Access to Justice and the Instrumentality of the Legal Process

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Article

Access to Justice and the Instrumentality of the Legal Process

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Abstract: This article study was developed based on the relationship between access to justice and the instrumentality of the legal process, aiming to assess the effectiveness of the constitutional principle enshrined in Article 5, item XXXV: "the law shall not exclude any injury or threat to a right from the consideration of the Judiciary" (BRAZIL, 2008, p.27). To achieve this goal, the concept of justice was examined, as well as the definition and evolution of access to justice within legal science. In light of these concepts, it became possible to establish a connection between access to justice and the instrumentality of the legal process. This analysis reveals that the State has not yet achieved sufficient efficiency in providing support to its less favored citizens in facilitating access to justice.

Keywords: justice; access to justice; effectiveness; barriers to judicial protection; instrumentality of the legal process; constitutional guarantee

1. INTRODUCTION

The present study aims to understand the relationship between access to justice and the instrumentality of the legal process, highlighting the utility of the legal system for individuals who rely on state protection to assert their rights.

This article will demonstrate that access to justice is a fundamental guarantee and will further explore its connection to citizenship. For citizenship to be fully realized, it is essential to ensure the rights listed in the Constitution of the Federative Republic of Brazil, with a particular focus on due process, the right to a full defense, and the right to appeal.

Additionally, this work will address the challenges faced by citizens when seeking judicial redress for violations of their rights, such as the burden of legal costs and the toll imposed by the judicial process.

It is important to note that this study does not intend to exhaustively cover the subject matter. Instead, this monograph will analyze how access to justice and the instrumentality of the legal process interact within the legal system. The research will be conducted by consulting texts that specifically address instrumental processes.

A quantitative method will be employed, utilizing legal doctrine, case law, academic articles, and legislation. The analysis will begin by defining the concept of justice according to legal scholars.

The structure of this study is as follows: first, the concept of justice and its evolution will be defined. Access to justice and societal responses to it will then be examined, along with the obstacles to exercising this guarantee. The relationship between access to justice and the legal process, including its instrumentality, will also be explored through theoretical research. This research starts with an explanatory approach to the concept of justice, as well as the relationship between access to justice and the instrumentality of the legal process.

The second chapter of this work will explore the concept of justice and its role within legal science.

The third chapter will address the evolution of access to justice in general terms, contrasting it with the functioning of the judiciary.

The fourth chapter will discuss the nature of access to justice. It will present two perspectives: one that views access to justice as a fundamental right, and another that reduces it to mere judicial protection, seeking to strip it of its status as a fundamental right.

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In the fifth chapter, the relationship between access to justice and society will be examined, focusing on the right to legal action and the obstacles to achieving the effectiveness of this right.

The sixth chapter will define the legal process from the perspective of general legal doctrine and will introduce neo-institutionalist theory.

The seventh and final chapter will explore the relationship between access to justice and the instrumentality of the legal process.

2. WHAT IS JUSTICE?

Justice within society functions to restore balance in relationships between individuals when a violation of rights causes imbalance.

According to Carlos Roberto Gonçalves, the Romans linked law and justice, thus highlighting the necessity for justice in societal actions. For Gonçalves, "on the other hand, the creation of law has no other objective but the realization of justice" (GONÇALVES, 2007, p.2).

In this regard, Leal points out:

> Legal Science must seek its object in the persistent inquiry into the nature of law, aiming to ground its focus in this critical investigation, producing and extracting knowledge beyond the outdated conceptions of natural law, whether subjective or objective, which are embedded in fixed and immutable norms, ideologically constructed or discovered as logical references for stabilizing social and economic life, in an artificial sense of fairness devoid of any connection to the legal realities and economic relations inherent to capitalist society. Legal Science, as a postmodern theoretical achievement of humanity, based on multiple systems of legal explanation, represents a continuous challenge to the consciousness of nations against the absolutism of legal ideas formed in theories devoid of historicity, designed to preserve dominant privileges through the euphemism of formal equality of rights and the symbolic defense of human rights. (LEAL, 2005, p.22).

The author Luiz Carlos Koppe Brandão, in his article *State and Justice: Conceptions and Correlations*, establishes a relationship between justice and the values governing society:

> "Justice is, therefore, above all, a value: not a being, but an attribute of being. Not the imposed order, but the value of that order, or rather, the values it expresses, the 'possible characteristic of a social order' (Kelsen, 2001). Not only law and its corresponding judicial apparatus, but also, and primarily, the ideology and contradictions that shape this law.Now, if the State can be seen as the political expression of society and its conflicts, each type of society will correspond to a particular State. Consequently, to each model of the State, with its values, there will correspond a specific type of justice" (BRANDÃO, 2007, p.1).

The author Cinthia Robert, in her book *Human Rights and Access to Justice*, cites the concept of justice according to Norberto Bobbio and Aristotle.

> According to Norberto Bobbio, justice is a normative concept: “it is a social end, just like equality, freedom, democracy, or well-being,” and the greatest difficulty lies in defining it in descriptive terms.
>
> The polysemy of the term derives from the very meaning given to justice. As Bobbio highlighted, with Aristotle began the distinction between distributive justice and corrective justice. Distributive justice is expressed through the distribution “of honors, material goods, or any other divisible thing among those who participate in the political system,” while corrective justice pertains to situations where one seeks redress for a harm suffered (ROBERT, SÉGUIN, 2000, pp. 198-199).

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The author analyzes the concept of justice by discussing material and formal justice, the former being a comparison of similar cases as well as their differences, and the latter asserting that similar cases should be treated similarly.

Robert further states:

> "We can still establish the dichotomy between formal justice and material justice—the former requiring the application of legal norms. Legal norms, in turn, may be formally just or unjust, but formal justice will apply them using the formal principle that different cases should be treated differently. On the other hand, material justice seeks to find the similarities and differences in the characteristics of each case to serve as a basis for similar or differentiated treatment" (ROBERT, SÉGUIN, 2000, p.199).

The principle to which the author refers is the first part of Article 5 of the Constitution of the Federative Republic of Brazil, which states that all individuals are equal before the law:

> "Article 5: All persons are equal before the law, without distinction of any kind, ensuring to Brazilians and foreign residents in the country the inviolability of the right to life, liberty, equality, security, and property, under the following terms: (...)" (BRASIL, 2010, p.14).

Thus, it is concluded that justice serves as a mechanism to provide society with a balance that makes coexistence possible. However, this balance is not inherent solely to justice; it is interconnected with the law, which theoretically defines who is entitled to what is in dispute. Nonetheless, this does not guarantee that the just outcome in a factual situation will align with what the law prescribes, as the relationships between citizens depend on subjective factors such as morality, culture, customs, and other considerations.

3. EVOLUTION OF ACCESS TO JUSTICE

Access to justice within legal science has gone through several phases, which eventually enabled individuals from less privileged classes to access judicial protection. However, reaching this stage required an evolution, as described by Robert:

> "The history of law reveals that society has gone through various stages before arriving at jurisdiction. Initially, there was social vengeance—tribes and social groups gathered for mutual defense. Later, in the phase of private vengeance—such as the Judgment of Ordeals—vengeance was no longer carried out by the social group but by the nascent State. Finally, the current phase emerges, where we observe that the State prohibits vengeance and assumes the function of dispensing justice. The State creates the obligation and the necessity to provide legal assistance to those who could not afford it" (ROBERT, SÉGUIN, 2000, p.177).

Society generally conceptualizes access to justice as access to judicial protection, i.e., access to the judiciary. However, Alexandre Cesar, in his book *Access to Justice and Citizenship*, emphasizes that it is not limited to this notion. He notes:

> "Within an axiological conception of justice, access to justice is not reduced to being synonymous with access to the judiciary and its institutions, but rather to 'an order of values and fundamental rights for human beings,' which are not restricted to procedural law" (CESAR, 2002, p.49).

The focus of access to justice cannot be limited to judicial institutions alone; it must extend further because the ultimate aim should concentrate on the benefits that can be generated for citizens. Thus, the emphasis should be on justice as a means of ensuring social equilibrium. Cesar further emphasizes:

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> "On the other hand, it is essential to highlight that access to justice, from a broader perspective, should also be seen as a political instrument, a transformative movement, and even more, a new way of conceiving the legal system" (CESAR, 2002, p.51).

Although access to justice was guaranteed, no means were provided to make it effective, as the lawyers who provided legal aid were private practitioners and were not compensated for their work. As a result, they worked out of charity when offering legal assistance to the less fortunate.

It became evident that while the guarantee existed, the necessary mechanisms did not, as the State should have financed attorneys for those who could not afford them, thereby ensuring parity between parties that could afford legal representation and those that could not.

Thus, during the 18th and 19th centuries, access to justice was guaranteed only to those who could afford the costs, meaning it was merely a formal right rather than a substantive one, as it only benefitted those with financial means. Another problem faced by the underprivileged population was the scarcity of professionals willing to dedicate their time to assisting them in legal disputes for free.

However, the gravity of the situation became increasingly apparent, leading to demands, as Cesar points out:

> "Nevertheless, from the beginning of this century, with the surprising growth of capitalist societies in both size and complexity, the individualistic perspective has weakened, and collective claims for new rights, termed 'new human rights,' have emerged. These are the rights that will truly make the previously recognized rights in 'declarations of human rights' effective. It is through the actual right of access to justice that this is achieved" (CESAR, 2002, p.55).

Cappelletti highlights:

> "In market economies, lawyers, particularly the more experienced and highly competent, tend to devote more of their time to paid work than to free legal assistance. Moreover, to avoid excessive charity, those who support the program generally set strict eligibility limits for those wishing to benefit from it" (CAPPELLETTI, GARTH, 1988, p.32).

With the limited number of professionals available to meet the population's demands, more legal practitioners would need to be willing to engage in this type of work. However, it must be emphasized that legal professionals need to be compensated to ensure, among other things, their own livelihood. Therefore, there must be a balance between pro bono and paid legal cases.

During the second half of the 20th century, demands and movements from the population intensified, seeking higher quality and more effective access to justice. To achieve these objectives, ideas for modifications to the entire judicial system emerged, with the primary goal of providing the underprivileged with access to the judiciary through public defenders funded by the state, thus beginning to ensure access to judicial protection.

Cappelletti exemplifies possible modifications that could be made to reach the desired solution to access to justice issues:

> "Changes in procedural forms, changes in the structure of courts or the creation of new courts, the use of laypersons or professionals, both judges and teachers, modifications in substantive law aimed at avoiding litigation or facilitating its resolution, and the use of private or informal mechanisms for dispute resolution" (CAPPELLETTI, GARTH, 1988, p.65).

It becomes evident that it is necessary to universalize justice. Dinamarco explains that universalizing justice means increasing its scope, making it accessible to the greatest number of people within society. He points out:

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> "Much has been done recently, both globally and in Brazil, in favor of the universalization of judicial protection. International doctrine speaks of three waves of procedural law reform, aimed at (a) comprehensive legal assistance for the needy, (b) the inclusion of certain supra-individual conflicts that were previously excluded from any judicial protection (diffuse and collective rights and interests), and (c) the technical improvement of internal procedural mechanisms (Mauro Cappelletti). In Brazil, these movements breaking away from traditional civil procedure are extraordinarily significant in recent decades. The establishment of small claims courts (today, special civil courts), the institution of public civil actions and collective actions for the protection of environmental and consumer values, the collective writ of mandamus, the more frequent use of that remarkable political instrument known as the popular action, the vigilant performance of the Public Prosecutor's Office in court, and the evolving mindset of judges now focused on the values underlying all this reality—this is the developmental picture that Brazil has been experiencing with greater intensity than in any other part of the civilized world. It could become an effective factor in aligning the procedural system with the reality of the population's needs. It is hoped that the occasional misuse of some of these mechanisms will not lead to a retraction or regression in relation to the progress they represent" (DINAMARCO, 2009a, p.116).

It can be concluded that access to justice should not be restricted to the judicial system and its institutions but extends beyond, as understood by the cited authors, as a fundamental human right. Initially, the defenders were private attorneys who, out of charity, donated their time to assist the less fortunate. However, the time dedicated was limited and of low quality due to the lack of financial interest, as legal professionals need to be compensated for their services. Given these difficulties, the State gradually began to provide public defenders, remunerated by the government, for the population.

4. WHAT IS ACCESS TO JUSTICE?

Access to justice is a necessity for the population and is not restricted merely to bringing a particular demand to the attention of the judiciary; it extends beyond this to encompass both civil and criminal defense, as will be demonstrated throughout this chapter. Some authors view it as a fundamental right, while others see it solely as access to judicial protection. Regarding access to justice, José Nilton Nascimento Neves reflects on access to justice and due process:

> The issue of access to justice is not limited to the understanding that it is possible to obtain judicial services from a competent body, namely the Judiciary, which represents a portion of the power of the State. Undoubtedly, access to justice must be offered by this body; however, it is not solely confined to it for its consolidation. (NEVES, 2012, p.1).

Citizens typically seek the judiciary in various situations, particularly when state judicial protection is required or when a contractual obligation between parties is breached. In such cases, the aggrieved party tends to seek a resolution for the situation by bringing this claim to the judiciary with the aim of achieving justice based on existing laws.

Thus, it is possible to visualize that the instruments of the legal process must facilitate access to justice, as well as provide a prompt and effective resolution to the specific case while always preserving the principles of adversarial proceedings and the right to full defense. Ada Pellegrini Grinover emphasizes:

> Access to justice, therefore, is not synonymous with mere admission to the process or the possibility of initiating a lawsuit. As will be seen in the text, for effective access to justice, it is indispensable that the maximum number of people be permitted to demand and defend themselves adequately (including in criminal proceedings); restrictions concerning certain cases (small value, diffuse interests)

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> are also condemnable. However, for the completeness of access to justice, this and much more is required. (CINTRA, GRINOVER, DINAMARCO, 2010, p.39).

According to the author DINAMARCO:

> To meet the constitutional requirement of the adversarial principle, every procedural model described by law must contain—and all procedures that are concretely initiated must contain—opportunities for each party to present, argue, and prove their case. The plaintiff argues and makes requests in the initial complaint; once the process is initiated by the filing of this complaint, the defendant is allowed to respond right away, being able to assert defenses and request dismissal of the complaint or termination of the process. The plaintiff can request the anticipation of the remedy, which will be granted if the requirements set forth in law are met (CPC, art.273); both parties are permitted to produce evidence for the alleged facts; the party adversely affected by a decision has the option to request a favorable ruling from the Court (appeal). When making a request, each litigant presents arguments intended to persuade the judge, and also argues at the conclusion of the proceedings and before the verdict, analyzing the facts, the evidence, and the legal consequences thereof, etc. (DINAMARCO, 2009a, p.222).

Access to justice is governed by constitutional principles, including the adversarial principle and the right to full defense, which are fundamental guarantees aimed at ensuring procedural effectiveness. Dinamarco points out that there are shortcomings in the judiciary that need to be addressed to ensure effective access to justice, illustrating what such access should entail:

> These needs can be summarized in a binomial composed of quantity and quality. It is insufficient to increase the range of conflicts that can be brought to justice without enhancing the capacity to produce favorable outcomes. It is also inadequate to produce favorable outcomes concerning conflicts that are amenable to judicial resolution while leaving many others outside the realm of judicial protection. (DINAMARCO, 2009a, p.128).

However, the author Rosemiro Pereira Leal critiques the notion of "access to justice," stating that it does not aim to guarantee parties a fair decision regarding their dispute, but rather to ensure that they have access to state protection to assist in resolving the dispute. The author further asserts that the expression "access to justice" is not synonymous with a collection of fundamental procedural guarantees enumerated in the Brazilian Constitution, nor with the principles governing procedural law. Thus, LEAL concludes regarding access to justice:

> Since the random or subjective idea of a legal order realizable through judicial activity is antinomic, we present the topic under the designation "access to jurisdiction" (and not to justice), because the correct expression "access to jurisdiction" dispenses with meta-legal explanations of unattainable sociological idealism or outdated judicial attitudes. Access to jurisdiction is achieved through the right of action created by the constitutional norm as an unconditional right to invoke the judicial activity of the State (...). (LEAL, 2005, p.82).

It should be emphasized, however, that judicial protection guarantees the right to action, that is, the right to resort to state judicial protection. However, because it involves litigation, the parties remain subject to the judgment of the judge, who may rule in favor of the plaintiff or the defendant.

Therefore, access to justice cannot be linked to a favorable decision, as it could be unfavorable, or it might result in a partial decision where both parties experience losses and gains. DINAMARCO further states:

> Access to justice is not equivalent to mere entry into court. The very constitutional guarantee of action would be ineffective and impoverished if it merely ensured that

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> people's claims reach the process without also guaranteeing them adequate treatment. It is essential that the claims presented to judges reach an effective final judgment, without the exacerbation of factors that could obstruct the continuation of the process; otherwise, the procedural system itself will be sterile and ineffective while it resolves itself into a mere technique of addressing the right to action, without concern for external outcomes. In preparing for the substantive examination of the claim, it is essential that the parties be treated equally and allowed to participate, with the judge himself also not being excluded from participation, as he bears the primary responsibility for conducting the process and correctly judging the case. Only those who receive justice have access to a just legal order. Receiving justice means being admitted to court, being able to participate, having adequate participation from the judge, and ultimately receiving a judicial provision consistent with societal values. These are the contours of a just process, or an equitable process, composed of the effectiveness of a minimum of guarantees of means and results. (DINAMARCO, 2009a, p.118).

From the exposition by the author, it becomes clear that the instruments that drive the process are essential to achieving the intended objectives, such as ensuring the effectiveness of judicial protection.

For DINAMARCO, the targeted reforms that occurred in the civil code brought more efficiency to the process, describing them as follows:

> The reforms of the Code of Civil Procedure, particularly enacted through laws approved since 1994, were a response to many of the demands from both doctrine and the population for a more efficient procedural system capable of addressing the trinomial quality-timeliness-effectiveness. Aiming to improve the quality of judicial protection, they introduced a crucial innovation in preparing the judge for the judgment of the case, which is the preliminary hearing established by the new art.331 of the Code of Civil Procedure: it is at this moment that, if conciliation between the litigants is not achieved, the judge becomes acquainted with the relevant points and issues, thereby defining the subject of evidence to be produced and the means of proof to be presented. (...)
>
> Regarding the timeliness of judicial protection, they not only enacted numerous simplifying innovations in procedural acts but also established and regulated what is known as anticipatory judicial protection (art.273), in addition to implanting a differentiated and expedited judicial protection represented by the monitoring process (arts.1102-a, 1102-b, 1102-c) and seeking prompt execution of judicial title, reaching the point of seeking the satisfaction of the credit recognized in the sentence through payment by the creditor, under penalty of fine, independent of any executive measures (art.475-J).
>
> For the effectiveness of protection, particularly in the challenging realm of obligations to do or not to do, they empowered the judge with highly efficient powers to be exercised even in the knowledge process, dispensed from the formal initiation of forced execution (art.461). (DINAMARCO, 2009a, p.119).

Nevertheless, effective judicial protection as articulated above has not yet been achieved due to procedural delays that cause cases to prolong unnecessarily. However, delay is not always linked to procedural processes, which can be exemplified by difficulties in hearing a particular witness or by more elaborate expert evidence.

The aforementioned problems result in the final decision obtained in the process being ineffective for various reasons, including the deterioration of the subject matter in dispute, as well as the death of one of the parties, which can sometimes lead to the extinction of the process due to loss of subject matter.

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On this matter, DINAMARCO supports his arguments in his work *Instituições de Direito Processual Civil* regarding the right to access judicial protection:

> Conscious of the need for institutionalized judicial protection as a factor for peace in society, the people obtain solemn promises from the State to dispense it and to guide the exercise of jurisdiction along certain lines capable of ensuring high-quality outcomes. As in other countries, Brazil features this fundamental promise in its constitutional framework, formally established in the prohibition against excluding complaints of injury or threat to rights from judicial consideration (art.5, inc. XXXV). This is the traditional formula presented as the constitutional guarantee of action and, in more recent times, as a guarantee of the unavoidability of judicial oversight. (DINAMARCO, 2009a, p.112).

Thus, the right to access justice should be defended, but it must be afforded the respect due to human dignity. Another point to be emphasized is that a decision considered just by the state may not always be reached by those who sought the state's assistance. The decision may fully address the subject of the claim, or it may rule that the right belonged to the defendant or result in the claim being partially upheld.

> However, it should be remembered that the constitutional guarantee allows citizens to bring claims regarding violated rights to the attention of the State, but the State must remain vigilant not to violate other fundamental guarantees enshrined in the constitution, such as bringing to the judiciary's attention any violations of rights.

5. SOCIETY AND ACCESS TO JUSTICE AND ITS OBSTACLES

The right to effective access to justice has been considered a fundamental guarantee, serving as a means to exercise citizenship through the reclamation of violated rights with the support of judicial protection. Mauro Cappelletti notes:

> "Perfect effectiveness, in the context of a given substantive right, could be expressed as complete 'equality of arms' — the guarantee that the final outcome depends solely on the relative legal merits of the opposing parties, without regard to differences that are extraneous to the law yet affect the assertion and claim of rights. This perfect equality, of course, is utopian. The differences between the parties can never be completely eradicated." (CAPPELLETTI, GARTH, 1988, p. 15)

Over time, the State has attempted to ensure access to justice in its own way; however, this goal has been achieved slowly, initially guaranteeing the formal right to access justice. Subsequently, attorneys began volunteering their time to make this guarantee effective; nevertheless, this initiative faltered, as not all were willing to donate their time to assist the poor without financial compensation.

From the ineffectiveness of voluntarism among lawyers, the State recognized the necessity of going further, determining that to make this right effective, it would be essential to subsidize legal representatives. Thus, paying legal professionals to represent the underprivileged would facilitate access to the courts.

Nonetheless, this approach still failed to satisfy all, as a significant number of people rely on these attorneys, while the number of available defenders does not correspond to the actual need for quality legal services. The effectiveness of the measures taken by the State has not been complete; however, this situation could be resolved with greater commitment from the public authorities to hire a number of professionals proportional to the demand.

It should also be noted that access to justice does not guarantee that the claims brought before the court will be duly met as intended. The main objective is to achieve social pacification regarding the claimed right; in this regard, DINAMARCO more aptly states:

> "It is manifestly impossible to satisfy everyone — and the very dialectical structure of conflicts demonstrates that the complete satisfaction of one party implies the

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> contrariness to the other. However, experience also shows that, despite their conflicts, the suffering is lesser than that arising from the instabilities inherent in identification. In any case, of the anguishes of two, only one can possibly be disappointed, should their opponent be satisfied." (DINAMARCO, 2009a, p. 131)

Thus, citizens have the right to seek judicial protection without prejudgment regarding the validity of their claims. They are also assured the right to contradict and to a broad defense concerning what is alleged in court. They are guaranteed the opportunity to prove their assertions regarding the claimed right by all means admitted in law, ensuring that the decision at the end of the process aligns with the interests of the parties involved.

5.1. COURT COSTS

Access to the judiciary in Brazil is very burdensome for those who seek it to resolve disputes, thus hindering access for those who do not have the financial means to cover such expenses.

MARACINI notes:

> "The problem of court costs stands out in cases of low value due to the disproportion it generates between the benefit claimed and the expenses incurred in the process. In such cases, it is not financially viable for anyone, rich or poor, to litigate in court for the desired right, as the costs associated with attorneys and the payment of court fees, if they do not exceed, closely approximate the economic value of the litigated object. Therefore, accessing the courts is not compensatory." (MARACINI, 2003, p. 21)

To access justice, citizens must pay court costs. If a party does not qualify for free legal aid or if their request is denied, they must bear these costs, which makes it quite burdensome for them.

In this sense, Article 19 of the Brazilian Code of Civil Procedure regulates how court costs should be paid, as well as the most appropriate time for each cost to be settled:

> "Art. 19. Except for provisions concerning free legal aid, the parties are responsible for covering the expenses of the acts they perform or request in the process, prepaying these costs from the outset until the final judgment; and, in execution, until full satisfaction of the right declared by the sentence. § 1 The payment referred to in this article shall be made at the time of each procedural act. § 2 It is the responsibility of the plaintiff to advance the expenses related to acts that the judge determines ex officio or at the request of the Public Ministry." (BRAZIL, 2010, p. 617)

Regarding this matter, Mauro Cappelletti comments:

> "The formal resolution of disputes, particularly in the courts, is very costly in most modern societies. While it is true that the State pays the salaries of judges and auxiliary personnel and provides the buildings and other resources necessary for trials, litigants must bear a significant portion of the other costs necessary for the resolution of a dispute, including attorney's fees and some court costs." (CAPPELLETTI, GARTH, 1988, p. 15)

Thus, it can be emphasized that the costs associated with attorneys and judicial services are high, making access to judicial protection challenging for the poor and rendering them vulnerable to violations of their rights. Nevertheless, the judiciary must have costs to provide all judicial services.

Mauro Cappelletti emphasizes that "Any realistic attempt to address access issues must begin by recognizing this situation: lawyers and their services are very expensive." (1988, p. 18)

MARACINI demonstrates in his book "Legal Assistance, Judicial Assistance, and Free Justice" that there are barriers preventing the filing of claims, both of low and high value, due to financial constraints.

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MARACINI argues:

> "Although justice is, in legal terms, accessible to all who approach it, access to the courts is costly. The reality shows that not everyone can afford the costs of a legal action, including the expenses related to the process and the attorney's fees. For broad segments of the population, the idea of litigating in court or consulting a lawyer appears to be unattainable, a privilege enjoyed solely by those who can afford the service." (MARACINI, 2003, p. 22)

Therefore, it must also be taken into account that costs become elevated in light of procedural delays. Depending on the value of the object in dispute, the continuation of the process may become unfeasible if it surpasses the value of the litigated matter.

Cappelletti observes:

> "Individuals or organizations with considerable financial resources have obvious advantages when initiating or defending claims. Firstly, they can afford to litigate. Furthermore, they can withstand the delays of litigation. Each of these capabilities, in the hands of a single party, can become a powerful weapon; the threat of litigation becomes both plausible and effective. Similarly, one party may be able to incur greater expenses than the other and, as a result, present their arguments more efficiently." (CAPPELLETTI, GARTH, 1988, p. 21)

While financial issues affect the number of underprivileged individuals who enter the courts, other obstacles exist, such as a lack of information arising from insufficient or minimal education. However, it should be emphasized that the lack of information is concentrated in smaller towns where the population has little access to or knowledge about their rights guaranteed by law.

MARACINI adds:

> "Moreover, since the lack of resources is often accompanied by a lack of information, access to justice is obstructed by the fact that the poor are unaware that they have rights to assert or that they might succeed in their endeavor to fight for their rights. Cultural barriers are, in fact, more challenging to overcome than economic barriers. The latter can be mitigated by exempting the needy from process expenses and providing them with a free attorney to advocate for their interests. Cultural barriers will only be effectively removed as the sociocultural level of the population evolves. That is to say, while the lack of resources can be supplemented by State resources, the issue of lack of education is not remedied merely by having someone knowledgeable act alongside the poor. It is necessary for the poor themselves to have their own knowledge, ranging from basic education — to which the Brazilian population as a whole does not have effective access — to minimal notions of law that allow them to identify their rights.
>
> Unless this barrier is overcome, no matter how good the legal assistance service is, it will be ineffective, as the poor may not seek it out, either because they do not recognize that they have rights to defend or because they approach the attorney without favorable chances after becoming involved in complex or impossible-to-solve problems. The lack of education may even be the very cause of certain legal issues or may lead the poor to become embroiled in conflicts, taking on a disadvantageous position." (MARACINI, 2003, pp. 22-23)

Another issue is that the underprivileged classes exhibit resistance to trusting lawyers and often feel intimidated when they must appear in court before judges and prosecutors.

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Over time, the State has implemented some measures to subsidize access to the courts to alleviate the identified problems. MARACINI emphasizes some actions taken by the State to try to mitigate access issues to judicial protection:

> "To address the first of the factors noted above — access for cases of low value — the Special Court for Small Claims was created under Law No. 7,244/84. For the defense in court of diffuse interests, Law No. 7,347/85 established the public civil action. More recently, the Consumer Protection Code — Law No. 8,078/90 — provides mechanisms for the judicial protection of diffuse and collective consumer interests. Lastly, to prevent lack of resources from hindering access to justice, the State has established the assistance of public defenders." (MARACINI, 2003, pp. 24-25)

This reform regarding public defenders, intended for those who cannot afford legal representation, is a crucial public policy to facilitate access to justice. However, it is necessary to ensure that public defenders receive proper training and supervision to provide quality legal assistance. The number of public defenders must also be expanded to respond adequately to the demand.

Ultimately, public policies must be put into practice to ensure the right of citizens to seek legal representation and the right to access justice.

5.2. PROOF AND CONCLUSIONS

The right to judicial protection is a constitutionally guaranteed right that is often limited by the absence of appropriate measures to facilitate access to the judiciary. Structural problems hinder the performance of the judiciary, leading to a lack of trust from the population, which fears that the judiciary cannot effectively respond to their demands.

Access to justice cannot be limited to the formal provision of the right to seek a remedy; the implementation of public policies must also be emphasized, taking into account the realities of the underprivileged population. The poor face various barriers that render them vulnerable to violations of their rights, significantly impacting their ability to seek justice.

Ensuring effective access to justice involves the adoption of effective measures by the State, aimed not only at addressing financial and structural barriers but also at promoting education and awareness of rights among the population.

6. THE PROCESS AND ACCESS TO JUSTICE

To analyze the instrumental nature of the process, it is necessary to examine how doctrine defines the process in order to clearly understand its components.

The author Moacyr Amaral Santos, in his work *Primeiras Linhas de Direito Processual Civil: Processo de Conhecimento*, establishes a definition of process for the modern Brazilian legal system as “a set of acts that assist in resolving the dispute.” However, he points out that this definition does not fully encapsulate the essence of the process, as the process has a complex nature.

Assuming that the procedural relationship requires the defendant to be aware of the action brought by the plaintiff, it also depends on the fulfillment of obligations by both the parties and the judiciary, ensuring compliance with the norms and principles that govern the process.

Moacyr Amaral Santos further defines the process in his book as “the means by which the State exercises its jurisdictional function, that is, to resolve disputes and, consequently, the claims. The process is the instrument of jurisdiction” (2009, p. 276).

The function of the process is to resolve the claim brought by the plaintiff before the State, allowing for judicial protection. Thus, the judge may either accept the claim, reject it, or render a partial judgment in favor of the plaintiff. The process is divided into categories relevant to the requested judicial protection, namely: the process of knowledge, aimed at understanding the origin of the dispute and deciding who has the right concerning the contested property.

Execution may be based on extrajudicial or judicial titles (judgment) with the objective of enforcing the rights described in the title, while precautionary measures aim to protect the disputed object, ensuring its integrity at the conclusion of the dispute.

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Regarding the definition of the process and its general divisions, it becomes possible to present the Neo-Institutionalist theory, which is closely interconnected with the constitution due to its foundation in constitutional principles.

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6.1. Neo-Institutionalist Theory

The Neo-Institutionalist theory proposes that to achieve the desired process, there must be control and oversight over the application of laws governing the law as a whole. This can lead to a more instrumental process by enforcing existing legal norms.

Concerning Neo-Institutionalist theory, LEAL states:

> "The Neo-Institutionalist theory of the process is not a finished order of thought. It stands as a critical-participatory appeal from the legally legitimized parties to initiate procedures in all domains of jurisdiction. These would be the agents of permanent enforcement or expansive reconstruction of citizenship through transformations in society, utilizing the principles of adversarial proceedings, broad defense, and equality to achieve the legal project of leveling all parties in the procedural resolution of conflicts of interest.
>
> The Neo-Institutionalist theory of the process has no relation to other theories that, when proposing to instrumentalize conflict resolution in society, do not commit to the self-inclusion of all in fundamental rights, without which one might argue, in our view, the tyranny of concealing legal problems rather than their shared resolution." (LEAL, 2005, pp. 101-102)

He further adds:

> "In the Neo-Institutionalist theory, due process (right-to-come) institutionalizes the legal system through a self-discursive principle (adversarial process, equality, broad defense) foundational to a procedurality that should be adopted as an interpretative framework for the self-inclusion of normative recipients in the enforceable, certain rights already guaranteed in the constituent discourse of constitutionality.
>
> (...)
>
> The Neo-Institutionalist theory advocates for the oversight (open constitutional control available to any citizen) of the legislative process based on the institutional and constitutional foundations of legality, as well as in the operation, modification, application, or extinction of established law, and works towards the socialization of critical-democratic knowledge based on (fundamental rights) the self-illustration (dignity) through the exercise of citizenship as legitimization of the right of action coextensive with the proceduralized process." (LEAL, 2005, p. 104)

Author André Del Negri, in his book *Controle de Constitucionalidade no Processo legislativo – Teoria da Legitimidade Democrática*, provides explanations regarding the Neo-Institutionalist Theory and constitutional process.

André explains:

> "The conceptual clarification of the radical 'neo,' the nomenclatural component of the 'Neo-Institutionalist Theory of the Process,' comes to light. It is important to remember that the radical 'neo' in this theory does not signify a 'new theory' or a 'renewal' of a pre-existing idea. In this context, it is emphasized that 'neo' denotes a new theoretical demarcation space, where democratic law must be operationalized, constructed, deconstructed, monitored, applied, and interpreted collaboratively. Consequently, for the Neo-Institutionalist theory, jurisdiction is no longer merely the activity of the judge (Social State), but rather an activity constructed by the procedural parties from the contents of the law, as the judge, serving by functional duty to the people and constitutional norms, does not hold the constructive keys to

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> a law that spontaneously arises from his inner judgment (special sensitivity in deciding). This position of Rosemiro Leal is entirely appropriate for abstract and concrete procedural oversight in Democratic Law (Due Process of Law) as enshrined in the current Brazilian Constitution (art. 1)." (DEL NEGRI, 2008, pp. 104-105)

Thus, André Del Negri elucidates Rosemiro Leal's understanding of the Neo-Institutionalist Theory and its relation to the constitution, adding that the adversarial process must be present within the proceedings as a constitutional guarantee rather than as a procedural guarantee originating from ordinary law.

He further clarifies how the process is perceived in Neo-Institutionalist theory:

> "Finally, it should be clarified that, according to the Neo-Institutionalist theory, the Process is not merely a characteristic or a type of Procedure, but a bearer of fundamental guarantees (adversarial process, broad defense, and equality)." (DEL NEGRI, 2008, p. 107)

As highlighted, the relationship between the process and access to justice has been established through the historical evolution of the process, evidenced by the need for a third party to intervene in the relationship between the parties to resolve the dispute in a manner deemed most appropriate.

The relationship between process and access to justice is characterized by the fact that the former is the means through which the State provides its jurisdictional protection to resolve disputes presented to it, respecting the explicit and implicit constitutional precepts that include the right of the legal subject to bring to the State's attention any violation of rights.

The Neo-Institutionalist theory presented in this chapter encompasses several significant points for the process, including its governance by adversarial proceedings, broad defense, and equality; and the allowance for any individual to raise the constitutionality of existing norms. These points, if popularized, would enable greater participation from the recipients of the norms in the oversight of constitutionality.

7. ACCESS TO JUSTICE AND THE INSTRUMENTALITY OF THE PROCESS

To establish the connection between the instrumentality of the process and access to justice, it is essential to understand the concept of instrumentality within legal proceedings.

The author Cândido Dinamarco discusses access to justice and the instrumentality of the legal process by linking it to fundamental guarantees, reinforcing that access to justice is, in fact, a fundamental right. Dinamarco notes:

> "Speaking of the instrumentality of the process or its effectiveness means, in this context, referring to it as something made available to individuals to make them happier (or less unhappy) by resolving conflicts that involve them with just decisions. More than a principle, access to justice is the synthesis of all principles and guarantees of the process, whether at the constitutional or infraconstitutional level, in legislative, doctrinal, or jurisprudential venues. The idea of access to justice, which is the most important methodological point of the current procedural system, arises from the examination of any of the great principles." (DINAMARCO, 2009, p. 359)

The recognized right to bring a legal action ensures that citizens can resort to the State's judicial protection to resolve disputes. This right also provides underprivileged citizens the opportunity to bring claims before the court to assert their rights.

Dinamarco further states:

> "The guarantee of access to the judiciary (the so-called 'right to sue') consists of ensuring individuals access to judicial protection, with their claims and defenses to

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> be reviewed, and only denied review in cases clearly defined by law (universalization of process and jurisdiction). Today, efforts are made to prevent small conflicts or disadvantaged individuals from being excluded from the judiciary; individuals and entities are legitimized to present judicial claims (diffuse interests, class actions, direct actions of unconstitutionality extended to various representative entities); and the judiciary, gradually, approaches the merit review of administrative acts, overcoming the fascist idea of discretion and the subtle distinction between subjective rights and legitimate interests, used as a shield to protect them from judicial scrutiny. These measures towards the universalization of process and jurisdiction represent the first meaning of the constitutional guarantee of judicial control and the first step towards access to justice." (DINAMARCO, 2009, p. 359)

The right to sue has led to an overwhelming volume of cases within the judiciary, as virtually anything can be brought to the courts, which in turn has caused a system overload, reflecting in delayed decisions in most cases. This is enshrined in Article 5, paragraph XXXV of the 1988 Brazilian Constitution, which states that "the law shall not exclude from the judiciary's review any injury or threat to a right." (BRASIL, 2010, p. 14).

Dinamarco emphasizes:

> "Article 5, paragraph XXXV of the Constitution, previously interpreted as merely guaranteeing the right to sue, politically signifies placing all legal crises capable of generating dissatisfaction under the jurisdiction's control, and therefore the feeling of unhappiness from those seeking but not obtaining a certain benefit. This provision does not merely guarantee access to the courts or a judgment of the claims but the judicial protection itself for those who are right. The guarantee of action, as such, is satisfied with opening the way for claims to be brought before the court, and a judicial decision subsequently issued, but it says nothing about the effectiveness of judicial protection itself. The principle of the inescapability of judicial review commands that claims be accepted in court, processed, and judged, and that protection be provided by the judge to the one entitled to it—and, above all, that it be effective as a practical result of the process [...]. All these openings provided by the principle of inescapability are subject to legitimate restrictions imposed by the technical rules of the process and by other coexisting rules, even at the constitutional level." (DINAMARCO, 2009, p. 203-205).

The observation of the principle of *contradictório* (adversarial principle) is essential for the resolution of legal disputes, as it ensures that both parties are heard, leading to a decision that is fair. On the effectiveness of the adversarial principle, Dinamarco notes:

> "It is easily understood that this solemn constitutional guarantee of legality does not stand on its own but serves as a pledge for observing something of greater substantive importance, which is the adversarial process. Compliance with due process, which legitimizes judicial decisions, does so precisely because experience shows the legislator, the judge, and everyone else that observing these rules is the safest path to ensuring the effectiveness of the adversarial principle. It is indispensable for the system to inform the parties of the judicial acts, the acts of court officials, and the opposing party's actions. It is essential that these acts and decisions allow the party to respond appropriately, generating new situations of convenience. A constructive dialogue between the parties and the judge must also be established to better instruct the case for decision-making." (DINAMARCO, 2009, p. 361)

When analyzing the adversarial principle, it becomes clear that there are three fundamental aspects: the guarantee that both parties are aware of each other's arguments, that the judge is fully

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informed about the factual situation, and that a dialogue is established through petitions, hearings, and evidence presented by both sides. This ensures that the final decision is perceived as just by both parties.

In this sense, Dinamarco explains:

> "The guarantee of the adversarial principle, although intimately tied to the idea of process to the point that it is now considered an essential part, does not have its own inherent value. Together with the guarantees of access to justice, due process, natural judge, and equality of the parties, these all aim at a single goal, which is the synthesis of all the purposes integrated into constitutional procedural law: access to justice. Since the main purpose of the process is to achieve peace with justice, it is essential that the entire process is structured and conducted according to these rules aimed at making it a pathway to a fair legal order." (DINAMARCO, 2009, p. 362)

Dinamarco connects positive instrumentality with procedural techniques:

> "The substantive significance of constitutional and legal guarantees and principles of the process. Speaking of the effectiveness of the process or its positive instrumentality is referring to its ability, through the rational observance of these principles and guarantees, to ensure peace according to criteria of justice." (DINAMARCO, 2009, p. 362).

Ada Pellegrini adds:

> "Instrumentality of the process, in this context, refers to the positive aspect of the relationship that links the procedural system to the material legal order and the world of individuals and the state, highlighting the necessity of preparing it for the full accomplishment of all its social, political, and legal objectives." (CINTRA, GRINOVER, DINAMARCO, 2010, p. 47).

In conclusion, the instrumentality of the process, as explained by Dinamarco, means its effectiveness, which occurs when conflicts are resolved. Thus, the relationship between instrumentality and access to justice becomes evident: for instrumentality to exist, the process must exist, and for the process to exist, individuals must have access to judicial protection. One is dependent on the other, highlighting the significance of these interconnected concepts.

8. CONCLUSION

As presented in this work, access to justice is a confluence of values and fundamental rights, which historically were not respected but have gradually gained recognition and protection over time. To ensure that access to justice is truly effective, certain barriers must be overcome, many of which have been mitigated over time. One of these is the right to state-funded legal representation for individuals unable to afford it. Additionally, the provision of legal aid serves as a means to enhance the effectiveness of judicial access by reducing litigation costs. However, even if a party benefits from such protection, they may still be liable for certain expenses, such as court-awarded attorney fees.

Although the right to bring a case before the judiciary is enshrined in the Constitution, it is important to recognize that the efficiency of the public sector is not optimal. Several factors contribute to this inefficiency, including the large backlog of cases pending in judicial offices and the disproportion between the number of court staff and the volume of cases being processed in courts and tribunals.

Another point that must be considered is that when seeking redress through the judiciary, there is no guarantee that the decision rendered by the judge will be perceived as just. What the plaintiff might view as a just outcome is one in which all claims outlined in the initial petition are granted in full. On the other hand, from the defendant's perspective, a just decision would be one that

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completely upholds their defense. Therefore, if the court's decision is only partially favorable, it is likely that neither party would perceive it as entirely just.

The neo-institutionalist theory presented by Rosemiro Leal and André Del Negri posits that the judicial process, according to this theory, should be governed by the principles of adversarial proceedings, equality, and the right to a full defense. This aims to foster the inclusion of the law's recipients in the oversight of both substantive and procedural law, in accordance with the Federal Constitution. This approach understands that the control and oversight of the constitutionality of laws could be exercised by any citizen.

Finally, the relationship between access to justice and the instrumentalization of the legal process in a positive sense lies in the rational application of principles, bridging the gap between procedural law and substantive law, as well as between society and the legal process. The goal of this application is to ensure that the decision rendered in court has *erga omnes* effect, thus making its enforcement possible and achieving the intended result.

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