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THE CONSUMERIZATION OF THE URGENT INTERLOCUTORY RELIEF IN THE BRAZILIAN CIVIL PROCEDURAL SYSTEM

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ABSTRACT: This study approaches the relationship of the contemporary society with Provisional Relief according to the Brazilian Civil Procedural Law. First, the steps that led to the development of a consumer society and the influences of new technologies are discussed. Thereafter, Provisional Relief – which can be urgent (as a protective or as a satisfactory measure) or based on high probability, with its relevant aspects – is introduced, highlighting its purpose of being an important tool, since time is a factor that has to be watched by a fair and efficient judiciary. Then, the interrelationship between Provisional Relief and mass society is analyzed, in order to demonstrate that Provisional Relief is not a product to be consumed at any cost. Despite the fact that a mass society is accustomed to immediate solutions and even that it is necessary to correct any formalisms that are not in line with characteristics contemporary society, this research concludes that rush must not be mistaken for an emergency.

KEYWORDS: Consumer society. Conflicts. Civil Procedure. Provisional Relief.

RESUMO: O presente estudo trata sobre a relação da sociedade contemporânea com a Tutela Provisória, instituto do Direito Processual Civil Brasileiro. Abordam-se as etapas que levaram ao desenvolvimento de uma sociedade de consumo e as influências decorrentes das novas tecnologias. Em seguida, é apresentada a Tutela Provisória, que pode ser de urgência (com natureza cautelar ou satisfativa) ou de evidência e seus aspectos relevantes, ressaltando sua finalidade de servir como uma ferramenta importante, já que o tempo é um fator a ser observado para uma prestação jurisdicional justa e eficiente. Após, é apresentada a inter-relação existente entre a Tutela Provisória e a cultura de massa, demonstrando que aquela não é um produto a ser consumido a qualquer custo. Por mais que a sociedade de massa esteja acostumada com soluções imediatas e que seja necessário corrigir eventuais formalismos que não coadunam com as características da sociedade contemporânea, esta pesquisa conclui que a pressa não pode ser confundida com a emergência.

PALAVRAS-CHAVE: Sociedade de consumo. Conflitos. Processo Civil. Tutela Provisória.

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INTRODUCTION

The contemporary society is in a moment of great technological development, which influences all way of living. This technology not only reaches large industries as a production tool, but was also "domesticated" in a way that the common citizen seems not to know how to live without a smartphone or a computer anymore, both necessarily connected to the internet.

Nowadays, when you get into any means of public transportation in the capital city of São Paulo, for example, a great part of the users is *browsing* on social media using cellphones and they don't seem very interested in what happens to other people who share that same means of transportation.

Moreover, living without a smartphone seems to have become something almost impossible, a task for a true *outsider*, regardless of age, job post, or financial conditions.

This consumption vision is not only limited to cell phones, but it is also possible to extend it to several products, such as automobiles, home appliances, electrical and electronic products, and even service activities, with a special highlight to entertainment.

If technology has provided great advances already experienced through concrete products that have vastly changed former paradigms, society no longer understands that certain areas can continue to exist disconnected with these new realities.

Civil procedural law is not immune to such changes. The achievement of an effective and rapid jurisdictional service is expected, avoiding long years of legal battles. Therefore, this study aims to analyze how the consumption society deals with this process and, more specifically, with what are called Temporary Custodies, especially those categorized as *urgent*.

1. THE CONSUMPTION SOCIETY

In the industrial society, accordingly Karl Marx (1999, p. 30), consumption was already an attractive topic, inasmuch as products have transformed into delight and individual appropriation objects, once the product vanishes from the social movement, transforming itself directly into an object and servant of the individual need to satisfy enjoyment as a period.

Given that, in consumption, things are subjectivized because there is in a dialectical relation with production in which it is impossible to separate them. Therefore, production would create consumption and consumption would generate production. At that time, the German author witnessed a deep frustration among the work-people, who could not enjoy a great part of the products they manufactured, which led to a non-identification between the product and its creator (KONDER, 1983, p. 41-55). However, although there are still products that are difficult to access by most individuals, there has been a substantial change in the access to consumption by the contemporary society.

In the technological society, the desire for consumption becomes so essential that man accepts and desires to work more and more, relinquishing the free time he could reserve for himself or for his friends and family, because this is a concrete way of making economic access to the goods he wants to acquire possible (PUGLIESI, 2015, p. 127).

Rose Marie Muraro (1971, p. 7-10) accurately identified the stages of a consumption society, from what had already occurred in the United States, and which she predicted would also occur similarly in Brazil.

Firstly, an incentive to consumption begins, under the justification that this is necessary to generate economy movement. Until recently, the publishing of news articles revealing the concern of the Brazilian Government to offer credit to keep consumption up was common, under the same argument, even though the country has not reached a development level close to developed nations.

Well, Brazil has not even achieved sufficient progress. Therefore, wouldn't it be more important for the Government to be concerned with saving resources to direct them to the investments needed to achieve the ideal development and infrastructure?

From the moment people start to consume the products offered to the extent that virtually everyone has acquired them, the second stage – called *planned obsolescence*– begins (MURARO, 1971, p. 8). That is, the exchange of previously purchased products by new ones is encouraged, regardless of whether they are still fulfilling their roles satisfactorily, because:

> [...] a sociedade complexa do capitalismo avançado, em que se generaliza o trabalho assalariado, apresenta ao homem produtos consumíveis e, nele, a perpetuidade do trabalho é garantida pelas necessidades crescentes do consumo massificado: os objetos já não se destinam a durar, a permanecer como quadro da vida dos homens, delimitados pelas suas funções de uso,

> mas a ser destruídos na voragem da novidade fabricada e da obsolescência (PUGLIESI, 2015, p. 127).[3]

In order to make this second stage effective, the very design of the manufacturing quality and the materials that compose the products are modified to reduce their *lifespan* since products which last for a long time are not interesting for the market. Fashion also has a relevant role to encourage consumption, as it concedes *status*. Thus, a simple color change can be a relevant factor to encourage the exchange of products that, individually analyzed, would still be useful.

The third stage is through advertising, which aims to reach people's unconscious – which includes even a subliminal way – influencing peoples most intimate values, and even family structures, if necessary, not for ideological reasons, but only in order to reach the interests of the large economic groups, that is, to make it possible to sell products and maintain profits.

Finally, the last stage would be the revolt against consumption, which can be through violent or peaceful protests.

This great technological evolution, which made several products available to people, apparently occurred without a *cultural counterpoint*, because instead of making people free, it causes their deep alienation. It causes men to be frustrated and dependent on consumption.

Many authors tried to define *culture*. We prefer to perceive it as:

> [...] um sistema adaptativo que, mercê de costumes, ócio, liberdade (inclusive política), concepções de destino, finalidade e objetivos a alcançar, estabelece as metas gerais de uma determinada sociedade e, em certa medida, de cada um dos membros dessa sociedade. Com isso queremos dizer: a Cultura de uma dada sociedade só prefigura parcialmente os anseios de seus membros individuais. Entretanto, apesar dessa parcialidade, consegue estabelecer o pano de fundo das principais aspirações e os critérios de recompensa dos esforços individuais com as benesses que a civilização correlata a essa cultura puder oferecer a seus membros. (PUGLIESI, 2015, p. 140)[4].

[3] Our translation: "[...] the complex society of advanced capitalism, in which wage labor is generalized, presents man with consumable products, and for him, the labor perpetuity is ensured by the increasing needs of mass consumption: objects are no longer designed to last, to remain as a framework of lives of men, delimited by their functions of use, but to be destroyed in the vortex of fabricated novelty and obsolescence"

[4] Our translation: "[...] an adaptive system that, by virtue of customs, leisure, freedom (including political), conceptions of destiny, purpose, and objectives to be achieved, establishes the general goals of a specific society and, to some extent, of each member of that society. What we want to mean is that the Culture of a society only partly represents the ambitions of its individual members. However, despite the partiality, it is able to establish the background of the main aspirations and the criteria of reward of individual efforts with the perks that the correlate civilization to this culture is able to offer to its members".

Thus, as the author mentions in that same work, instead of technological progress having served as an answer to long-term cultural ambitions and projects, men have become slaves to these benefits, because technological evolution has overcome, at least at this time, cultural ambitions.

Law, on the other hand, is inserted in the scope of culture, notwithstanding the rules already materialized and enforced in the scope of civilization[5]. Law regarded as a cultural manifestation reflects the rules from a theoretical and an intellectual point of view. Laws also have the role of imposing compossible behaviors or repressing them, using coercion as a tool, which tends to be made according to the interests of dominant groups.

Therefore, it will be very common the existence of a disconnection between Law as a cultural manifestation and Law as an achievement in civility. Frequently, society's ambition does not correspond to what legal rules allow or intend to induce, which brings different types of crises and difficulties to social life.

One of these problems in Brazilian Law, for example, refers to the quality and speed of jurisdictional services for conflict resolution.

A technological and globalized society, which has become a voracious consumer, is not able to understand the reasons for delays in providing the intended custody. It is accustomed to acquiring the desired goods and replacing or discarding them at an increasing rate, even though there is no real need for that.

That is precisely why, in order to satisfy this desire for a rapid problem resolution, new ways of alternative dispute resolution have been created. They aim, more than ever, to achieve an efficient and fast result, sometimes with no concerns for the justice of the final result.

Curiously, an inquiry that does not arise sufficient concerns the study of the causes that make our society so dependent on external bodies for conflict resolution; the discussions are more focused on how to hasten the response of these bodies.

Of course, men are not exempt from conflicts. In order to avoid the return to barbarism, the State – as a human creation – became responsible for solving them, reserving

[5] Pugliesi (2015, p. 141) also says that Civilization "representa a totalidade de realizações concretas que uma dada Cultura tenha prefigurado e, em geral, estará aquém das possibilidades sugeridas por essa mesma Cultura." Our translation: "[Civilization] represents the amount of concrete achievement that a specific Culture has constituted and, generally, it will be under the possibilities suggested by that Culture". Which means it would be connected to the Culture through the human behavior.

to itself the monopoly of jurisdiction. However, to what extent can a society or its laws encourage the arising of these conflicts? If the cause is not faced, the search for solutions aimed only at their consequences will have little effectiveness, notwithstanding it is necessary to reflect on this essential instrument of social pacification.

The debate on the effectiveness of jurisdictional services cannot be limited to procedural rules, although they are much needed. It must also be directed to laws of material nature, which probably do not meet the demands of the current Brazilian society properly. Even if a qualitative progress is made in adjective rules. There is a constant ideological conflict included in this matter...

Commenting on the trend of the specification of Human Rights, a stage after the positive test of rights in general, Bobbio (2004, p. 32) says that:

> Finalmente, descendo do plano ideal ao plano real, uma coisa é falar dos direitos do homem, direitos sempre novos e cada vez mais extensos, e justificá-los com argumentos convincentes; outra coisa é garantir-lhes uma proteção efetiva. Sobre isso, é oportuna ainda a seguinte consideração: à medida que as pretensões aumentam, a satisfação delas torna-se cada vez mais difícil. Os direitos sociais, como se sabe, são mais difíceis de proteger do que os direitos de liberdade. Mas sabemos todos, igualmente, que a proteção internacional é mais difícil do que a proteção no interior de um Estado, particularmente no interior de um Estado de direito. Poder-se-iam multiplicar os exemplos de contraste entre as declarações solenes e sua consecução, entre a grandiosidade das promessas e a miséria das realizações.[6]

Well, the more rights society gives to its citizens, especially when it is not prepared, that is, when there is no structure capable of enforcing them, the more difficult it will be to satisfy them, which will foster an environment of chaos and litigation. The formally acquired rights are not materialized in the real world, which arises another disconnection between culture and civilization.

Incidentally, ordinary citizens started to face jurisdictional services as an item of consumption. As a result, they seek the provision of an immediate satisfaction because that is how it happens in other fields of life.

[6] Our translation: "Finally, coming from the ideal plane to the real plane, on one hand is speaking of the Human Rights, ever new and ever more extensive rights, and to justify them with convincing arguments; other thing is ensuring them an effective protection. On this regard, the following statement is convenient: as the pretensions increase, their satisfaction becomes more and more difficult. Social rights, as they are known, are harder to protect than freedom rights. But we all know that, equally, international protection is harder than protection in a State, particularly within a Rule of Law. There are uncountable examples of contrast between solemn statements and their attainment, between the greatness of promises and the misery of achievements."

If jurisdictional services became an item of consumption, in cases of unfavorable decision, the citizen would not feel any obligation to follow it spontaneously. If the citizen has already breached the material rule that led to the start of the dispute, he/she does not feel embarrassed to ignore the judicial order once again.

Furthermore, although there is a great discussion about rights, it seems that its counterpoint, duties, as obligations destined to the individual, is ignored or there is just no interest in analyzing them. However, duty, as an obligation of the State, has always been very much remembered, although it is strongly criticized, and quite rightly, because the Brazilian State does not enforce it properly many times.

In any case, when conflicts between individuals arise, it is the responsibility of the State, when summoned, to intervene and it must have tools to allow a proper response, bearing in mind the features of the new mass society.

In this conflict situation, there is a preponderant factor to ensure the justice of the decision of the judge: time. For a judge, the resolution of a dispute in six months or a year can, subjectively, make no difference. Nevertheless, for litigants, time can be crucial to the maintenance or definitive disruption of relationships, or a determining factor in ensuring the satisfaction of the aggrieved party.

Just as society began to consume mass products, problems of the same nature also started to arise at the same speed. Therefore, methods of jurisdictional action should be reviewed, with a special emphasis on the different ways of Temporary Custody that are set forth in the current Brazilian Civil Procedure Code ("CPC").

2. URGENT INTERLOCUTORY RELIEF AS AN ANSWER TO MASS SOCIETY

2.1. Introductory concepts

Living in society implies facing dissent, so much so that, Wambier and Talamini (2016, p. 37-38) point out the available assets are limited – or so it seems – and needs, aspirations, interests, and pretensions are unlimited. Hence, the constant disputes: two individuals or sets of individuals claim the same good, or one of them intends to do so and the other resists to give it. Conflict of interest or litigation is this type of clash: a "resisted claim". Human dignity – this essential trait of man, which makes him live not only according

to his instincts – has led him, in his life in society, to seek ways of solving conflicts that were not merely instinctive.

Formerly, when the characterization of the proceeding considered only the initiative of individuals, and not the function of the judge, it was natural that the process was conceived as a mere *business of the parties*[7], and not as a place where the State manifests its authority (jurisdiction) (MARINONI; ARENHART; MITIDIERO, 2016, p. 424).

Historically, up to the Modern Age there were only two possible attitudes from the judges, accordingly Greco Filho (2010, p. 28),if the legal proceeding did not interfere with the things of the Sovereign, justice was granted as permitted; if it did interfere, the judge acted as its agent.

In these terms, the authentic process–as we currently know it– arose when the State, by prohibiting private justice (self-relief), called upon itself the application of law as something of public interest in itself and, furthermore, structuring the system of rights and individual guarantees, brought the courts between the administration and the rights of citizens (GRECO FILHO, 2010, p. 28).

Once the legal proceeding arises – litigation itself, the general line of the judicial process, in order to solve it, is made ordinarily through *knowledge*, or the *knowledge stage*, because when the judge first establishes contact with the cause and its grounds, among which the de facto and the evidence, then he judged at the end of a complete instruction and in light of the disclosed facts by the production thereof, with obvious reasons for the knowledge to be the natural support for the judgment (DINAMARCO, 2016, p. 254).

The Brazilian Constitution, in its article 5, section I and *caput*, establishes that all, considering those under a jurisdiction, are equal before the law, so much so that in spite of this the right to *adversarial procedure* and *full defense* of the parties is highlighted, as long as the parties are subject to judicial proceedings:

According to Nery Jr. (2016, p. 245), right to adversarial proceedings means, on one hand, the need to inform the parties of the existence of the lawsuit and of all acts of the

[7] In this sense, "no direito romano – período das 'legis actiones' e do processo 'per formulas' – o processo dependia de prévio consenso das partes. As partes, já no direito romano arcaico, levavam seus conflitos ao pretor (Praetor) – fixando os limites do litigio e do objeto que deveria ser solucionado – perante ele se comprometia, a aceitar a decisão que viesse a ser tomada (MARINONI; ARENHART; MITIDIERO, 2016, p. 423). Our translation: "in Roman law - the period of *legisactiones* and the *per formulas* process – the proceeding depended on prior consensus of the parties. The parties, already in archaic Roman law, took their conflicts to the praetor – fixing the limits of the litigation and the object that was to be solved – before him, they sworn to accept the decision to be taken," that is, the so-called *litiscontestatio.*.

proceedings, and, on the other, the possibility of the parties to react to acts that are unfavorable to them. Furthermore, to ensure that an adversary is present also means the obligation to notify (*Mitteilungspflicht*) and the obligation to inform (*Informationspflicht*) of the court so that the litigant can express its views. Contenders have the right to deduce their claims and defenses, to carry out the evidence they required to demonstrate the existence of their right, in short, the right to be heard in the proceedings in all its terms.

However, there are *urgent situations* in which, as Dinamarco (2016, p. 254) teaches, the subject of the proceeding must not wait for the "realization of all judicial knowledge with the effectiveness of the adversarial procedure, defense, proof and discussion of the cause, because, during the course of the litigation the problem ~~(life goods in crisis, conflicts~~) can evolve into the consummation of undesirable and perhaps even irreversible situations, to damages to some of the subjects. Damages might not only be the procedural ones, that is, caused by injurious purposes within the proceeding, but also the ones that attempt the very subject of rights, those are the obstacles to the life established in the material scope.

Likewise, Carnelutti (*apud* DINAMARCO, 2016, p. 254) said: "tempo é inimigo dos direitos e seu decurso pode lesá-los de modo irreparável ou ao menos comprometê-los insuportavelmente"[8] .

According to Dinamarco (2016, p. 255), in order to remedy such distressing situations, the procedural rules adopted emergency measures, characterized as interim reliefs or interlocutory relief, depending on the case– both of which were linked to a need to decide at the outset, under the penalty of compromising the final decision of the proceeding. These procedural techniques are applied in different situations, in order to neutralize the effect of time on rights.

If we take the problem of the effect of time on rights to the context of consumer society – in which modern man is inserted, where life and the information (social and cultural) exchanged in it travels quickly under the implacable gaze of Earthly time – it becomes even more worrisome. In this regard, Nery Jr. (2016, p. 361) points out that time is vitally important in the proceeding nowadays, since the acceleration of communications via web (internet, e-mail), fax, cell phones, together with social, cultural and economic

[8] Our translation: "Time is an 'enemy' of rights and its course can harm them irreparably or at least unbearably compromise them".

globalization has led to a greater demand from those under jurisdiction and administration for the prompt resolution of judicial and administrative proceedings.

By the way, this globalization gave greater visibility to the advantages and disadvantages, correctness and misunderstanding of the public authorities due to the exposure to which they are subject, a situation caused by the transparency that must exist in a democratic Rule of Law (NERY JR., 2016, p. 361).

Thus, here are the words of Eduardo J. Coutere (1945, p .37): "*en el procedimento el tiempo es algo más que oro: es justicia*"[9].

The high importance of time to the proceedings transpired to the legislator and therefore to the contemporary operators and agents of law since the question of the reasonable duration of the proceedings naturally met dilemmas in their daily life. However, time in the proceeding shall be invariably understood taking into account the specificities of each individual case [once that], since there is no need to require that complex cases have the same length of time as little or simple cases (BUENO, 2017, p. 58).

According to Nery Jr. (2016, p. 362), the complexity of the case may require protracted probation, such as multiple expertise, which will make the reasonable length, in this case, greater than that of a simpler case.

Moreover, in such cases, other and more complicated circumstances need time to be elucidated. Complications in the persecution may lead to a proceeding with a reasonable duration. In this way, the reasonableness of the duration of the procedure must be assessed by means of objective criteria verified in concrete hypothesis, as Nery Jr. (2016, p. 362) point out: a) the nature of the case and the complexity of the case; b) the conduct of the parties and their prosecutors; c) the activity and behavior of the competent judicial and administrative authorities; d) the legal establishment of time limits for the practice of procedural acts that effectively assures the right to adversarial proceedings and defense.

The reasonable duration of the procedure must take into account all the time required until all the satisfactory activities of the law (compliance or enforcement) occur. There would be no use in, for example, a judgment awarded in six months, if the judgment of the appeal takes two years, and the enforcement of the sentence takes another four years (FONSECA, 2017, p. 94-95).

[9] Our translation: "in the proceeding, time is something more than gold: it is justice".

In spite of this, the *effectiveness* of the (and through the) procedure – an important variable of reasonable duration – is measured by its capacity to make the controversial, threatened or injured rights concrete. As Bueno (2017, p.59) understands, from a constitutional perspective, advocated by him, procedural efficiency is sufficiently disposed in section LXXVIII of Article 5 of the Brazilian Federal Constitution. Exactly for the purpose of procedural efficiency, the parties have the right to resolve the merits without undue delay.

Faced with the problem of the delay of the proceeding, the important role of anticipatory techniques is highlighted, either because of the emergency or of the greater probability of the existence of the right of the plaintiff legitimizing the inversion of the burden of time and of the proceeding. In addition, according to Marinoni, Arenhart and Mitidiero (2016, p. 224), it has to be taken into account that these (procedural) techniques are not by chance directed towards the need to distribute, in an isonomic form, the burden of the proceeding and, therefore, the manifestations of the principle of equality.

In this context, it is clear that it is the judge who has the power, before providing the final relief, to grant temporary protection in favor of the party at risk of irreparable damage (WAMBIER; TALAMINI, 2016, p. 405).

Even in cases of emergency, it would be of no avail that the party in need receives relief only at the end of the proceedings, that is to say, a party under a state of emergency, if at that time of the provision of final judicial relief its right is already exhausted (WAMBIER; TALAMINI, 2016, p. 405). Then, in this case, jurisdiction would have been useless by the fact of consuming relevant material and human resources for nothing.

Likewise, we cannot move away from due process of law, because not everything is an emergency – despite the fact that this is becoming a common practice in the Judiciary. Depending on the analysis of each case, given that due delay is allowed because, as Fonseca (2017, p. 94) points out, producing evidence, causing incidents, appealing, all this is part of due process, and all of this requires process time. The fact that a reasonable duration is sought does not imply the removal of rights inherent in due process of law.

Contrary to what many might think today, investing in the adversarial proceeding and in the motivation of judicial decisions is not an outrage to the reasonable duration of the process.

The stronger the adversarial proceeding exercised by the parties and the greater the degree of influence of their arguments on the solution of the cause, the greater the use

of debates and procedural activity, which, in theory, can generate less resources or, at least, less chances of their provision (FONSECA, 2017, p. 96).

Well, it is important not to lose sight of the fact that, in order to dispute resolutions by means of the existing rules of the substantive law, it depends on the regular development of due process, however, as said before, this consumes time, considering the need for observance of the constitutional guarantees of the procedure and the formation of a judgment based on certainty by the judge (BEDAQUE, 2017, p. 918).

The exception to this rule is the deviation, though temporary, from these stages of judgment as a way of relativizing, in specific situations, the harmful effect of time on the disputed right to one of the parties,

Nevertheless, it is the duty of the State legislator to establish the right to a reasonable period by means of procedural techniques, in which the power of the judge ensures the reasonable duration of the procedure (article 139, II, CPC) (FONSECA, 2017, p. 95). That includes not only granting Provisional Remedies when necessary in the light of the specific case, but also to avoid abuses of rights in this regard.

2.2. Relevant aspects of (urgent) interlocutory reliefs and its relationship to procedural effectiveness

As a matter of priority, to deliver the final judicial relief, it is necessary to observe the due process of law, which certainly demands time. Bedaque (2017, p. 920) declares, in this respect, that the proceeding must be carried out in accordance with the legal model laid down by the law, which includes adversary proceedings, full defense, publication, statement of reasons, natural judge principle, two-tier judicial authority by appeal (the Courts), procedural legality, etc.

Thus, the legislator needs to regulate the activity of the judge to avoid the delay of the proceedings that may cause harm to the party, whose claim is supported by plausible, believable arguments, because in any case they seek to give a greater dose of practical effectiveness to final court protection, enabling those who are entitled to it to obtain results as similar as possible to the spontaneous fulfillment of the right (BEDAQUE, 2017, p. 920).

In fact, the Brazilian legal system provides for two kinds of Provisional Relief, considering them a modality of jurisdictional protection, whose scope is not, at least in principle, to definitively solve the crisis of material law, since it is opposed to the final and

definitive decision, and may, therefore, be urgent (danger and plausibility) or based on high probability (plausibility) (BEDAQUE, 2017, p. 921).

The first one, according to Bedaque (2017, p. 921), is designed to eliminate the danger of serious damage and difficult reparation", which is called emergency protection[10], so much so that to obtain it, it is necessary to demonstrate the motive capable of compromising the effectiveness of the final relief (*periculum in mora*), in addition to the likelihood of the alleged right (*fumus boni iuris*).

In this sense, it is also worth emphasizing that the distinction of urgent interlocutory reliefs – whether before a more conservative (precautionary measure) or satisfactory (anticipatory measures) nature –is not so relevant in practical, since the purpose of both types is to *neutralize* the danger of procedural delay.

In this regard, Costa Machado (2017, p. 41) understands that if we look at the whole picture from the angle of *periculum in mora*, what we have is that, in the case of both precautionary (conservative) and anticipatory measures (satisfactory), what is always at stake, when it is granted, is the efficiency of the final result of the proceeding which is reestablished by neutralizing the danger of delay – if the conservative or satisfactory decision is only granted because of *periculum in mora*, it is clear that the purpose of providence is always its elimination.

As Bueno (2017, p. 265) teaches, the *urgent interlocutory relief* can still be granted at the outset, that is, at the beginning of the process and without a prior hearing with opposing party[11], or after prior justification (article 300, § 2°, CPC), without offending the principle *audi alteram parte*, just postponing it.

In accordance with § 3 of art. 300, CPC[12], the urgent interlocutory relief will not be granted when there is danger of irreversibility of the effects of the decision. Thus, as Bueno (2017, p. 266) points out, a true negative assumption, which wants to inhibit the anticipation

[10] Here, it is worth to elucidate the idea of emergency for the civil proceeding according to Costa Machado (2017, p. 21), to whom, there is the following logical reasoning: emergencies always attach to some form of danger; the urgent interlocutory relief always assumes *periculum in mora*; the delay in granting a court order may create the danger of injury – for the proceedings and for the right of the party – which, when the case arises, must be eliminated by provisional and urgent relief (default + danger of procedural damage = *periculum in mora*, the object of the dispute and of the neutralization that carries out the "urgent interlocutory relief").

[11] Bueno (2017, p. 265) remarks, in this respect, that if the magistrate understands that the specific case, despite the claim of emergency by the applicant, accepts the previous establishment of the adversarial proceeding, the determination of summons is equivalent to the rejection of urgent interlocutory relief.

[12] Original text: "§ 3º *A tutela de urgência de natureza antecipada não será concedida quando houver perigo de irreversibilidade dos efeitos da decisão."*

of relief in the case which is commonly called "reverse *periculum in mora"*. However, the following reservation is made in perspective of the effectiveness of the law by the process.

It is necessary to overcome the literal interpretation of the provision to circumvent the recognition of its substantial unconstitutionality: the prohibition of granting interlocutory relief based on emergency in cases of irreversibility shall not prevail in cases of damage or risk for the defendant. It is implicit to the system – because of the constitutional model – the so-called *principle of proportionality* to remove the literal rigor of this norm (BUENO, 2017, p. 266).

A criterion which the judge may use in these cases (*hard cases*) is always to use proportionality to weigh the plaintiff's and defendant's positions, visualizing their positions after imagining the effects of the interlocutory relief, as they would affect the situations of one and the other (ARRUDA ALVIM, 2016, p. 173).

This is a rationale to be made by the judge, because, often, the one who asks for an urgent interlocutory relief needs, as soon as possible, an order that compels the other party to an action – paying the right amount, delivering something, doing or not doing something (ARRUDA ALVIM, 2016, p. 173).

Hence why, accordingly Arruda Alvim (2016, p. 173), the plaintiff bears the burden of proof in the sense that, until it has been granted what it seeks, it is suffering from the factual consequences of the legal relationship between the parties. If the measure is deferred, the party in default of its obligation will bear the burden, that is, it is its interest that it is being disrespected, and it is up to it to prove its reason for reversing the situation. There is a scale where the interests of the plaintiff weight on one side and the defendant's on the other. The granting of a provisional relief means to anticipate the effects of the final judgment, and thereby define who should bear the burden of time elapsed until this final judgment

In accordance with Calamandrei (*apud* DINAMARCO, 2016, p. 256), it happens that between doing well and doing immediately, in urgent situations, the judge chooses to do immediately, leaving the final judgment of good or evil for the quiet investigations to judge the case.

That is why, according to Dinamarco (2016, p. 256), urgent interlocutory reliefs are issued on the basis of an incomplete and superficial cognition, and it is natural that they are not definitive, and, therefore, they fall within the concept of temporary measures (CPC, arts,

294 ss), that is, without binding the judge when it is judging the cause itself (judgment on the merits).

Even more natural is that they (urgent interlocutory reliefs) are not susceptible to obtaining the authority of the *res judicata*– and, therefore, that they need revision whenever it is convinced that the party did not have the right that it seemed to have, in a first and necessarily superficial examination (DINAMARCO, 2016, p. 256).

The second type of provisional relief, also identified in the procedural system, in the article 311 of Brazilian Civil Procedure Code ("CPC"), is the so-called *interlocutory relief based on high probability*, which is based on the existence of a certain situation in which, under the law, authorizes the immediate and Provisional Relief of the supposed right affirmed in the complaint, since there is no risk of serious damage or difficult reparation, but if the circumstances justify reversing the consequences normally borne by the plaintiff, because of the delay in the proceedings (BEDAQUE, 2017, p. 921).

Besides, Costa Machado (2017, p. 20) points out that in case of interlocutory relief based on high probability the judge only focuses on the probability of recognition of the claim, the likelihood of the alleged facts or, in other words, the intensity of *fumus boni iuris* or the evidence in its view that the claimed right exists without any consideration of the danger to the procedural activity.

Marinoni, Arenhart and Mitidiero (2016, p. 221) perceive, in these conflictive situations of life, the value of time in the proceeding is of circumstantial relevance, because the plaintiff is harmed by the time of justice to the same extent as the unreasonable defendant is benefited by it.

For this reason, the plaintiff whose life depends on the property in litigation may feel obliged to yield to the delay of the process, which gives the defendant the conditions for the structuring of strategies of deferral and, in other words, the possibility of abusing its right to defense (MARINONI; ARENHART; MITIDIERO, 2016, p. 222).

From this perspective, with the time of the proceedings, in view of the prohibition of auto-relief, it has therefore become indispensable for the judge to mature his judgment on disputes, but this means that time is, above all, a problem of jurisdiction. For this reason, the State Judge as personified in the figure of the magistrate must ensure that the defendant does not abuse his right to defense or practice acts aiming at delaying the proceedings (MARINONI; ARENHART; MITIDIERO, 2016, p. 222).

In the context of provisional reliefs (genre), for the hypothesis of its granting, whether in the species of legal measures *based on high probability* or *urgent* – as precautionary or anticipatory court protection –, *general power of relief* was a term used to refer to the set of powers of the judge.

Today, it is preferable to speak of a *general power of urgency (or emergency)*, since the emergency situation requires an action that will soon satisfy the probable right of the plaintiff, otherwise it will no longer be possible:

For example, given by Wambier and Talamini (2016, p. 406), in which the plaintiff must, under the risk of death, perform an emergency surgery that his health plan refuses to pay: the judge, then, before definitively deciding who is right, determines on an urgent basis that the health plan, which is the defendant in the proceeding, should bear the cost of the surgery, namely, determining the provision of advance relief (article 294, sole paragraph, CPC/2015).In fact, a balance is necessary between the judge's meditation and the speed demanded by the peculiarity of the dispute.

This is recurrent in the history of procedure law, according to Wambier and Talamini (2016, p. 221), because in most cases, the plaintiff intends to change a situation that has stabilized in favor of the defendant. In such situations, the reversal of an advantage that is being enjoyed by the defendant is sought after. Thus, for instance, when the plaintiff asks for a sum in money or a personal property or a real property, the longer the process lasts the more the plaintiff has to wait to obtain the claimed property, and, in return, the longer the defendant has to enjoy the good it is in its patrimonial sphere.

Time is also an important factor when considering non-patrimonial rights, such as personality rights and rights concerning environment law, because the conversion of these kinds of litigations in a simple compensation can give the idea that it is possible to admit their violation.

Legal tools, especially the procedural techniques of anticipation of judgment, including the technique of the partial judgment of the merits (article 356 of CPC) along with temporary protections (article 294 *et seq.* of CPC), seek to distribute the burden of delay in the process in a proper way.

And it is not up to Man to abuse these tools of optimization of "procedural time" as a way to achieve the aspirations of an *information society* accustomed to the mass consumerization of products and services. This would be a miscomprehension of such legal

instrument, that are an exception for the rule of judgment. They are a way to deal with peculiar circumstances of life and not definitive orders.

In any case, interlocutory relieves must not serve as personal satisfaction for people within the consumer society, which is characterized by fast, ephemeral and superficial pleasures. Thus, these attributes are not in line (and shouldn't be) with the nature of Law, which deals with the lives of people as it seeks to settle their disputes, law demands security – which is *achievable* by the process (= time) –in the decisions taken by the State. That is even necessary for the acceptance of the jurisdiction, as a role of the State.

3. THE INTERRELATION BETWEEN PROVISIONAL RELIEF AND CONSUMER CULTURE

With the enactment of the 1988 Brazilian Federal Constitution, called the "Citizen Constitution", one of the procedural principles envisaged was the access to justice. A few years later, the Special Civil Courts were created. They have a recognized relevant role on the solution of conflicts of low complexity and low economic values, aiming at simplicity of the procedures and at their speed.

As a consequence, access to justice was facilitated and there was a huge increase in the number of demands for disputes resolutions. However, in a short time, this special system was overloaded and, once again, the promise[13] did not materialize as expected. In fact, the manner of legal action of the big defendants – such as banks, service concessionaires and others – did not differ from the positions maintained in their common proceedings. That is, there was an external and formal change, without a prior internal change, in posture.

If, on the one hand, there was a great technological development, which allowed advances in several branches of knowledge, including in the science of Law itself, impelling the existence of a culture of consumption, with a marked individualism and an exacerbated hurry; on the other hand, it seems that the Brazilian society has not yet been able to offer a judicial structure that satisfies its wishes.

[13] By the way, Assis points out (2006, p. 195-204) that culture does not put thrown against the people, is not being enough a behavior effective changing of the society, to change the its laws, once some studies show that the procedural reforms are fruitless without the collection of indispensable empirical data, in order to identify the points of the process in which time is spent the most, among them the so-called dead times, that is, waiting times between a procedural act and other.

Technology has brought about a significant change in the relationship between time and man, both for good and for evil.

Provisional Relief also arrived as an important and innovative tool, brought to the Brazilian procedural system to stop time from damaging or negatively interfering in the jurisdictional provision, to avoid an imminent injury or to reestablish an apparently fair previous situation, because the system itself recognizes its incapacity for conflict resolution in a really appropriate time.

However, it is often improperly treated as a synonym of procedural speed or as a simple shortcut to the satisfaction of the right, or as a fundamental tool to guarantee justice in a specific case. And with each reform, means to increase the number of possibilities of Provisional Relief are sought after. The promise is increased, giving more and more rights (randomly), without really guaranteeing practical conditions for their effectiveness, generating a deep frustration, which undermines the credibility of the entire procedural system and also of the state body.

In fact, although it is true that the Judiciary has many deficiencies and that proceedings are not completed in a reasonable time, it is also a fact that there is a massive propaganda of criticism against the procedural system that does not make any distinction or qualification informing that there are claims that cannot be easily resolved in a short period of time.

Thus, for any and all problems, when seeking a lawyer, one of the first manifestations or requests made to the professional is the wish to obtain an "injunction" to obtain the true satisfaction of the right the client thinks he is entitled to and that has been taken from him.

Following this trend, it is not uncommon for the lawyer to answer the request of his client, and to request the granting of provisional relief, *urgent* or *based on high probability*, even if it is clear that it is impossible to grant it and considering the lack of requirements to authorize such a measure, further increasing the citizen's expectation that his problem will be solved in a short period of time. Even though it is not true and the lawyer just does this to please him.

Because there are so many requests before Judiciary for provisional relief without proper grounds or even without the presence of authorization requirements, the judges tend to reject them, even in situations in which it could or should be granted.

The great number of claims – many of them equal or at least similar, are also a result of *mass society* – cause an accumulation of work that seems to have no end and can cause the judge to lose his sensibility, which is so important in this position, precisely conceived for resolving in the best way possible conflictive legal relations.

Rather than keeping in mind the people who are facing problems displayed in the proceedings, they only see numbers and goals to be fulfilled. Perhaps this makes it easier to reject or approve those claims, without considering the consequences of their actions (of their judgments).

In any hypothesis of denial of an injunction, the result is more dissatisfaction of the person that is under jurisdiction and, in some cases, against her own defender (attorney), since the citizen strongly believed that his right was so clear and evident, that it would be practically impossible for him not to obtain the intended benefit.

Provisional relief is therefore a mere circumstantial technique to eliminate, temporarily, the bad consequences of the (temporal) crisis of the Judiciary.

So, this kind of temporary protection cannot be understood as a solution for all the issues of the procedural system and also as a way to meet whole judicial demands that the consumer society brings with it. Citizens will rarely be satisfied due to the rule of consumer life – specifically due to the notion of time of the information society –which is improperly transported to legal system. Moreover, the dispute resolution is and must be obtained only after exhaustive judicial pronouncement by obeying constitutional guarantees, that is, by means of a decision that is capable of producing *res judicata* and that settles disputes in a definitive way and with as security as possible.

This, however, demands the full exercise of the adversarial procedure and, consequently, full defense, as well as the due and thorough analysis of the evidences, that is, compliance with *due process of law*. In fact, all of the procedure seems like a "necessary evil" for the citizen who is inserted in the reality of the consumer and information society and does not know how to deal with the time necessary to the proper course of the judicial process, which leads him to unduly exploit relevant legal institutes such as that of provisional guardianship.

CONCLUSION

Technological development has given society access to many products, which are now intensely consumed, regardless of whether there is a real need of them. This happens mainly because of the incentive made by the market.

Without a cultural counterpoint to ground and direct the technological development, the delight of these products did not and will not provide man with true liberation. On the contrary, it will create a big and deep dependence, revealing itself incapable of providing true happiness or a greater understanding of its existence. So much development came without a clear goal, apparently, they were limited to providing mere comfort.

By becoming used to throw away and buy products at any time and without a useful reason to justify it, society seems to want to apply this same vision to all areas and Law was not immune to this.

The jurisdictional provision seems to be understood by the great mass as a product to which it is entitled, to the extent of its often-ephemeral interests. Conflicts, which multiply – often generated by commonplace issues or that could be solved without the need to involve third parties – take on a disproportionate dimension and end up seeking the state structure for their solutions. After all, the State has promised to distribute justice.

However, the mass consumer society has become used to fast relations. So, it feels frustrated by a slow judiciary power that is unable to meet its demands at its own pace.

Under this approach, as it is often not possible to definitively resolve a judicial proceeding in a short period of time, Provisional Relief becomes highly relevant and an important remedy, but it cannot be indiscriminately applied, as the consumer society wishes.

Provisional Relief is not an "express judgment", but a fundamental tool to prevent procedural time from making it impossible to satisfy the demanded right. Its indiscriminate use can have negative consequences. However, it is also true that it deserves a more adequate and creative attention from judges, who often refuse to grant it because of excessive prudence or lack of effective and timely understanding of specific cases.

Provisional Guardianship is not, therefore, a product to be indiscriminately consumed and society must understand that rush and celerity are different terms.

REFERENCES

ALVIM NETTO, José Manoel de Arruda. **Novo contencioso cível no CPC/2015**. São Paulo: Editora Revista dos Tribunais, 2016.

ASSIS, Araken de. **Duração razoável do processo e reformas da lei processual civil**. In: FUX, Luiz et al. (Coord.). **Processo e Constituição: estudos em homenagem ao Professor José Carlos Barbosa Moreira**. São Paulo: RT, 2006.

BEDAQUE, José Roberto dos Santos. **Art. 294**. *In*: BUENO, Cássio Scarpinella (coordenador). **Comentários ao código de processo civil** – vol.I (arts. 1° a 317). São Paulo: Saraiva, 2017.

BOBBIO, Norberto. **A era dos direitos.** Trad. Carlos Nelson Coutinho. 7ª reimpressão. Rio de Janeiro: Elsevier, 2004.

BUENO, Cassio Scarpinella. **Manual de direito processual** civil. 3. ed. São Paulo: Saraiva, 2017.

COSTA MACHADO, Antônio Cláudio. **Tutela provisória**: Interpretação artigo por artigo, parágrafo por parágrafo, do Livro V, da Parte Geral, e dos dispositivos esparsos do CPC em vigor que versam sobre Tutela Provisória. São Paulo: Malheiros, 2017.

COUTERE, Eduardo J. **Proyecto de Código de Procedimento Civil**. Exposição de Motivos, Capítulo II, § 1°, n. 10. Montevideo: Impressora Uruguaya, 1945.

DINAMARCO, Cândido Rangel. **Instituições de direito processual civil**: *vol. I.* 8. ed. São Paulo: Malheiros, 2016.
_____. **Instituições de direito processual civil**: *vol.II.* 7. ed. São Paulo: Malheiros, 2017.

FONSECA, Vitor. **Art. 4º**. *In*: BUENO, Cássio Scarpinella (coordenador). **Comentários ao código de processo civil** – vol.I (arts. 1° a 317). São Paulo: Saraiva, 2017.

GARBI, Carlos Alberto. **Tutela Jurisdicional diferenciada e efetividade do processo**. *Revista dos Tribunais*. vol. 782/2000, p. 48-67. São Paulo: RT, 2000.

GRECO FILHO, Vicente. **Direito processual civil brasileiro**: teoria geral do processo e auxiliares da justiça, vol. I. 22. ed. São Paulo: Saraiva, 2010.

KONDER, Leandro. **Marx – vida e obra.**5ª ed. Rio de Janeiro: Editora Paz e Terra, 1983.

MARINONI, Luiz Guilherme; ARENHART, Sérgio Cruz. MITIDIERO, Daniel. **Novo curso de processo civil:** *teoria do processo civil.* Vol. 1. 2. ed. São Paulo: Editora Revista dos Tribunais, 2016.

MARX, Karl. **Para a crítica da Economia Política**. Trad. Edgar Malagodi. São Paulo: Editora Nova Cultural, 1999.

MURARO, Rose Marie. **A mulher brasileira e a sociedade de consumo**. *In:* FRIEDAN, Betty. **Mística Feminina.** Trad.: Áurea B. Weissenberg. Rio de Janeiro: Vozes, 1971.

NERY JR., Nelson. **Princípios do processo na Constituição Federal**. 12. ed. São Paulo: Editora Revista dos Tribunais, 2016.

PUGLIESI, Márcio. **Teoria do Direito – Aspectos Macrossistêmicos**. São Paulo: Sapere Aude Grupo Editorial, 2015.

WAMBIER, Luiz Rodrigues; TALAMINI, Eduardo. **Curso avançado de processo civil**: *teoria geral do processo*. Vol. 1, 16. ed. São Paulo: Editora Revista dos Tribunais, 2016.