own production of judicial decisions in all areas of the country, with deleterious repercussions in the reasonable duration of made.

The rigidity of the grounds in the new code of Civil procedure is notorious, behold, as already seen, will not be considered justified the decision that limited the indication or reproduction of legislation, and should be decided in a more exclusive in the parties, pointing out all the points raised by both during the process, justifying the claims of critics in the sense of the possible violation of the principle of procedural swiftness.

On the other hand, there are experts who praise the changes brought by the new code of Civil procedure, to argue that the rationale is provided for in the Federal Constitution, being the main demonstration in civil process of the democratic State of law.

With this understanding, said the professor at the Universidade Federal da Bahia, Fredie Didier Jr., who did not understand the reason for the request to the veto by the magistrates, as shown above:

Were the judges arguing that it is possible to interpret the decision without examining the reasons therefor? The President of the Republic, if veto these devices, avalizaria this understanding.
Even the professor and judge of the Court of Rio Grande do Sul, Alexandre Freitas Chamber, said:

You can't live with false arguments (of type "missing requirements, indefiro") that anything they say and are incompatible with the democratic State of law. So, here is my confidence in that, with the penalty, we have real decisions and democratically based.[10]

In this way, it is observed that the supporters of this new "mode" to state reasons, praising this change by virtue of the constitutional principles already exposed, as well as legal certainty for the parties, as well as for facilitating the exercise of the double degree of jurisdiction, to the extent that favor the parties that can counteract the reasons given by the judge in his decision with greater ownership, avoiding superficial decisions, which are very common in the daily life of the judiciary.

5. CONCLUSION

Infer, therefore, that the new provision that brings the new code of Civil procedure, regarding the rationale of judicial decisions, is just a reflection of the constitutional forecast on the same topic.

However, the specifications found that demand full attention device judgmental, to treat with greater rigour the motivation of his decision.

Just need to motivate detailed manner has provoked discussion among the jurists. Those in favour of the new provision consider this beneficial for achieving the democratic State of law and make more efficient the process, upon reaching its end contemplating all the disputed points in it. The contrary to writing, in turn, claim that the change will harm the procedural swiftness and reasonable duration of made and clamor for a veto to the device.

Therefore, note that there is a conflict of principles governing legal relations, and about the possibility of the veto, must define which one should prevail in relation to the other, or one that is more beneficial to society and jurisdictional activity in General.

REFERENCES

BRAZIL, Superior Court of Justice – 6th t.-Habeas Corpus nº. 90,684-Rapporteur Minister Maria Thereza de Assis Moura.


[5] Will be referred to as CRFB/88 throughout the text


[7] Ibid.

[8] Ibid.


[10] Ibid.