FUNDAMENTAL RIGHTS AND LINES FOR REFORMULATING THE BRAZILIAN CRIMINAL PROCEDURE CODE[1]

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Abstract
Brazil, a geopolitically complex country, has a criminal process that is problematic in several respects: in the legal sphere, there are difficulties of constitutional compatibility in terms of isonomy; sociologically, from the statistics, one can see the discriminatory selectivity with which criminal justice operates; psychologically, the legal regime of evidence weakens the adversarial method in the formation of evidence and tends to push judges into paranoid spirals in the conduct of proceedings, overriding the centrality of the parties in the cognitive activity of the process. With the aim of clarifying the premises needed to discuss an accusatory reform in the country, the article describes the state of the art of Brazilian criminal procedure, evaluates the proposal of the preliminary draft of a new code of criminal procedure (PLS 156/09) and, drawing on foreign experience (especially Italian and Chilean), to the extent that it is useful for the argument, proposes an accusatory model that is considered to be more appropriate to the Brazilian legal and social reality.
Keywords
Criminal Procedure regulation. Brazilian criminal procedure. Fundamental rights.
Summary

1. INTRODUCTION.

Brazil has a very complicated geopolitical structure. This makes it difficult to take any serious action on the set of laws or even on a branch of law such as criminal procedure. This is why, among other things, moving

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towards an accusatory system in criminal procedure, leaving behind the inquisitorial system, seems to be a task for many generations.

First and foremost, there has been an inquisitorial culture ever since the Portuguese arrived and took possession of the land (the Afonsinas Ordinances of 1446), which is why we have such a resistant epistemology. In people's minds - and even among scholars in many cases - the criminal process is inquisitorial and anything that appears outside its boundaries has the face of the new, the different, that which subverts order: the new, as we know, is the enemy of "consolidated truths" and, in general, as an unknown, it produces fear. Fear of change, even if it's for the better, is one of the main causes of resistance, and it's the source of a litany of arguments against change, all of which have false premises and most of which can be easily refuted. To maintain that the inquisitorial system is better, from a democratic criminal procedure point of view, is almost like saying that the Earth is flat, a thesis that has long since been refuted, for example by Aristotle on the basis of eclipses and the Earth's shadow on the moon.

In any case, there are those who insist that the question of systems doesn't matter: that everyone has their own system; that judges carry out criminal procedural democracy, regardless of which system they are in; that systems are the way they are studied today, and so on. Without absolutely precise sources, the narratives slide in the face of the interests of the defenders of the opinions. But this is symptomatic and part of the structure. After all, everyone defends themselves, in order to legitimize, as a rule, a democratic past, even if it is mired in the quagmire of a criminal procedure system like Brazil's, which doesn't lie with a result that - without manipulation - opts for the poorest and who are counted in the hundreds of thousands, somehow forgetting those who have the most. That alone would be enough to show that systems do matter - and a lot! - in order to shed light on everyone's practice, and not just that of a few.

If this is the case, we need to go back to the normal course of the history of criminal procedure systems, if only to reaffirm that the whole world works with them, which is not synonymous with the truth - obviously - but allows for a coherent dialog without too much invention. And, as the

subject concerns the ideological background of criminal procedure, the possibility of identifying the points of divergence between the subjects depends on the clarity of the discursive premises: the opacity of the premises leaves the road clear for the ideologization of technical arguments, confusing a plane that does not allow discussion with one in which the best solutions could easily be found based on precise and shareable criteria.

On the one hand, the notion of a system can be found in many authors, including contemporary ones, but no one doubts that, at least when thinking about criminal procedure, Kant has not been surpassed[4] , who links the notion of a system to the elements of a whole (as the Greeks already wanted) that hold them together under a single idea, that is, a principle. A principle which, as an unrealizable word and considered *a priori* by Kant, serves to connect the elements that are put together. More or less like the 35th camel in Malba Tahan's fable[5] , the pseudonym of Professor Júlio César de Mello e Souza, so famous in Brazil for so many generations. With this notion of a system, the criminal process finds a palatable solution to the tangle of complex relationships and situations that are formed within it, so that we can have a coherent and acceptable explanation. A foundation for its foundations.

On the other hand, *partial solutions* and *staging coups* are not worth it. Brazil is tired of those, because the system won't change and we're stuck with more of the same, with a veritable "patchwork quilt" made up of criminal procedure codes and extravagant laws. We have just seen what happened in the Supreme Court's decision with Law No. 13.964, of December 24, 2019, which, with a coup de théâtre, emptied the novelties - particularly the Judge of Guarantees, the accusatory process, the double file

[4] This refers to the chapter on the Architectonics of Pure Reason, in KANT, Immanuel. *Critique of Pure Reason*. Introduction, translation and notes by Giorgio Colli. Milano: Adelphi Edizioni, 1976, p. 806 ff.

[5] See: TAHAN, Malba. *The calculating man*. 58th ed. Rio de Janeiro: Record, 2002, p. 21-23.

and the legal regime of filing - but kept the names of the novelties, deforming their original meaning and demolishing the legislative sources that supported them, giving them new texts with a veritable creative activity masquerading as "interpretation in accordance with the constitution". The name (signifier) alone says little without the proper meaning, unless it serves to deceive reality: it is said that the system is accusatory in the precept, but in reality it continues to be inquisitorial, as it has always been.

In short, the immense complexity that Brazil imposes makes it necessary to think about a democratic accusatorial system based above all on the general notions we have on the subject, but always with an eye to reality. Without observing reality, the work is merciless to those who venture into the mission, usually resulting in terrible consequences for the less fortunate.

2. The process of re-founding criminal procedure in Latin America towards accusatory models.

In Latin America, through a regional action financed by the OAS (Organization of American States) and led by Julio Maier and Alberto Binder (from Argentina), the first re-founding took place in 1992, in Guatemala[6] . It was an omen. Then it happened in every country except Brazil, which was still very much linked to the Italian inquisitorial model of the *Rocco Code*, which inspired the current model (Decree-Law No. 3.689, of October 3, 41) .[7]

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[6] On the subject, see: GONZÁLEZ POSTIGO, Leonel. *Thinking about judicial reform in Brazil: theoretical knowledge and transformative practices*. Trad. Fauzi Hassan Choukr. Florianópolis: Empório do Direito, 2018, p. 18-25, and LANGER, Máximo. Revolution in Latin American criminal procedure: diffusion of legal ideas from the periphery. *Revista da Faculdade de Direito da UFRGS*, Porto Alegre, v. 1, n. 37, 2017. DOI: 10.22456/0104-6594.79266. Available at: https://seer.ufrgs.br/index.php/revfacdir/article/view/79266. Accessed on: Nov. 7, 2024.

[7] In this sense, Ricardo Jacobsen Gloeckner (*Autoritarismo e processo penal: uma genealogia das ideias autoritárias no processo penal brasileiro* [electronic resource]. Vol. 1. 2ª ed. São Paulo:

Under Getúlio Vargas (1937-1945), given its ideological affinity with the Italian fascist regime, Brazil imitated the Italian legal model in terms of criminal procedure, i.e. the 1941 code; like any imitation, the result had - and still has - differences from the imitated model. Perhaps the most important are the police investigation and the legal system of the Public Prosecutor's Office.

The first difference concerns an institute created in the Empire, with Decree no. 4824 of November 22, 1871, and kept in the legal system without significant changes until today. It would be the Brazilian correspondent to the *istruzione* procedures of the *Rocco code*, the first phase of criminal prosecution, qualified as an administrative procedure, but whose acts fully converge in the instruction and trial, with very fragile limits of use[8] ; however, instead of a judge, protected by guarantees for the independent exercise of his function, it is presided over by the police delegate, who is vulnerable to the influences of the Executive Branch and others. The police investigation, the vulnerability of the person/body who conducts it and the transmission of acts to the investigation and trial are problematic points in the Brazilian system, because they jeopardize equality between citizens (art. 5, of the CR/88) and weaken the effectiveness of the adversarial process

Tirant lo Blanch, 2023, p. 294), paragoning, from a historical-political perspective, the ideological foundations of the criminal procedural laws in force in Italy, from fascism, and in Brazil, from the 1941 code, he concludes that "the parallel with Italy is valid precisely because of the existing legislative and textual similarities, which go beyond - and how! - la semplice affermazione di che il Brasile avrebbe "copiato" il codice Rocco, il che è una bugia", traduzione di "The parallel with Italy is valid precisely because of the existing legislative and doctrinal similarities, which go far beyond - and as! - the simple assertion that Brazil has "copied" the Rocco code, which is an untruth".

[8] See art. 155 of the 1941 CPP, which allows the judge to use the acts of the police investigation in the reasoning of the sentence whenever he does not use them "exclusively", that is, without corroborating evidence formed in judicial contradiction or not - a limit that, as we see in practice, is very easy to exceed.

(provided for in art. 5, LV, of the CR/88) in the formation of declarative evidence .[9]

The second difference, more recent than the first[10] , concerns the legal system of the Public Prosecutor's Office, which can be seen in the separation of careers between prosecutors and judges, and in the discipline of criminal prosecution. Although the Brazilian Public Prosecutor's Office is administratively an organ of the Executive Branch and its head, both in the states and in the Union, is chosen every four years by the head of government, this does not mean that it cannot then act against the very state governor or president of the republic who appointed it, because it has all the necessary guarantees to be able to do so, i.e. the Brazilian Public Prosecutor's Office enjoys financial and functional independence for its professional practice. The Brazilian legislator did not lay down in the Constitution, as the Italian legislator did (art. 112 *Cost.*), the obligation to take criminal action[11] , but this also does not mean that the exercise of

[9] On the classification of evidence as declarative or critical-indictive, see FERRUA, Paolo. Questões probatórias nos escritos de Franco Cordero. (trad. Bruno Cunha Souza) in: POLI, Camilin Marcie de; MIRANDA COUTINHO, Jacinto Nelson de; PAULA, Leonardo Costa de (Org.). *Mentalidade inquisitória e processo penal no Brasil: Escritos em homenagem ao Prof. Dr. Franco Cordero*. vol. 6. Curitiba: Observatório da Mentalidade Inquisitória, 2023, p. 63-72, p. 65-69. On the subject, see also: CORDERO, Franco. *Tre studi sulle prove penali*. Milano: Giuffrè, 1963, p. 17 ff, and FERRUA, Paolo. *Evidence in criminal proceedings: Struttura e procedimento*. v. I. 2. ed. Turin: Giappichelli, 2017, p. 66 ff.

[10] The current discipline of the Public Prosecutor's Office is composed, as a rule, of the 1988 Constitution of the Federative Republic of Brazil and the Organic Law of the Public Prosecutor's Office (Law no. 8.625, of February 12, 1993).

[11] In the Brazilian legal system, the only provision that apparently stipulates that criminal prosecution is mandatory is in the military criminal procedure code (art. 30), but as it is a special rule, it is not interpreted extensively for all criminal proceedings in general. This gives the Brazilian legislator greater flexibility to develop alternative procedures and mechanisms to deflate the demand for a criminal response. For a description of the legal regime of criminal prosecution and how compulsory prosecution is understood in Brazil, see CUNHA SOUZA, Bruno. *Scarcity, Efficiency and Public Criminal Action: between obligation and opportunity in the exercise of action*. São Paulo: Tirant lo Blanch, 2023, p. 113-157.

criminal action is arbitrary, since compliance with legality imposes a duty on the prosecution service, the exercise of which is controlled and the violation of which constitutes subjective situations of duty to investigate what happened and, eventually, to punish those who are recognized as responsible. On the subject of the legal systems of the Public Prosecutor's Office and criminal prosecution, Brazil's political-legislative choices, even with their problems, seem better than those made in Italy, and with an accusatory reform they should be reaffirmed and developed.

In any case, for information purposes, it should be clarified that in Brazil, in the first degree, the judge works as a monocratic body, except in cases of prerogative jurisdiction, and can produce evidence ex officio (art. 156, I and II, of the CPP). In addition, in Brazilian criminal justice, the case files are digital and hearings can also be held remotely online. These aspects, however, as they are in the Brazilian model, are not seen as something to recommend to other countries.

According to the 2023 general data from the "World Justice Project (WJP) Rule of Law Index"[12] , Brazil ranked 83rd out of the 142 countries evaluated, but specifically considering the criminal justice factor, it ranked 114th. Still on criminal justice, in the sub-criteria relevant to the subject, Brazil was rated poorly, especially in the criterion relating to impartiality: among the 142 countries evaluated, it came 142nd. Such an assessment has its reasons and the best way to tackle the problem is to adopt and effectively implement an accusatorial model.

3. The context of accusatory reform in Brazil.

Initially, there is a problem of method in legislative reform, i.e. whether it would be better to carry out a partial or global change to the system. With the unsuccessful initiatives to draw up a new criminal

[12] WJP Rule of Law Index, country information (Brazil - 2023), available at: "https://worldjusticeproject.org/rule-of-law-index/global/2023/Brazil/Criminal%20Justice/", accessed on 22.10.2024.

procedure code for Brazil in recent decades, there has been a tendency towards partial reforms in an optimistic illusion. In 2008, for example, a series of laws reformed the code. Nothing significantly new: without changing the original structure of the code, the new laws left it with an even more inquisitorial spirit.

Contrary to the tendency towards methodological preference, in 2009 a commission of jurists met to draw up a preliminary draft of a new code of criminal procedure, in line with the 1988 Constitution. The text was subsequently presented to the National Congress and has been under discussion since 2009 (previously in the Senate as PLS 156/09 and today in the Chamber of Deputies as PL 8.045/10). In the committee's debates, the choice arose between the inquisitorial process (reformed) and the accusatory process and, in accordance with Brazilian constitutional provisions, the accusatory process prevailed.

Since then, however, Brazil has experienced an increasingly intense period of political instability. The culmination came on March 17, 2014, when Operation Car Wash (a sort of imitation *of Mani Pulite*, although it differs in many ways from the original[13]) was launched, led by then judge Sergio Fernando Moro, on the eve of the 2018 presidential elections, which led to the arrest of Lula, who at the time was the biggest name on the center-left and is now the president of the republic. Without the possibility of participating in those elections, Jair Messias Bolsonaro won, with whom Moro would later work, when he left his post as judge, as Minister of Justice. An unseemly scenario that raised many doubts among the Brazilian people.

While in Bolsonaro's government, Moro had the initiative to produce, without stating the reasons for the measure, a bill called the "anti-crime package", with a series of reforms to the country's criminal procedure, law and execution. From the name, you can infer how crude the proposal was, but things didn't turn out the way the former judge wanted. During the

[13] On the subject, see: MIRANDA COUTINHO, Jacinto Nelson de. *Un parallelo tra "Mani pulite" e Lava Jato in Brasile*. Critica del Diritto, n. 2, p. 66-83, Luglio-Dicembre 2018.

discussions on the bill, some "jabuticabas" were included: literally, a type of fruit found only in Brazil, but the meaning of the word is used in the country to designate surreptitious insertions of new provisions in a bill. These were parts of the proposal in the preliminary draft of PLS 156/09, with a few minor changes: a "judge of guarantees" (a judge with functional competence for the preliminary investigation and who cannot subsequently pass judgment in the case), a double file model[14] , hierarchical control over the filing of charges, a non-prosecution agreement (similar to a "*plea bargaining*"), a judge with no evidentiary initiative and an explicit statement about Brazil's choice of an accusatory process. With Law No. 13.964, of December 24, 2019, the "anti-crime package" was approved.

The news was not well received: the law with the "jabuticabas" was passed, Moro resigned from the Bolsonaro government - not only for this reason, but this was probably one of the reasons for choosing the former judge; everyone was supposed to study them, understand them and then apply them; pressure groups immediately formed against the reform. With ADIs 6.298, 6.299, 6.300 and 6.305, the Supreme Court's counter-reform arrived through an "interpretation in accordance with the constitution"[15] : The reform was emptied, for example, by modifying the competence of the "judge of guarantees", excluding the double file model in order to retain the formation of single files by mere accumulation and the control over filing returned as before, that is, done by a judge and then by the hierarchically superior body of the Public Prosecutor's Office; the judge's evidentiary

[14] On the subject of the double file model and its importance for the accusatory process, it is worth looking at the experience with the *doppio fascicolo* in Italy. See BRONZO, Pasquale. *Il fascicolo per il dibattimento. Potere delle parti e ruolo del giudice*. Milan: Cedam, 2017.

[15] See: MIRANDA COUTINHO, Jacinto Nelson de; MILANEZ, Bruno; CUNHA SOUZA, Bruno. *The future of the judge of guarantees. In*: Processo e justiça na contemporaneidade: estudos em homenagem aos 50 anos do professor André Nicolitt. Belo Horizonte, São Paulo: D'Plácido, 2023, p. 227-238, and BRONZO, Pasquale. The judge, the parties and the evidence in the Italian criminal trial system: a contribution to reform in Brazil. *Rev. Bras. Dir. Proc. Penal.* 2024;10(2). doi:10.22197/rbdpp.v10i2.959.

initiative was retained, as well as the provision according to which the structure of Brazilian criminal procedure *will be* accusatory - the choice of verb tense, unfortunately, was precise, but it is not known when this will happen.

Now, there is nothing left to do but wait for the discussions on a new code of criminal procedure to be rekindled, with the hope that a global reform will take place and that, in particular, it will be truly accusatory. However, the initial proposal, that of PLS 156/09, summarized its content in these terms: it outlined an accusatory procedural structure, but without an adequate double record mechanism; without the judge's evidentiary initiative, unless it is favorable to the accused[16] (which seems like an inquisitorial trap[17]); and it made the subject of the case more widely

[16] This follows from the interpretation of articles 4 and 162, caput and sole paragraph, of the preliminary draft. The subject - the limits to be placed on the judge's instructional powers - was the subject of intense discussion in the Commission of Jurists. In a way, the texts of the precepts leave open at least one question, which is absolutely pertinent to the issue and whose answer is decisive in identifying which structure, accusatory or inquisitorial, the Brazilian model would lean towards in the application of the hypothetical future code, that is, at what point the judge would be authorized to intervene. If the judge is allowed to take part in the construction of the procedural knowledge obtained during pre-trial proceedings alongside the parties, the tendency, which is expected due to the country's tradition, is for the judge's activity to overlap with that of the parties, weakening the effectiveness of the adversarial process in the production of evidence.

[17] Precisely because there is no time limit on when the judge's initiative can be used, this exception is a great risk of the new system degenerating into the old practices of the previous code. In Italy, for example, Paolo Ferrua (*La prova nel processo penale: Struttura e procedimento*. v. I. 2. ed. Turin: Giappichelli, 2017, p. 127 ff.) and Franco Cordero (*Procedura penale*. 9ª ed. Milano: Giuffrè, 2012, p. 617) maintain that a residual and subsidiary exception to the rule prohibiting judges from taking the initiative in evidence is necessary, justifying that the unavailability of the object of criminal proceedings, resulting from the compulsory nature of the criminal action (art. 112, Cost.), prevents a complete exclusion of the judge's initiative and that, if there were such an exclusion, even in the face of serious gaps in the body of evidence, the risk of a conviction of an innocent person or an acquittal of a guilty person would increase, given the damage to the correct reconstruction of the facts that this

available, with a kind of "*plea bargaining*" for crimes with sentences of up to 8 years.

4. The draft bill (PLS no. 156/09) for accusatory reform in Brazil.

The reform proposal currently before Congress is incomplete and unsatisfactory. Even though it talks about adopting an accusatorial system, it maintains a mixed process: a "two-headed monster"[18] - which came about with the "Code Napoleon" (17.11.1808) and represents a fraud of a procedural system, because the apparent attempt to reconcile accusatorial and inquisitorial results in the preponderance of the inquisitorial structure over any accusatorial advances - which will continue to systematically prey on the socially vulnerable. The alternative to this is to identify the fundamental characteristics of the inquisitorial system present in the

prohibition would cause. In any case, it is worth pointing out Paolo Ferrua's necessary clarification in this regard (*idem*, p. 127): "Undoubtedly, a systematic intrusion by the judge in the procedural instruction would put his impartiality at risk; but it is equally true that, taken to the extreme, impartiality could only be guaranteed by separating, as happens in jury proceedings, the figure of the one who directs the procedural interrogation from that of the one who decides on guilt. It is important that the times and methods of judicial intervention in evidentiary matters are well defined, limiting it to a strictly subsidiary dimension in relation to the initiative of the parties; in this way, the risk of invasiveness on the part of the judge will be inversely proportional to the professionalism of the litigants" - free translation of "Senza dubbio una sistematica intromissione del giudice nell'istruzione dibattimentale metterebbe a rischio la sua imparzialità; But it is also true that, given the extreme consequences, impartiality could be safeguarded only by separating the figure of the person who directs the escusione dibattimentale from that of the person who decides on the appeal, as is the case in the jury trial. It is important that the times and methods of judicial intervention in evidentiary matters are well-defined, to be circled in a dimension that is strictly confidential in relation to the initiative of the parties; thus, the risk of invasion by the judge will be inversely proportional to the professionalism of the contenders".

[18] Free translation of the expression "*mostro a due teste*", from CORDERO, Franco. *Guida alla procedura penale*. Torino: UTET, 1986, p. 73.

Brazilian legal system and, in terms of legislative policy, to adopt others that correspond to the structure of an accusatorial system.

That's why it's so important to keep in mind the correct structural difference between the systems, leaving aside the secondary ones, including the one related to the first movement; after all, all the known differences are important, but the decisive one is the one about the management of evidence: remembering that the pure inquisitorial models remain only in history (if they existed at all), while in the accusatory models, evidence is formed in a strong adversarial system, in the (reformed) inquisitorial models, evidence is formed in a weak adversarial system . [19]

Thus, there are two aspects that are instrumental to the realization of a strong adversarial system in the formation of evidence, without which a system cannot be re-founded, going from inquisitorial to accusatory: the prohibition of the judges' evidentiary initiative and the preservation of the judges' cognitive originality. At least in the Brazilian criminal procedure system

In the first place, judges cannot take the initiative on evidence. When this possibility exists, it tends to push the judge towards a "primacy of hypothesis over facts" and, consequently, towards "paranoid mental frameworks"[20] ; hence the desirability of excluding the judge from

[19] The distinction presented is by Paolo Ferrua (*La prova nel processo penale: Struttura e procedimento*. v. I. 2. ed. Turin: Giappichelli, 2017, p. 7-17), who highlights the fact that pure inquisitorial models remain only in history. It can be said that the aforementioned author follows the position of Franco Cordero (Linhas de um processo acusatório. Trad. Marco Aurélio Nunes da Silveira. In: POLI, Camilin Marcie de; MIRANDA COUTINHO, Jacinto Nelson de; PAULA, Leonardo Costa de (Org.). *Mentalidade inquisitória e processo penal no Brasil: Escritos em homenagem ao Prof. Dr. Franco Cordero*. vol. 6. Curitiba: Observatório da Mentalidade Inquisitória, 2023, p. 17-46) on the decisive criterion for differentiating the accusatorial and inquisitorial processes. In the same vein, see: GIOSTRA, Glauco. *Prima lezione sulla giustizia penale* [E-book]. Bari-Rome: Laterza, 2020 (in Portuguese: GIOSTRA, Glauco. *First lesson on criminal justice*. Translated by Bruno Cunha Souza. São Paulo: Tirant lo Blanch, 2022).

[20] CORDERO, F. *Guida*... cit., p. 51.

evidentiary initiatives in criminal proceedings. However, if we can't think of a model without such a prohibition, the way forward necessarily involves restricting as much as possible the time and manner of judicial intervention in evidentiary matters, always with the aim of maximizing the effectiveness of the adversarial process in the formation of evidence.

Secondly, the cognitive originality of the judges must be preserved as much as possible. The decision on the merits must be taken on the basis of the knowledge indicated by the parties, in front of the investigating judge, respecting the principle of immediacy, which is necessary for true orality[21] . To this end, access to the acts of the investigation by the trial judge tends to be detrimental to the effectiveness of adversarial proceedings, as it usually reduces the need for the judge to listen carefully to the information brought up in the adversarial hearing, understanding that experience first hand, when his knowledge is contaminated by previous knowledge of the police investigation produced by third parties on the same topics; especially since it is possible to use what was produced, without adversarial proceedings (in the preliminary investigation) in the motivation of the sentence, with the limit of art. 155 of the CPP, which is very easily overcome with a simple argumentative exercise; therefore, the effectiveness of the adversarial process in this context is weak.

This is the place of the "diaphragm" that Francesco Carnelutti talked about back in 1961: "The adversarial process is the essential means of guaranteeing the impartiality of the judge, which does not mean honesty, as is commonly believed, but rather the ability to overcome his own natural partiality; in short, to be beyond the parties, which means being beyond man. Unfortunately, with the current method, the evidence collected in the preliminary phase is evidence that is formed without an adversarial process, in other words, without that guarantee that is indispensable to justice. And

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[21] On the relationship between immediacy and orality, see CORDERO, Franco. *Ideologie del processo penale. Con un'appendice (I poteri del Magistrato; Stilus Curiae; Strutture d'un Codice; Legalità Penale).* Rome: Università "La Sapienza", 1997, p. 165 ff.

if the judge, at the hearing, trusts this evidence to the point that, unfortunately, almost always, when the accused or the witness says something different to what they said at the preliminary stage, they believe the first and not the second version, and sometimes even force the witness, if not the accused, to return to it with the threat of incrimination, this means that the adversarial process at the hearing is nothing more than a fiction, not to say a mockery of justice. So the dilemma is as follows: either the evidence is taken in an adversarial manner in the preliminary phase and secrecy is waived, or secrecy is maintained and, in order to guarantee that the evidence is taken in an adversarial manner, a diaphragm must be placed between the preliminary phase and the final phase, which means that the judge is forbidden to know what happened in the preliminary phase"[22] . That's why the adoption of a double file model, similar to the Italian *doppio fascicolo*, is essential for the effective implementation of an accusatory model in Brazil, in order to overcome the excessive use of knowledge from the

[22] Translation of, "The adversarial process is the essential means of guaranteeing the impartiality of the judge, which does not mean onestà, as is commonly believed, but rather the ability to overcome one's own natural partiality; insomma di arrivare ad essere al di là delle parti, che vuole poi dire al di là dall'uomo. Therefore, with the current method, the evidence taken in the preliminary phase is evidence that is formed without contradiction, that is, without that guarantee that is indispensable to justice. And if the judge, at the hearing, gets rid of this evidence to the point that, however, almost always, when the accused or the witness tells him something different from what he said at the preliminary stage, he believes the first and not the second version, and every time the testimony is perfected, the witness, if not the accused, has to return to the matter with the minimum incrimination, which means that the adversarial hearing is nothing more than a conclusion, not to mention a failure of justice. Now the dilemma is this: either the evidence in contradiction is formed in the preliminary phase and the secret is renounced, or the secret is maintained and in order to guarantee the formation of the evidence in contradiction, a diaphram must be created between the preliminary phase and the definitive phase, which means that the judge is forbidden to know what happened in the preliminary phase", CARNELUTTI, Francesco. *In* DE LUCCA, Giuseppe (org.) *Primi problemi della riforma del processo penale*. Florence: Sansoni, 1962, p. 57-58.

preliminary investigation to favor what is produced in the adversarial process between the parties.

5. Proposal for a new criminal procedure in Brazil.

So, for a concrete re-foundation of the Brazilian criminal procedure system, various models were considered, but now most strongly the one that gave rise to Chile's new criminal procedure code, of 29.09.2000; and which proved to be the most effective compared to all the others in Latin America. The Chileans, as we know, started almost from scratch, since in the inquisitorial system they had there wasn't even a Public Prosecutor's Office, which was created from then on. Then all the judges were given a choice: they either had to adhere to the new system or retire; and only five of them remained. For all those who are starting now, there is a serious theoretical and practical update, especially in relation to the Constitution and the new system. They have also created a new structure of judicial organization, with a specialized group of civil servants and even new buildings. Bureaucratic service is no longer among the judges' competences, but is carried out by specialized officials. The judge must "speak the law" and nothing more. On the other hand, the application of the new Code of Criminal Procedure started in the smallest places in the countryside and was gradually incorporated into the larger cities, until it reached Santiago. Chile, therefore, is an example to be observed, always with the necessary adaptations, especially in relation to the Brazilian situation, which refers to a country of continental dimensions and with few resources.

Therefore, given the Constitution, the accusatory structure to be adopted in Brazil, in short, must begin with the adoption of orality as an instrument[23] *of due process of law*, in which decisions (almost all of them) are taken in a hearing, with a strong adversarial system. The structure should be

[23] BINDER, Alberto. *Elogio de la audiencia oral y otros ensayos*. Monterrey: Poder Judicial del Estado de Nuevo León, 2014, p. 29 et seq.

three-phase, i.e. in three stages, in each of which hearings predominate: 1st, preliminary hearing; 2nd, intermediate hearing; 3rd, pre-trial and trial hearing (in Chile, *juicio oral*). Within each phase, when issues relating to the case arise, the parties request hearings and the judges, if they admit them, summon the opposing party and, in accordance with the strong adversarial system, decide at the hearing itself. This results in speed.

5.1 First stage.

The preliminary hearing is also known as the investigation formalization hearing. At this hearing, first of all, the accused learns that there is a preliminary investigation underway against him. The judge competent to conduct it is the Judge of Guarantees, who will also be responsible for the intermediate phase. Thus, at the preliminary hearing, in the presence of the parties and orally, there are: (1) the opening of the hearing and the formalization of the investigation; (2) informing the investigated person about his situation and his individual rights and guarantees, including the right to appoint a lawyer (public defender) if he does not have a private lawyer; (3) checking the legality of the arrest in flagrante; (4) the reasoned provision, if appropriate, of real or personal precautionary measures, especially pre-trial detention; (5) the anticipation, if necessary, of the production of unrepeatable evidence; (6) the judge sets the deadline for the conclusion of the preliminary investigation - which can be extended, with justification - under penalty of dismissal; (7) the settlement of criminal cases with *plea bargaining*, due to predetermined circumstances and, as a rule, for crimes with a sentence of no more than eight (8) years, all in order to avoid the investigated/agreant being sent to prison under a closed regime.

5.2 Second stage.

The intermediate hearing, on the other hand, takes place after the conclusion of the preliminary investigations. It basically serves to control and decide on the exercise of the action by means of a *complaint* (from the Public Prosecutor's Office), in the case of public criminal action, or *a complaint* (from the offended individual or their legal representative, if applicable), in the case of private criminal action. If the admissibility

decision is positive, the case is opened and preparations begin for the pre-trial hearing. Marco Aurélio Nunes da Silveira's explanation on the subject is worth quoting for its clarity: "This preparation for the next stage includes the presentation of the parties' 'theories of the case', which serves to delimit the subject of the trial. Thus, the content of the case will be delimited by the parties and cannot be extended or modified by the judge. In addition, the parties must expressly indicate each means of proof they intend to produce in the "oral trial". This allows the control of the legality of the evidence (legitimacy and lawfulness) to be carried out even in the intermediate phase, a measure that aims to prevent the judge of the case from having contact with illegal evidence, an event that could irreparably damage his impartiality."[24] . Finally, if there is no *plea bargaining*, the judge of guarantees initiates an Auto de Abertura de Juliamento Oral (in Chile), which in Brazil should correspond to a Termo de Abertura da Audiência de Instrução e Juliamento, in which, among the provisions determined, there should be the accusation (specifically the charge), the evidence to be presented by the parties, and the day and time of the hearing. This document is what goes to the judge (or judges) of the pre-trial hearing, and the records of what has been done so far, from the preliminary investigation onwards, are kept at the office of the judge of guarantees, at the disposal of the parties. The judge of guarantees, of course, cannot take part in the last phase, i.e. the one in which the trial of the case takes place. As you can see, in the intermediate phase there is a kind of "sanitation" of the process, seeking to remove obstacles to the investigation and trial of the criminal case.

5.3 Third stage.

The pre-trial hearing (like a *dibattimento* in Italy, with the necessary adaptations) is the responsibility of a panel of three judges (in Chile); and it should be in Brazil too, even though the tradition (as a rule) of cases being

[24] SILVEIRA, Marco Aurélio Nunes da. *The intermediate stage and the judge of guarantees in the Brazilian criminal process: an important and insufficient step*. Justiça do Direito, v. 33, n.3, p. 189-221, Sep/Dec, 2019, p. 209.

conducted by single judges in the first degree of jurisdiction is very long, in keeping with the inquisitorial tradition. In this case, too, the economic issue weighs heavily, given the high cost of collegiate trials, especially in the interior of the country and in small districts, where there is often a shortage of judges; in other words, although the position exists, it is not filled and so there is not even a judge to judge monocratically. In any case, the COVID-19 pandemic has shown that it is perfectly possible to form and compose collegiate trials "online"; and this could happen in the first degree, for example, with a hybrid structure: the judge of the case (the one who would receive the information from the judge of the guarantees) would be present, with the parties and everything necessary, as if the act were a monocratic hearing; only that the collegiate would also be composed of two more judges chosen at the time, among those available previously organized, even if they were from other courts. Cyber structures allow this, and there's no reason not to use them. After all, they increase the autonomy of judges and qualitatively strengthen collegiate decisions[25] . It would be a revolutionary step forward for Brazil; and a healthy way to expand the accusatory culture, so important in a systemic re-foundation. The procedure in the pre-trial hearing follows the logic of the aforementioned hearings: after it opens, the criminal case on trial is declared, as it came from the judge of guarantees; then the defendant's defense conditions are verified: if he has a lawyer; if he understands what is happening and its consequences, etc.then the evidence indicated by the prosecution and defense is produced; then the defendant can be heard, if he wishes to exercise his self-defense and does not opt for his right to silence; then the prosecution and defense (in that order) make their closing arguments; and then the panel decides, in a secret but recorded meeting, with the presiding judge of the panel (the one present) pronouncing the decision in the courtroom, immediately setting a day and

[25] A proposal for collegiate trials in Brazil can be found in: MIRANDA COUTINHO, J. N. *Sistema acusatório e julgamento colegiado em primeiro grau: o que Lenio Streck tem a ver isso?* Revista da Academia Paranaense de Letras Jurídicas, v. 7, p. 173-190, 2022.

time to hand down the written judgment, within the established time limit, failing which, among other things, the defendant who is in prison will be released. Once the parties have been notified of the judgment, the time limits for appeals begin, to be set in accordance with the law.

6. Final considerations.

This summary, of course, does not exhaust the possibilities of the hearings. In them, evidentiary incidents and the most diverse requests will arise. Everything, as a rule, will be done orally and decided by the judges at the hearing itself, unless this is impossible, for example in formal communications with public bodies. Another important thing - and one that can be learned from Chile and other re-founded models - is that acts are not postponed, except in cases of express legal provision or when it is totally impracticable to carry them out. This, in a way, guarantees *fair play*[26] . In the end, the quality of an accusatorial system depends especially on healthy, psychologically uncomplicated people, as Cordero said[27] , but the rules, even if they are of high quality, are of little value if the people involved avoid applying them.

And so, despite the current tendency to look to other Latin American countries, such as Chile, and the United States, it would be useful to try to bring Brazil closer to Italy, because after 1988, when Brazil had its democratic Constitution and Italy its democratic Code of Criminal Procedure, the Italians have a lot to teach us.

[26] CORDERO, F. *Procedura penale.* 9th ed., Milano: Giuffrè, 2012, p. 101.
[27] CORDERO, F. *Guida...* cit., p. 42-43.

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