

The Participatory Adversarial Process and the Valuation of Borrowed Evidence

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Abstract

The right to evidence constitutes one of the central structural axes of civil procedure in a democratic state governed by the rule of law. Although not expressly provided as an autonomous fundamental right in the Brazilian Federal Constitution of 1988, it emerges as a necessary corollary of due process of law, adversarial proceedings, the full right of defense, the inalienability of jurisdiction, and the prohibition of unlawful evidence. This article investigates the constitutional foundations of the right to evidence, the epistemological relevance of truth in civil procedure, the participatory character of adversarial proceedings under the Brazilian Code of Civil Procedure of 2015, and, finally, the systematic role of borrowed evidence as a procedural technique that promotes efficiency, cooperation, and the reasonable duration of proceedings. The research adopts a doctrinal and bibliographic methodology, grounded in specialized doctrine.

Keywords

Right to Evidence, Truth in Civil Procedure, Participatory Adversarial Proceedings, Evaluation of Evidence, Borrowed Evidence, Brazilian Code of Civil Procedure (2015)

1. Introduction

Evidence occupies a central position in contemporary civil procedure, as it enables the reconstruction of legally relevant proceedings and sustains the legitimacy of judicial decisions in order to guarantee the effectiveness of access to justice, a corollary foundation of the Democratic Rule of Law. In a Democratic State of Law, judicial activity is only legitimate when it is based on a procedure that ensures the parties the real possibility of participating in the formation of the judge's conviction, with evidentiary activity being the instrument par excellence of this partici-

pation.

With the doctrinal evolution of constitutional civil procedural law, the Code of Civil Procedure of 2015, in turn, expressly enshrined a cooperative model of procedure, in which the adversarial process takes on a substantial feature; the parties to the process and the judge start to act as participants in a procedural dialogue, and evidence ceases to be a simple formal instrument to become a true mechanism for the rational construction of the truth for the achievement of a fair process.

In this context, the study of borrowed evidence stands out, expressly affirmed in Article 372 of the Code of Civil Procedure of 2015, a legal mechanism that allows the use, in a certain case, of evidence produced in another, provided that the limits of the adversarial process are respected. Borrowed evidence is, therefore, a mechanism for rationalizing the evidentiary activity, for achieving efficiency and a reasonable duration of the process, which is now expressly integrated as a possible path for the parties in the realization of justice.

This Article initially examines the constitutional perspective of proof; then, the search for truth as an instrument for the realization of justice; the participatory adversarial process as a structuring vector of evidentiary activity; the evaluation of evidence in the cooperative model; and, finally, borrowed evidence as a technique for the realization of the fundamental right to evidence in the Code of Civil Procedure of 2015.

2. The Constitutional Perspective on Evidence

The right to evidence, although not expressly provided for in the Federal Constitution of 1988 as an autonomous right, necessarily derives from a set of fundamental guarantees structuring the fair process, being, therefore, a fundamental right of an implicit nature¹.

It emerges, specifically, from the due process of law (Article 5, LIV), from the adversarial system and full right of defense (Article 5, LV), from the prohibition of unlawful evidence (Article 5, LVI), and from the clause of the inalienability of jurisdiction (Article 5, XXXV), all fundamental rights expressed in the Federal Constitution of 1988, whose rationality leads to the effectiveness of access to justice and the guarantee of the realization of the (Democratic) State of Law.

In this context, as Vitor de Paula Ramos argues, the right to evidence is a *core element of the fair process*, as it represents the right to actively contribute to the

¹The doctrine provides that fundamental rights may implicitly arise from other fundamental rights expressly affirmed by the Federal Constitution of 1988, a reading made from the provisions of paragraph 2 of article 5 of the Federal Constitution, which provides as follows: “Paragraph 2 - The rights and guarantees expressed in this Constitution do not exclude others arising from the regime and principles adopted by it, or from international treaties to which the Federative Republic of Brazil is a party.” According to Manoel Gonçalves Ferreira Filho: “11. It is worth noting that the jurisprudence of the Federal Supreme Court suggests a material conception of fundamental rights. In fact, the thesis that fundamental rights can be recognized by their intrinsic nature is indirectly corroborated by this Court. This is what can be inferred from its understanding that the fundamental rights recognized are not all contained in Title II of the Constitution, but are spread throughout the Magna Law. For example, some are listed among the limitations of the power to tax (Section II, of Title VI of the Constitution)” (FILHO, 2007).

reconstruction of the facts relevant to the resolution of the controversy, without which the effective exercise of jurisdiction would become merely formal (Ramos, 2013).

The author demonstrates that the fundamentality of evidence is not only formal but also material, insofar as its content is decisively constitutive of the basic structures of the Constitutional State. Without the effective possibility of demonstrating the proceedings with evidence, the process ceases to be an instrument of justice and becomes a mere empty rite, an end in itself, capable only of bringing about injustices.

In this context, the right to evidence is directly based on the guarantee of access to justice. It is not too much to reinforce the teachings brought by Professor Luiz Roldão de Freitas Gomes Filho, Judge of the Court of Justice of the State of Rio de Janeiro, who, in a vote rendered in Interlocutory Appeal No. 0004672-46.2023.8.19.0000, makes evident this characteristic of the right to evidence as a right to effect access to justice:

“In effect, the Constitution of the Republic establishes access to justice as a fundamental guarantee (Article 5, XXXV CRFB), which is materialized through adequate judicial provision ensuring due process of law. In this vein, the search for the real truth is a corollary of the principle of due process, as a necessary instrument for achieving access to a fair legal order. Thus, justice cannot be done without understanding, with certainty, the procedural framework brought to the consideration of the judicial body. To the extent that the justice of the jurisdictional provision is linked to the commitment of the process to the real truth, and this is only reached through the evidentiary instruction, the judge is allowed to determine the production of evidence so that the set of evidence is complete” (TJ-RJ, AI n° 0004672-46.2023.8.19.0000).

Thus, at the same time that, on the one hand, the evidentiary activity constitutes a right of the party, on the other hand, it is linked to a procedural burden, a duty of the party, so that judicial protection is effective. The evidentiary activity, therefore, does not constitute a merely procedural faculty, but a true constitutional duty to carry out substantive justice, since the adequate jurisdictional provision presupposes a commitment to the possible truth of the proceedings, which can only be achieved through evidentiary instruction.

The Recipient of the Evidence and the Principle of Shared Use

In line with the effectiveness of access to justice, it is necessary to recognize an essential paradigmatic change for the contemporary understanding of evidence as a true right and fundamental duty: it is the redefinition of its addressees and the way in which its constitution, circulation, and evaluation in the process take place. Evidence is no longer understood as an exclusive instrument of private interest for the parties but assumes an unequivocal public function, linked to the very legitimacy of judicial activity.

In proceeding, the national doctrine is firm in stating that evidence is not only intended for the judge but also for the parties and all the subjects of the process, as members of a procedural legal relationship marked by collaboration and the rational search for the truth. As Alexandre Freitas Câmara teaches, evidence has direct and indirect recipients, not belonging to the party that produced it but to the process as a whole (Câmara, 2023). This is the consecrated principle of shared use of evidence, according to which all procedural subjects can make use of the evidence regularly incorporated into the records, regardless of who produced it.

This conception definitively breaks with the privatist view of evidence, according to which each party would be the “owner” of the means of proof produced by it. On the contrary, through shared use, the evidence becomes part of the cognitive heritage of the process, serving as a common instrument for the formation of judicial conviction and for the full exercise of the adversarial procedure.

On this subject, William Santos Ferreira deepens this understanding by demonstrating that the shared use of evidence can take place from two different perspectives: internal shared use, which occurs within the scope of the process in which the evidence was produced, and external shared use, which is verified when the evidence is used in other different processes (Ferreira, 2014). It is precisely in this second plane that borrowed evidence is inserted, which consists of the use, by another court and in another proceeding, of evidence regularly produced in a different proceeding, a topic that will be analyzed specifically at a later time.

This collective and transindividual character of evidence decisively reinforces its link with the idea of procedural cooperation, as structured by the Code of Civil Procedure of 2015, ruling out any possibility of strategic use of evidence of an exclusively private or merely opportunistic nature. Evidence, in this new model, cannot be instrumentalized as a technique of surprise, concealment, or illegitimate tactical advantage, and must always serve the rational reconstruction of the proceedings.

From this perspective, evidence cannot be dissociated from the epistemological discussion about truth in the process, since it is not intended for a procedural purpose in itself, but rather for the search for possible truth as a condition for the fair protection of substantive law.

3. The Search for truth as the Realization of Justice

Considering this scenario, the right to evidence is not limited to the simple formal possibility of producing evidential means but is projected as a true instrument for the realization of material justice. In this sense, contemporary doctrine has begun to reconnect civil procedure with its epistemic vocation: the rational reconstruction of proceedings as a condition for the correct application of the law.

Michele Taruffo vigorously denounces the spread of a skeptical stance in relation to the truth, a phenomenon she calls veriphobia, characterized by the denial of the possibility, usefulness, or even legitimacy of the search for truth in

the judicial process². This posture profoundly compromises the function of the process, as it empties its rational dimension and its institutional purpose of resolving conflicts based on a controllable reconstruction of the factual reality (Taruffo, 2013).

Taruffo maintains that, although absolute truth is unattainable, the process must pursue the possible truth, constructed through rational procedures of investigation, control, and evaluation of evidence. Procedural truth, in this perspective, is not an arbitrary fiction, but the result of an institutionalized procedure of verifying the proceedings.

Formal Truth and Material Truth: Overcoming a False Dualism

Historically, the opposition between formal (procedural) truth and material truth has become widespread in civil procedure. The so-called formal truth would be that extracted exclusively from the elements contained in the record, regardless of their correspondence with empirical reality; material truth, on the other hand, would represent the effective reconstruction of the proceedings as they occurred in the real world.

Contemporary doctrine, however, has come to understand this distinction as irrelevant. This is because procedural truth should not be different from “material” truth, that is, from truth founded on reality. Taruffo demonstrates that every procedural truth is, by definition, an institutionally constructed truth, but this does not mean that it is dissociated from reality. On the contrary, the process is structured precisely to allow the judicial decision to approach, within the inevitable cognitive limitations, what actually occurred (Taruffo, 2014).

Thus, the truth assumes the role of a logical presupposition of the justice of the decision. A legally correct decision, but based on a mistaken procedural reconstruction, compromises the very legitimacy of the jurisdiction. As Taruffo observes, it is not possible to conceive of a fair process without some degree of commitment to the truth of the proceedings.

The evidentiary activity, in this scenario, represents the technical instrument through which the process transitions from initial ignorance about the proceedings to a state of knowledge sufficiently justified to legitimize the decision. Evidence does not eliminate absolute uncertainty, but rationally reduces the risk of error, allowing the judicial decision to be based on reasons controllable by the legal community.

In the meantime, Giovanni Tuzet analyzes the relationship between proof and truth from the perspective of the philosophy of law, demonstrating that the judge, when evaluating the evidence, necessarily adopts a propositional posture: he forms

²Michele Taruffo demonstrates that skepticism about the possibility of reaching the truth profoundly compromises the rationality of the judicial process, transforming it into a mere rhetorical game disconnected from reality. Thus, procedural truth, far from being an arbitrary fiction, must be understood as a rational, provisional, and controllable reconstruction of the facts, resulting from the evidential activity submitted to criteria of adversarial and rational evaluation.

beliefs about the proceedings based on reasons. These beliefs are not subjective in the psychological sense, but are rationally justified by the elements contained in the process.

According to the author, the evaluation of evidence is not to be confused with a purely discretionary or intuitive exercise. It requires rational evaluation criteria, minimum standards of evidential sufficiency, and internal coherence among the elements of the evidentiary set (Tuzet, 2024).

This conception definitively dispels authoritarian models of decision based on arbitrary free assessment of evidence, bringing civil procedure closer to a true model of rationally justified decision.

William Santos Ferreira points out that the evidentiary path represents exactly the transition from ignorance to the definition of the occurrence or non-occurrence of a certain proceeding. Evidence makes it possible to move from a state of uncertainty to a state of sufficient rational conviction for judgment (Ferreira, 2014).

In this way, the public purpose of the jurisdiction imposes that the evidence be evaluated in favor of the correct reconstruction of the proceedings, regardless of which party produced it.

Now, the search for truth in the process is not to be confused with inquisitorial practices. On the contrary, in the Democratic State of Law, the truth is constructed through the adversarial process, the participation of the parties, the publicity, and the reasoning of decisions. It is a dialogical, controllable, reviewable, and institutionally legitimized truth.

It is also articulated with the constitutional guarantee of the reasonable duration of the process. The process cannot be a space for sacrificing the truth in the name of speed, nor an environment for the perpetuation of the evidentiary instruction. The balance between efficiency and adequate cognition requires techniques capable of preserving the quality of procedural reconstruction without compromising the functionality of the system.

It is in this context that borrowed evidence is later inserted as a technique for rationalizing the evidentiary activity, avoiding the unnecessary repetition of acts, and promoting efficiency without violating the adversarial process.

Having defined the importance of truth as a presupposition of the justice of the decision and of evidence as an instrument for its reconstruction in the process, it becomes necessary to examine the means by which this truth is legitimately constructed in the Democratic State of Law: the adversarial process.

If procedural truth is the result of an institutional construction, it can only be validly formed when submitted to debate between the parties, with the effective possibility of influencing the formation of the judge's conviction. It is in this sense that the adversarial process assumes a central role in the evidentiary dynamics, not only as a formal guarantee of manifestation, but as a condition for the legitimacy of the evidence, its evaluation and, ultimately, of the judicial decision itself, a theme that will be developed in the following chapter.

4. Participatory Adversarial Proceedings as a Corollary of Civil Procedure

The consolidation of the adversarial procedure as a structuring principle of contemporary civil procedure represents one of the most relevant transformations promoted by the Code of Civil Procedure of 2015. Going beyond the merely formal conception of the adversarial process as a simple information-reaction binomial, the legislator established a substantial, participatory, and cooperative adversarial model, in which the parties exert effective influence on the development of the process and on the formation of the judge's conviction.

The adversarial procedure, in this new paradigm, is not limited to the possibility of formal manifestation in the records but is projected as a true guarantee of influence on the course of the process and on the construction of judicial decisions, prohibiting the so-called surprise decision.

Gustavo Henrichs Favero demonstrates that jurisdictional activity is only legitimate to the extent that it develops as a dialogical phenomenon, in which all procedural subjects participate in the construction of the decision. The process ceases to be a space for the unilateral imposition of the state's will to constitute itself as a true working community, in which the judge and the parties act in cooperation (Favero, 2018).

Furthermore, Patrícia de Carvalho clearly distinguishes the two dimensions of the adversarial procedure: the formal, which guarantees the parties the right to be heard, and the substantive, which ensures the effective consideration of their arguments in the formation of judicial conviction (Carvalho, 2013).

The substantial dimension is essential for understanding the adversarial process as a true instrument of legitimacy for the evidentiary activity. It is not enough for the parties to be able to produce evidence; it is essential that this evidence be effectively considered by the magistrate at the time of the decision.

In this sense, the judge cannot act as an arbitrary conductor of the process, or as the absolute master of the evidentiary activity. The judge's power of direction finds direct limits in the constitutional duty to observe, evaluate, and respond to the manifestations of the parties, under penalty of emptying the adversarial process and the principle of full defense.

The Role of the Adversarial Procedure in the Evaluation of Evidence

The formation of the judge's conviction, in the constitutional model of the process, is not a solitary act, subjective or immune to controls. On the contrary, it is a dialogical process, publicly constructed, in which the parties exert real influence on the procedural and legal premises of the decision.

William Santos Ferreira points out that the judge's conviction must be understood within a rational and communicative structure, linked to the principle of motivation of decisions and the rational evaluation of evidence (Ferreira, 2014). The judge does not decide based on intimate impressions, but on the body of ev-

idence built under adversarial proceedings.

In this model, free assessment of evidence is no longer synonymous with absolute discretion and starts to mean freedom methodologically guided by rationality, coherence, and reasoning.

The participatory adversarial procedure does not exclude the judge's instructive powers but reconstructs them from a cooperative perspective. The magistrate can and should act for the proper instruction of the process, but always in dialogue with the parties, ensuring transparency, predictability, and participation.

In turn, Favero demonstrates that the participatory model replaces the hierarchical and authoritarian logic with a logic of functional symmetry, in which the judge acts as a guarantor of the balance of the procedural discourse, and not as its monopolist (Favero, 2018).

The judge's evidentiary initiative, in this context, is not aimed at replacing the parties' activity, but at correcting insufficiencies that compromise the suitability of the process for the rational reconstruction of the proceedings.

It is also in this model that it can be said that, in a constitutionalist view of evidence, its relevance goes from a mode of convincing the judge to elements that corroborate a certain procedural hypothesis (Castro, 2021).

Furthermore, it is in the scope of evidentiary activity that the participatory adversarial process reaches its maximum density. The production, challenge, control, and evaluation of evidence constitute the hard core of the parties' participation in the process, and the right to evidence is a direct consequence of the adversarial procedure: denying the production of relevant evidence is equivalent, in practice, to denying the right to influence the decision.

Thus, the admissibility of evidence becomes the rule, and its denial requires rigorous reasoning, under penalty of violation of due process. In the words of Freddie Didier Jr.:

“The right to participate in the production of evidence is a basic guarantee inherent to the adversarial process. Evidence produced secretly cannot be admitted, nor is it allowed to use evidence against those who did not participate in its instruction. (...) The right to examine the evidence produced is a corollary of the right to the production of evidence. Often the magistrate, analyzing the evidence brought to the process, tends to highlight, in his or her reasoning, only that which supports the winning thesis. (...) This, however, is not correct. It is essential that the adjudicating body also indicate why the evidence brought by the defeated party did not convince it. (...) It would be of little value to have the right to the production of a means of proof if the judge could solemnly ignore it.” (Didier, 2023).

In this context, the evaluation of the evidence is also subject to the adversarial procedure. Not only the production but also the interpretation of the evidence must be dialogical: the parties have the right to express themselves on the meaning, sufficiency, and credibility of the evidence. In other words, the participatory

adversarial procedure is essential for the correct evaluation of the evidence by the judge, which, in view of the reliability of the factual hypothesis, leads to the conviction of the judge for judicial protection.

It is in the context of the consolidation of the participatory adversarial process, the search for truth as the basis of a fair decision, and the rationalization of the evidentiary activity that borrowed evidence is inserted as a technique for the realization of the fundamental right to evidence in contemporary civil procedure.

5. Borrowed Evidence as a Means of Enforcing the Right from the Perspective of the 2015 Code of Civil Procedure

The borrowed evidence represents a dogmatic response to the challenge of reconciling cognitive depth with procedural efficiency, allowing the use, in a given process, of evidence validly produced in another, provided that the constitutional limits of adversarial proceedings, full defense, and motivation are respected.

Before the 2015 Code of Civil Procedure came into force, borrowed evidence did not have express legal discipline. Its admissibility resulted exclusively from jurisprudential and doctrinal construction, based, above all, on the principles of procedural economy, instrumentality of forms, and shared use of evidence.

William Santos Ferreira already pointed out that, in this period, the shared use of evidence could take on an external feature when evidence produced in one case was used in another, characterizing the borrowed evidence as a form of evidentiary acquisition outside the limits of the original process (Ferreira, 2014).

In this scenario, the absence of a formal legal provision generated uncertainty as to the admissibility requirements, the form of entry into the records, the extent of its probative force, and, above all, as to the limits imposed by the adversarial procedure.

Article 372 of the Code of Civil Procedure of 2015 promoted the express affirmation of borrowed evidence by providing that: “*The judge may admit the use of evidence produced in another proceeding, attributing to it the value he deems appropriate, subject to the adversarial procedure*”.

The express introduction of borrowed evidence in the normative system represents a significant dogmatic advance. The legislator explicitly recognized the legitimacy of the technique as a regular instrument of the evidentiary phase, subjecting it, however, to two essential filters: the rational evaluation by the judge and the observance of the adversarial procedure.

This is an unequivocal manifestation of the influence of the cooperative and participatory model on the structure of the evidentiary activity.

The position adopted here is that *the borrowed evidence is not a means of proof in itself, but rather a way for the evidence to enter the recipient process*, which is also defended by João Batista Lopes (Lopes, 2015) and José Américo Zampar Júnior and Juliana Carolina Frutuoso Bizarria (Zampar Júnior & Bizarria, 2018).

William Santos Ferreira clarifies that, at the origin, evidence is produced regularly in the original process; at the destination, it goes through the stages of entry,

admission, and evaluation, typical of evidentiary dynamics (Ferreira, 2014). What is transported is not the nature of the means of proof itself, but its documentation.

For this reason, any means of proof that is produced within the judicial process can be borrowed: testimonial evidence, expert evidence, judicial inspection, or even complex technical elements. An exception is made for documentary evidence, since its production is extra-procedural: documentary evidence enters the pre-constituted process, even if its presentation is the central object of the process.

In these terms, documentary evidence cannot be considered as a loan of evidence because, by adding the document to another process, something produced in the original process is not effectively transferred.

The understanding of borrowed evidence as a procedural path and not a means of proof definitively removes the relevance of the classification of borrowed evidence as typical or atypical evidence, which previously existed in the doctrine.

Furthermore, the borrowed evidence is, from a formal point of view, documented, as it enters the recipient process by means of transfer, certificate, copy, or reproduction of the evidential content. However, this does not transform it, ontologically, into documentary evidence (means of proof).

This is because the means of proof should not change when it is lent to the target process, which influences the way it should be valued: the content of borrowed testimonial evidence continues to be testimonial; that of borrowed expert evidence continues to be expert. The proof is only documented, but its ontological essence remains that of the original environment. The borrowed evidence, therefore, has the potential to assume exactly the same efficacy as it would have had in the process in which it was originally produced (Ferreira, 2014).

This distinction is absolutely central to the correct evaluation of borrowed evidence. If it were treated as a simple document, all the methodological and epistemological particularities of the originally produced evidence would be lost.

The relevance of this conceptual differentiation of borrowed evidence as a way by which the originally produced medium is maintained is important in verifying the requirements for its acceptance and, mainly, for its evaluation in the destination process.

Although the traditional doctrine points out multiple requirements for the admissibility of borrowed evidence—such as identity of parties, identity of object, or validity of the evidence at origin—the adversarial principle takes the form of a nuclear requirement and a condenser of all the others.

Article 372 of the Code of Civil Procedure itself expressly conditions the use of borrowed evidence on the observance of the adversarial procedure. In these terms, since the adversarial procedure is the central requirement for the effectiveness of the borrowed evidence, with the possibility of evaluating the evidence by the means in which it was produced in the original proceeding, it is necessary to understand, in the end, from which adversarial requirement this arises and what the practical implications of this are.

As seen above, the constitutional theory of evidence, enhanced by the nuances

of the 2015 Code of Civil Procedure, honors the effective/participatory adversarial process as a corollary of the right to evidence.

Zampar Junior also argues that borrowed evidence should only be admitted when the party against whom it will be used can fully exercise its right to influence its content and evaluation (Zampar Júnior & Bizarria, 2018).

In this context, the participatory adversarial process gains maximum importance: it is what transforms the borrowing of evidence into a constitutionally legitimate technique.

Borrowed Evidence and the Effectiveness of Participatory Adversarial Proceedings

In a regular environment of evidence production, the participatory adversarial process is an essential condition for the subsequent use of this evidence in another proceeding. Evidence only becomes truly “transferable” when it is formed under minimum parameters of reliability, publicity, and dialogical control, allowing the parties not only to be aware of the acts but, above all, to have an effective influence on their content. From this perspective, the borrowed evidence is not legitimized by the mere economy of acts but by the preservation of the constitutional matrix of due process.

The evaluation of the borrowed evidence, in this context, necessarily involves verifying the degree of participation of the parties in the adversarial process of origin. The greater the possibility of effective intervention by the parties in the formation of evidence—with the formulation of questions, challenges, and requests—the greater the possibility that this evidence will be valued, in the destination process, with the same epistemological force attributed to the original means of proof. It is not, therefore, a merely formal analysis of the existence of an adversarial procedure, but a qualitative evaluation of its effectiveness.

This does not mean, however, that in exceptional cases the evidence produced without full or participatory adversarial proceedings is absolutely prevented from being used in the destination process. There are borderline situations in which the repetition of evidence proves to be impossible or excessively costly—such as in cases of the perishing of the object of the expert opinion, the death of witnesses, or the material infeasibility of renewing the evidence. In these cases, it is admissible that the evidence be used in a mitigated manner, as long as it is submitted to a rigorous judgment of proportionality, with a corresponding reduction in its probative value.

This position is even defended by Fábio Tabosa, when he points out that the deficiency of the adversarial procedure should not be seen as a reason for the automatic discarding of the borrowed evidence, especially if the correction of this detail is possible in the destination process (Tabosa, 2022). This occurs, for example, when it is admitted that the party formulates new questions for the expert whose evidence was borrowed, requires technical clarifications, produces counter-evidence, or methodologically challenges the elements transferred.

The notion of “mitigated value” is concretely manifested in the manner in which the judge assigns differentiated weight to borrowed evidence when forming his or her judicial conviction. For instance, an expert report produced in the original proceedings without the participation of the opposing party, but subsequently subjected to technical clarifications, supplemental questions, and challenges in the destination proceedings, may be regarded as a relevant evidentiary element capable of supporting the decision. In another scenario, a witness statement obtained without adversarial participation, but corroborated by documents, expert reports, and other means of proof in the destination proceedings, may be used as corroborative evidence, albeit with lesser epistemic density than it would have had if produced under full adversarial scrutiny.

In such cases, the judge does not invalidate the evidence, but rather calibrates its probative value in light of the degree to which adversarial participation has been effectively reconstructed, requiring greater convergence with other evidentiary elements as the original dialogical deficit increases, in a genuine exercise of probative balancing.

In these cases, the borrowed evidence must also be evaluated in light of the effective degree of adversarial proceedings that was assured to the party in the original proceeding. Thus, the lower the possibility of effective participation in the formation of evidence, the lower its evidential weight in the destination process. This reduction does not constitute a sanction, but a simple epistemological consequence of the lower cognitive reliability of the evidential data produced under a dialogical deficit.

In other words, as Marinoni explains, even if it is no longer possible to make the adversarial procedure effective in relation to the evidence, there will be situations in which the prohibition of its use will result in the impossibility of sustaining a certain claim in court, causing, in these cases, a true conflict of fundamental procedural rights (the right to be heard and the right to judicial protection). The fundamental rights in collision must be weighed according to the circumstances of the specific case by applying the principle of proportionality, but always privileging the greater density of the evidential set (Marinoni, 2017).

Also, it is necessary to differentiate the adversarial exercise on the evidence already transformed into a document to be attached in the destination process from the adversarial exercise during the formation of the evidence that aims to influence the instruction. In these cases, if there is identity of both parties, there is no peculiarity in the admission of the borrowed evidence, keeping the evidence, in principle, its initial effectiveness.

However, where there is only partial identity of the parties, the admissibility of the evidence must be assessed from two perspectives: 1) if the party against whom the evidence is invoked participated in its production in the original proceedings, no particular difficulties arise; 2) if neither party participated in the production of the evidence nor exercised any effective influence over its formation, its admissibility should be restricted to strictly exceptional cases in which the renewal of the

evidence is impossible or excessively burdensome and in which, absent such admission, it would be impossible to prove the relevant facts, thereby causing harm to a more significant right from the standpoint of the legal system, pursuant to the principle of proportionality.

In the absence of such exceptional circumstances, the evidence cannot retain its original probative force against those who did not participate in its production. In such situations, the lack of adversarial participation in the formation of the evidence deprives it of its intrinsic probative value and its character as properly “borrowed” evidence, causing it to enter the destination proceedings merely as a documentary element, whose evidentiary weight must be independently assessed by the judge, rather than derived from the original means of proof.

The adversarial procedure, therefore, cannot be reduced to its merely formal dimension—that is, to the simple subsequent possibility of manifesting on an element already produced. The true adversarial process comprises the right to supervise, influence, and participate in the formation of evidence, and not only to react to it after its incorporation into the records. To admit that the adversarial process is fully supplied only in the process of destination would be equivalent to emptying the very constitutional logic of the production of evidence.

At this point, the understanding adopted by the Superior Court of Justice in AgInt no AREsp 1.333.528/SP reflects a predominantly formal conception of the adversarial principle, insofar as it considers the mere notification of the parties to comment on the transferred evidence to be sufficient. For the Court, the substantial identity of the parties and the possibility of subsequent challenge would be sufficient to legitimize the use of such evidence.

This approach, however, departs from the notion of substantive adversarial participation advocated in this study, which is grounded in the effective possibility of influencing the formation of the evidentiary material. While the STJ prioritizes subsequent procedural regularity, this work maintains that the legitimacy of borrowed evidence depends primarily on the dialogical quality of its original production.

The issue, therefore, is not a mere doctrinal disagreement, but rather a conflict between two distinct models of adversarial process: a formal model, centered on the possibility of subsequent manifestation, and a substantive model, oriented toward participation in the construction of evidence. The criticism of the precedent lies precisely in this institutional choice for a minimalist conception of adversarial participation, which tends to weaken its epistemological function.

The STJ’s position, in truth, reveals a misunderstanding of borrowed evidence as a mechanism for transferring evidence originally produced into destination proceedings. It reflects the assumption that borrowed evidence is not merely the documentation of prior proof, but rather proof that automatically retains the same probative force as that originally produced.

However, where a party has not had the opportunity to participate effectively in the formation of the evidentiary means—whether through the submission of

questions to the expert, monitoring the expert examination, presenting technical challenges, directly examining witnesses, or delimiting the facts relevant to the dispute—it cannot be said that substantive adversarial participation has occurred. In such cases, mere subsequent commentary on already finalized evidence does not allow for the reconstruction of the spaces of influence necessary for its democratic and procedural legitimacy.

Adversarial participation is not exhausted by the right to react to the outcome of the evidence; it essentially encompasses the right to intervene in its process of formation. When this space is suppressed, the evidence loses a significant portion of its cognitive reliability and, consequently, cannot retain the same probative force it would have had if produced under full adversarial scrutiny.

In this sense, the participatory adversarial process assumes a central role in the legal regime governing borrowed evidence. It not only conditions its formal admissibility but also determines the intensity of its probative force in the destination proceedings.

From a procedural standpoint, the party against whom borrowed evidence is used has specific instruments to challenge it in the destination court, being entitled to question not only its substantive content but also the regularity, methodology, and validity of its production in the original proceedings. Such challenges may be raised through specific submissions, requests for supplementary evidence, additional expert questions, or pleas of nullity, as appropriate.

Accordingly, the control of borrowed evidence is not limited to the internal analysis of its content but also extends to the external verification of its conformity with procedural guarantees in the original proceedings, especially with respect to adversarial participation, impartiality, and publicity.

It is precisely this substantive adversarial dimension that transforms borrowed evidence into a constitutionally legitimate technique of evidentiary circulation, capable of reconciling procedural economy, judicial efficiency, and the effective protection of fundamental procedural rights.

Finally, an addendum is required regarding the functional and utilitarian character of the borrowed evidence. Its admissibility is also justified by the need to implement the fundamental right to a reasonable duration of the process and to procedural speed (art. 5, LXXVIII, CF/88). In a procedural system committed to the effectiveness of judicial protection, it is not rational to require the repetition of evidentiary acts already regularly produced when there are no real gains in terms of cognitive depth and when such repetition would only contribute to the aggravation of procedural slowness.

As Marinoni points out, borrowed evidence avoids the useless repetition of procedural acts, rationalizes the investigative activity, reduces costs for the parties and for the State itself, and prevents the jurisdictional provision from being artificially delayed by evidentiary redundancies (Marinoni, 2017). It is, therefore, a technique that combines efficiency, economy, and cognitive depth, as long as it is applied under strict constitutional limits, especially those related to the adversarial prin-

ciple and broad defense.

William Santos Ferreira, in turn, frames the borrowed evidence within the field of the principle of maximum efficiency of the means of proof. The greater the capacity for rational use of the evidence already produced, the greater the ability of the procedural system to perform its constitutional function with less sacrifice of time, resources, and jurisdictional effort. From this perspective, the borrowed evidence does not constitute an “undue simplification” of the evidentiary activity but, on the contrary, reveals its technical sophistication within a cooperative model of process.

However, even when justified for reasons of efficiency and economy, the borrowed evidence can never dispense with the observance of the participatory adversarial procedure. Although its use is guided by a vector of procedural rationalization, it is the adversarial process that continues to function as an insurmountable limit of constitutional legitimation of the technique. Efficiency, in this context, does not impose itself as an autonomous or absolute value but remains functionally subordinated to the preservation of the fundamental guarantees of the process.

Thus, even in cases where the borrowed evidence is necessary to avoid the repetition of acts, to circumvent the impossibility of renewing the evidence, or to ensure the reasonable duration of the process, the participatory adversarial process must always be preserved, either by the effective participation of the parties at the origin or by the reconstruction, even if mitigated, of the spaces of influence in the destination process. It is precisely this balance between procedural efficiency and the democratic density of the adversarial process that ensures the borrowed evidence its full legitimacy in the Constitutional State.

6. Conclusion

Evidence, in contemporary civil procedure, goes far beyond its merely instrumental function, assuming a structural position in the legitimation of jurisdiction, in the rational construction of truth, and in the concrete realization of justice.

The right to evidence emerges as an implicit fundamental right, directly connected to due process, adversarial proceedings, the full right of defense, and access to justice. The search for truth, in turn, is not a remnant of an inquisitorial model, but a minimum epistemological presupposition of a just decision.

The participatory adversarial procedure, consolidated by the Code of Civil Procedure of 2015, in turn, transforms the evidentiary activity into a privileged space for cooperation, dialogue, and control of decision-making rationality.

In this context, borrowed evidence is presented not as a means of proof, but as a legitimate way of entering evidence into the process, as long as it is submitted to participatory adversarial proceedings and rational evaluation. At the same time that it promotes procedural economy and a reasonable duration of the process, borrowed evidence reinforces the fundamental guarantees of judicial activity.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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