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THE NEMO TENETUR SE DETEGERE IN THE CIVIL PROCEDURE. ANALYSIS OF THE ARTICLE 379 OF THE CPC

O PRINCÍPIO NEMO TENETUR SE DETEGERE NO PROCESSO CIVIL. ANÁLISE DO ARTIGO 379 DO CPC

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RESUMO

O presente trabalho verifica parâmetros para uma adequada interpretação do direito de a parte não produzir prova contra si, previsto no artigo 379 do Código de Processo Civil. Para tanto, busca uma compreensão histórica do dito instituto com base no direito de não autoincriminação. Demonstra, a partir de busca jurisprudencial, que há julgados que aplicam o artigo 379 do Código de Processo Civil, de maneira descontextualizada. Propõe uma verificação de contexto para a aplicação do referido direito constante do aludido dispositivo legal, conjugando-se a garantia do direito à não autoincriminação com a dimensão de obrigação de colaboração das partes no processo civil.

Palavras-Chave: Prova. Autoincriminação. Colaboração. Ônus.

ABSTRACT

This work analyzes parameters for appropriate interpretation of the right of the party not to produce evidence against itself, provided for in the article 379, of the Code of Civil Procedure. Therefore, it seeks a historical understanding of said institute based on the right of non-self-incrimination. It demonstrates, from a jurisprudential search, that there are judgments that apply the article 379 of the Code of Civil Procedure in a decontextualized manner. It proposes a verification of the context for the application of the mentioned right contained in the mentioned legal provision, combining the guarantee of the institute of non-self-discrimination with the dimension of the obligation of collaboration of the parties in the civil procedure.

KEYWORDS: Evidence. Self-Incrimination. Collaboration. Charge.

1 INTRODUCTION

Evidence is a fundamental part of the process. The elements and information brought to bear on an ongoing case influence the judgment for one side or the other. It is no coincidence that the Federal Constitution itself establishes, in Article 5, item LV, that "litigants, in judicial or administrative proceedings, and the accused in general are assured the right to an adversarial proceeding and a full defense, with the means and resources inherent to it", which includes evidentiary activity. In fact, the Federal Supreme Court itself recognizes the right to evidence as inherent to due process of law[1]. Article 379 (caput) of the current Code of Civil Procedure provides that the party has the right not to produce evidence against itself. According to the wording of the sections of the mentioned legal provision, the party has the duty to "I - appear in court, answering what is questioned of him; II - collaborate with the court in carrying out any judicial inspection that is deemed necessary; III - perform any act that is determined for him", preserving the right not to produce evidence against himself (as provided for in the main section).

The provision in question is very important because it is an innovation in civil procedural legislation, since the Code of 1973 did not contain a provision to this effect.

If one reads the provisions of the heading of the provision in question in isolation from other legal frameworks, one could come to the conclusion that the

[1] RMS 28517 AgR, Rel. Min. Celso de Mello, 2ª Turma, j. 25.03.2014, acórdão eletrônico DJe-082 divulg. 30.04.2014, public. 02.05.2014.

party can simply avoid carrying out any diligence if this could involve the production of probative material that is contrary to their interests.

However, this does not seem to be the best interpretation of the provisions of the heading of article 379 of the Code of Civil Procedure. In this sense, it is said that the literal interpretation of the provision "could lead to the absurd conclusion that the party would be free to collaborate with the production of all evidence that could lead to a result unfavorable to their claim" (CONCEIÇÃO, 2016, p. 240).

Imagine, for example, if someone, invoking the mentioned provision, refuses to take the DNA test in a paternity investigation. Clearly, this attitude would run counter to the legal framework resulting from the evolution of the Precedent 301 of the STJ (according to which paternity would be presumed for anyone who refused to submit to a DNA testing) to the Article 2-A, sole paragraph, of the Law 8.560 of 1992 (which establishes that "the refusal of the defendant to submit to the genetic code testing - DNA - will generate a presumption of paternity, to be assessed in conjunction with the probative context").

It is important to study the article 379, caput, of the Code of Civil Procedure, since there is room, rectius, need to verify the meaning to be extracted from the provision contained in this legal provision.

This being the case, it must be verified whether it is possible to draw up marks for a correct reading of the heading of the article 379 of the Code of Civil Procedure. The aim is to verify the most appropriate interpretation of the article 379 of the Code of Civil Procedure, insofar as it establishes the right of the party not to produce evidence against itself.

In order to prepare this paper, we evaluated doctrinal excerpts regarding the provision set out in the article 379, caput, of the Code of Civil Procedure. Considering that the mentioned law came into force in 2015 and entered into force in 2016, it should be noted that it is still in its validity, as well as the doctrinal material produced since then. In this part, the research will be bibliographical, in terms of the means employed.

A brief overview of the historical perspective of the right of the party not to produce evidence against him or herself is also provided, verifying a root of guarantee in the criminal process in favor of the accused.

Still in relation to the means, the research looked at the analysis of judgments from Brazilian courts to verify the applicability of the idea raised.

As for the purposes, it can be said that the work will be descriptive, since it aims to characterize the phenomenon surrounding a legal provision. It can also be said that the research will be exploratory, since it aims to obtain an overview of the subject to be addressed (especially in the part where judgments will be verified).

2 A BRIEF HISTORY OF THE RIGHT TO SILENCE. THE CHARACTER OF THIS RIGHT AS A GUARANTEE ARISING FROM CRIMINAL PROCEDURAL LAW INSPIRED BY THE AMERICAN CONSTITUTION

It's interesting to see - still briefly and perfunctorily - a historical outline of this institute in order to understand the fit of the provision currently established by the heading of the article 379 of the Code of Civil Procedure.

The right of a party not to produce evidence against them has its historical roots in criminal law.

Although the precise origins of the nemo tenetur se detegere principle are somewhat uncertain, it is known that torture was used to obtain confessions in ancient times and in the Middle Ages. It was, however,

> Com a evolução do pensamento racional, à proporção que foram ampliadas as proteções aos direitos individuais e limitando a voracidade punitiva estatal, gradativamente, o emprego da coação contra o indivíduo no interrogatório foi sendo minimizado até a completa extinção de tais métodos desumanos. Entretanto, persiste até os dias de hoje em alguns sistemas jurídicos de países subdesenvolvidos as consequências negativas da possibilidade de silenciar e que tal atitude seria interpretada em seu prejuízo.
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> Felizmente, a evolução do princípio nemo tenetur se detegere foi gradualmente sendo entendida como uma diretriz contrária à presunção de culpabilidade em desfavor do acusado que se mantivesse calado e exigisse seu direito ao silêncio. (MALAQUIAS, 2014)

In 16th century Brazil, the Portuguese ordinances (although they did not prohibit torture) did not oblige criminals to testify about incriminating facts. The Code of Criminal Procedure of 1832 allowed the accused to remain silent. The authors of this article have already published a work stating that "the right to silence came to Brazil from the inspiration of the United States Constitution, which began to provide for the possibility if the defendant remained silent from

the 5th Amendment to that Constitution (in 1787)" (FREIRE JUNIOR, BEZERRA, 2023, p. 126).

The doctrine based on the Constitution of 1891 and on the Decree 848 of 1890 understood that silence was permitted (since the positive law of these two laws did not expressly recognize the right to silence, but did not prohibit it). However, with the advent of various procedural laws in the States (as determined by the Constitution of the Empire) there were codes that made no provision for the silence of the defendant; there were codes that provided that silence could be interpreted to the disadvantage of the defendant (LIMA, 2016, p. 473).

Subsequent to these marks, the article 186 of the Code of Criminal Procedure (in 1941) stated that the silence of the accused, at the time of his interrogation, could be interpreted to the detriment of his defense[2].

The above provision established by the criminal procedure law was not accepted by the order inaugurated by the Federal Constitution of 1988, in view of the provisions of the article 5, item LXIII, of the constitutional text, according to which the prisoner will be informed of his rights, "including the right to remain silent"."[3]. It is a logical consequence of this construction to state that "this provision is sufficient to affirm the right to silence itself, insofar as it only warns of a right that exists", according to an excerpt from the ADPF 444/DF ruling. This right is also consistent with the sections LIV, LV and LVII of the same article 5 of the Federal Constitution, since the prohibition of self-incrimination stems from a broad defense (NERY JUNIOR, 2016, p. 292).

Decades later, the legislative amendment to the Code of Criminal Procedure, conveyed by the Law No. 10,792 of 2003, endowed the mentioned article 186 with the provision that the accused would have the right to remain silent (caput) and that his silence could not be interpreted to the detriment of the defense (sole paragraph).

The right of the defendant to remain silent has also been provided for in human rights treaties to which Brazil is a signatory, which set out the right of the

[2] Eis o teor do referido dispositivo: "Art. 186. Antes de iniciar o interrogatório, o juiz observará ao réu que, embora não esteja obrigado a responder às perguntas que lhe forem formuladas, o seu silêncio poderá ser interpretado em prejuízo da própria defesa".

[3] Ao que tudo indica, a inspiração para essa previsão é oriunda da Constituição dos Estados Unidos. Há de se destacar que o direito em comento não estava previsto originariamente na Constituição dos EUA. Ele foi veiculado pela V Emenda, em 1787. Antes, constava da Constituição do Estado da Virgínia, conforme anota VALE, Ionilton Pereira do. O direito ao silêncio no interrogatório no direito processual penal pátrio e comparado. Revista dos Tribunais, vol. 929/2013, p. 419-458, mar./2013, p. 3. Vide, também, ALVAREZ, Anselmo Prieto; NOVAES FILHO, Vladimir. A constituição dos EUA: anotada. São Paulo: LTr, 2001, pp. 71-72.

accused not to testify against himself – article 14, 3, "g", of the International Pact on Civil and Political Rights (in force ex vi of the Decree no. 592, of 1992) –, and article 8, 2, "g", of the Pact of San José da Costa Rica, (in force ex vi of the Decree no. 678, of 1992).

As such, it should be noted that "the possibility of the investigated/accused being forced to testify against themselves" is prohibited at any level (BEDÊ JÚNIOR and CARMINAT, 2020, p. 9).

This historical account is brief, but sufficient to open up a perspective that makes it possible to see that the provision set out in the article 379 of the Code of Civil Procedure has its roots in the criminal sphere, in order to protect the accused from the punitive zeal of the State.

In the light of the fact that the protection laid down in the article 379 of the Civil Procedure Code is intended to avoid the situation in which the subject attacks his own freedom, it is worth noting a critical point regarding the context of the English legal system, according to which the mentioned guarantee for criminal defendants cannot be used in the same way in civil procedure. In this respect, see:

> No mesmo sentido, Murphy e Glover apontam para a recente (e forte) tendência jurisprudencial na Inglaterra no sentido de que o direito à não autoincriminação não deve ser utilizado para evitar a disclosure nos processos civis. Tem-se entendido pela necessidade de se diferenciar a exibição de documentos do testemunho para efeitos do privilégio, havendo muitos críticos à aplicação do direito à não autoincriminação no primeiro caso. Em outras palavras, não seria razoável invocar o direito a não se autoincriminar para evitar a apresentação de documentos relevantes que já existiam independentemente do ato que ordenou sua revelação. Nesse sentido, embora o privilégio contra a autoincriminação tenha previsão legal ampla na Inglaterra, através do Civil Evidence Act de 1968, na s. 14,53 não são poucos os críticos dessa aplicação (NARDELLI, 2015, p. 13).

In other words, the transposition of the right not to self-incrimination in the criminal sphere with the corresponding right not to produce evidence against oneself in civil proceedings must be viewed with caution. This right was a real breakthrough in terms of criminal procedural protection for the accused, whether in scenarios that allowed torture (and made use of it) as a way of building convictions, or in scenarios that gave the silence of the defendant in criminal proceedings a weight against the defense itself.

In the context of civil proceedings, other coordinates must be considered, as will be discussed in Topic 4 of this paper.

3 JURISPRUDENTIAL REPERCUSSIONS ON THE PROVISION CONTAINED IN ARTICLE 379 OF THE CODE OF CIVIL PROCEDURE, TO THE EFFECT THAT THE PARTY MAY NOT PRODUCE EVIDENCE AGAINST ITSELF

In relation to the article 379 of the Code of Civil Procedure, the doctrine states that "with the exception of cases in which the law expressly guarantees the party the right not to produce evidence against them - as seen above - there is, as a rule, a duty to collaborate" (MARINONI, ARENHART and MITIDIERO, 2016, p. 261). It is also said that "[n]o party can be required, in adversarial proceedings, to make statements that could benefit the opposing party and act to the detriment of the declarant" (NERY JUNIOR and NERY, 2016, p. 1,098).

After stating that the content of the article 379 of the Code of Civil Procedure should be viewed with parsimony, Paulo Henrique dos Santos Lucon maintains that "non-interference in the freedom of the individual is imperative in any and all spheres, however, in civil and administrative matters, there are rules by which the inertia of the party works to the disadvantage of the party" (LUCON, 2015, p. 586).

It should be borne in mind that there are doctrinal positions that indicate the proper interpretation of the rule in the article 379 as a protection against possible criminal repercussions to the detriment of one of the parties, as will be discussed in Topic 4 of this paper.

Incidentally, and in the same vein as these doctrinal positions, there is a judgment according to which the principle nemo tenetur se detegere cannot be interpreted in civil proceedings in the same way as in criminal proceedings, so that the provision set out in article 379 of the Civil Procedure Code "does not exempt either party from complying with an act that has been determined for them, solely on the grounds that it may harm them"[4].

There are, however, judgments collected from the survey that do not make as good a cut as the decision mentioned above. These judgments will be discussed in the next sub-item.

[4] TJSC - AgIn 4008380-71.2018.8.24.0000 - 3.ª Câmara de Direito Comercial - j. 4/10/2018 - julgado por Gilberto Gomes de Oliveira.

3.1 A sample of judgments from various Brazilian courts on the Article 379 of the Code of Civil Procedure. The use of this provision as a reinforcing reasoning in judicial decisions

In a search of judgments made through jurisprudential search engines in these first years of the current Code of Civil Procedure, in various courts, it is possible to see that there is not really any systematic treatment of the provision set out in the article 379 of the mentioned Procedural Legislation.

It's true – and it's worth noting – that in the courts, most of the mentions of the article 379 of the Code of Civil Procedure have to do with orders to the parties to collaborate in the procedural process[5].

However, what raises concerns is the fact that, on a case-by-case basis, we see the use of this legal provision in terms of a latere argument, using it as a mere reinforcement argument; a fact that is liable to generate problems, since this use can contribute to an erroneous construction of the meaning of the provision under discussion.

For example, in a case involving a claim for damages for alleged copyright infringement, an appeal was lodged against a court decision that had required one of the parties to submit certain information. The Court accepted the interlocutory appeal, stating that this information was not relevant to the outcome of the case. This would be enough to resolve the issue raised in the appeal. However, the Court invoked – as a latere reasoning – the provision of the article 379 of the Code of Civil Procedure, which preserves the right of the party not to produce evidence against itself[6].

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[5] É o que se observa, por exemplo, nos seguintes julgados: (1) TRF 4ª R.; AC 5065345-20.2017.4.04.7100; RS; Quinta Turma; Relª Desª Fed. Gisele Lemke; Julg. 13/04/2021; Publ. PJe 13/04/2021; (2) TJPA; APL 0007300-45.2012.8.14.0028; Ac. 162802; Marabá; Quinta Câmara Cível Isolada; Rel. Des. Luiz Gonzaga da Costa Neto; Julg. 21/07/2016; DJPA 03/08/2016; Pág. 244; (3) TJMS; APL-RN 0111983-50.2007.8.12.0001; Rel. Des. Dorival Renato Pavan; DJMS 14/04/2020; Pág. 136; (4) TJSC; AC 0000326-91.2011.8.24.0078; Urussanga; Quinta Câmara de Direito Público; Rel. Des. Hélio do Valle Pereira; DJSC 21/08/2018; Pag. 404; (5) TJSP; AI 2184857-89.2019.8.26.0000; Ac. 13373569; São Paulo; Primeira Câmara Reservada de Direito Empresarial; Rel. Des. Cesar Ciampolini; Julg. 04/03/2020; DJESP 11/03/2020; Pág. 2795; (6) TRT 10ª R.; ROT 0000543-91.2017.5.10.0005; Terceira Turma; Rel. Des. José Leone Cordeiro Leite; DEJTDF 05/10/2020; Pág. 2180; (7) TJBA; AP 0023009-86.2007.8.05.0080; Salvador; Segunda Câmara Cível; Relª Desª Lígia Maria Ramos Cunha Lima; Julg. 29/10/2019; DJBA 05/11/2019; Pág. 491; (8) TJSP; AI 2013141-28.2018.8.26.0000; Ac. 12797203; São Paulo; Vigésima Sétima Câmara de Direito Privado; Rel. Des. Campos Petroni; Julg. 20/08/2019; DJESP 29/08/2019; Pág. 2957; (9) TJPR; Ag Instr 1741769-5; Cianorte; Décima Sétima Câmara Cível; Rel. Des. Fernando Paulino; Julg. 07/03/2018; DJPR 02/04/2018; Pág. 134; (10) TJRJ; AI 0028743-88.2018.8.19.0000; Rio de Janeiro; Vigésima Primeira Câmara Cível; Rel. Des. Pedro Freire Raguenet; DORJ 23/10/2018; Pág. 282.

[6] TJRS - AgIn 70070741046 - 6.ª Câmara Cível - j. 27/10/2016 - julgado por Ney Wiedemann Neto - WEB 31/10/2016 - Área do Direito: Civil; Processual; Comercial/Empresarial.

In the judgment of one rescission action researched, the part of the reasoning contained in the judgment that stated that the causal link between an omission of documents and the solution given to the judgment under attack was not proven would be sufficient. Nevertheless, the Court also makes use of the provision set out in the article 379 of the Civil Procedural Legislation, to emphasize that "those who do not produce evidence against themselves do not incur bad faith or malice, in accordance with the 'nemo tenetur se detegere' principle, enshrined in current legislation, such as the art. 379, caput, of the CPC/15"[7].

In the same vein, a certain claim in an appeal was dismissed on the grounds that it was impossible to produce evidence in the appellate sphere (as the Brazilian procedural system generally operates). This argument would be enough to resolve the issue. Subsequently, the impossibility of reversing the burden of proof in the case in question is also raised. This would be another basis for resolving the appeal. However, despite there already being enough material to resolve the challenge brought before the Judiciary, the rapporteur maintains that "[a]fter all, in the form of the art. 379 of the CPC, the defendant is not obliged to produce evidence against itself"[8]. This last part is unnecessary to resolve the appeal.

In an interlocutory appeal filed in a legal personality disregard incident, the respective Judicial Court rejected a request to carry out various steps on the grounds that they would be unnecessary to resolve the dispute and could be carried out by the requesting party itself. In addition to the arguments set out above (which would be enough to settle the judgment), it was stated that, "[o]therwise, the parties are guaranteed the right not to produce evidence against themselves"[9].

In another case, the hearing of one of the parties was deemed unnecessary, and the preliminary claim that the right of defense had been curtailed was dismissed. As in the other cases we visited, this would have solved the problem.

[7] TJMG - Processo 1.0000.16.091627-6/000 - 7.ª Câmara Cível - j. 28/11/2017 - julgado por Belizário de Lacerda - WEB 7/12/2017 - Área do Direito: Civil; Processual; Família e Sucessões.

[8] TJDF; RInom 0701790-87.2016.8.07.0020; Primeira Turma Recursal dos Juizados Especiais; Rel. Juiz Aiston Henrique de Sousa; Julg. 23/02/2017; DJDFTE 08/03/2017; Pág. 614.

[9] TJRJ; AI 0004479-02.2021.8.19.0000; Itaperuna; Segunda Câmara Cível; Rel. Des. Luiz Roldão de Freitas Gomes Filho; DORJ 07/04/2021; Pág. 392.

However, the right of the party not to produce evidence against itself was also raised – once again, as a reinforcing argument[10].

In a court case that was in the execution phase, a request made by the plaintiff, who wanted the defendant to show a document relating to the asset on which the pledge had been made, was rejected[11]. In this case, the plaintiff doubted the validity of the document in question. The core of the grounds for the claim was set out in the following excerpt from the judgment:

> Consoante se infere dos autos do cumprimento de sentença, a agravada coligira o instrumento particular de promessa de compra e venda do imóvel e o termo de imissão de posse da adquirente na posse do bem, de modo que, não assimilando a agravante a higidez desses documentos, deve suscitar incidente de falsidade ou insistir na penhora, assumindo os ônus derivados da sua iniciativa, pois poderá resultar no aviamento de embargos de terceiro em seu desfavor. O que não sobeja possível é se cominar à agravada o ônus de evidenciar a legitimidade dos documentos que exibira, notadamente porque, de conformidade com o artigo 379 do estatuto processual, à parte é preservado o direito de não produzir prova contra si mesmo, e, aventando a agravante a ilegitimidade do instrumento, deve valer-se das vias próprias para infirmá-lo, não se afigurando viável a transposição da fase executiva para nítido procedimento cognitivo.

It should be noted that, in the passage referred to above, in addition to indicating that the party has the right not to produce evidence against itself, it also indicates that there would be proper ways for the party to disprove the document over which there was doubt and also that the onus for doing so would not be on the defendant, but on the appellant. This being the case, it is questionable whether it was appropriate to refer to the provision contained in the article 379 of the Code of Civil Procedure, since it seems that the use of this provision does not in any way alter the court ruling that was issued.

The above comment can also be made in relation to a certain appeal decision in a paternity investigation case[12] in which the appellant claimed that his right to a fair hearing had been curtailed, since his request to summon the plaintiff to provide documentary evidence of his material needs was not accepted. In order to dismiss this claim, the court from which the judgment in question emanated

[10] TJMG - ApCiv 1.0079.15.005668-1/002 - 15.ª Câmara Cível - j. 2/8/2018 - julgado por Tiago Pinto - WEB 10/8/2018 - Área do Direito: Civil; Processual.

[11] TJDF; AGI 07049.54-81.2020.8.07.0000; Ac. 126.0064; Primeira Turma Cível; Rel. Des. Teófilo Caetano; Julg. 24/06/2020; Publ. PJe 10/07/2020.

[12] TJSP; APL 0000526-77.2005.8.26.0038; Ac. 11225287; Araras; Sétima Câmara de Direito Privado; Relª Desª Mary Grün; Julg. 02/03/2018; DJESP 09/03/2018; Pág. 1995.

invoked the rule on the burden of proof, placing this onus on the appellant. In addition to this reasoning (which was already sufficient), it was argued that no one is obliged to produce evidence against themselves, according to the wording of the article 379 of the Brazilian Civil Procedure Code. Once again, this is a judgment in which it was not necessary to mention the legal provision in question.

As well as being unnecessary, the mention of the article 379 of the Code of Civil Procedure in this latest judgment – like the others mentioned throughout this section of the paper – may contribute, as more judgments are handed down over the years, to the construction of unreasonable meanings that fit into any context.

Imagine, for example, in the case of the last judgment reported above, if – since it would not be possible for the party to demonstrate its material need given the provision not to produce evidence against itself – the other party could not submit to the paternity investigation examination either, because it would also be producing evidence against itself.

The legal provision is one and the same. But what makes the example solvable (even with some ease) is the difference in context between one approach and the other (in one, there is a refusal by someone to submit to an examination for genetic verification; in the other, there is a lack of need for someone to demonstrate their material need). That's why an interpretation that takes other elements into account is so important. And that's why it's also important not to make idle references to the legal provision under study, because if it fits in any situation, perhaps nothing else will be resolved by procedural means when there is even the simplest of controversies.

In this regard, to give you an idea of how a lack of systematic understanding of the legal provision under study can lead to an unreasonable application and result in totally different treatments, it is important to note that there have been tax execution motions in which the litigating estate was ordered to attach to the case file a copy of the administrative records that originated the disputed active debt certificate, without this meaning that the party was producing evidence against itself[13]. On the other hand, it has already been stated in other court cases that the public treasury could not be ordered to produce the records of

[13] Isso ocorreu nos seguintes julgados: TJMS; AI 1412159-82.2020.8.12.0000; Primeira Câmara Cível; Rel. Juiz Luiz Antônio Cavassa de Almeida; DJMS 20/10/2020; Pág. 115; e TJMS; AI 1406636-89.2020.8.12.0000; Primeira Câmara Cível; Rel. Juiz Luiz Antônio Cavassa de Almeida; DJMS 15/07/2020; Pág. 193.

administrative proceedings in court, because this would be an obligation for the treasury to produce evidence against itself[14].

These cases demonstrate a lack of standards for reading and interpreting the rule.

4 THE NEED FOR A CONTEXTUALIZED VERIFICATION FOR AN ADEQUATE INTERPRETATION OF THE LEGAL PROVISIONUNDER STUDY

The wording of the article 379 of the Code of Civil Procedure must be seen in context in order to avoid misuse. In the introduction to this article, we mentioned the unacceptable possibility of someone refusing to take a DNA test in a paternity investigation on the basis of the mentioned legal provision.

Let's imagine, just to work on one more hypothesis, in a more elaborate example, that a complaint is filed under the terms of the article 988 of the Code of Civil Procedure. The rapporteur of such an action, based on the article 989, item I, of the mentioned Code, requests information from a certain administrative authority against which an illegality is attributed. Would it be possible - in this merely hypothetical episode - for the said administrative authority, evoking the article 379 of the Code of Civil Procedure, to refuse to comply with the request coming from the judicial authority on the grounds that this would imply the production of evidence against it?

The answer to the above question seems to be in the negative (not just because it is a request). But it must be said that it is precisely in order to avoid situations such as those exemplified above that a reasonably well-constructed interpretation of the legal provision in the Article 379 of the Civil Code must be aimed at.

The examples illustrated above are fictitious. However, there is a case that has already been tried in a Brazilian court that also challenged the common sense of hermeneutic trails. It refers to a lawsuit in which a certain party, after claiming free legal aid, refused to prove that it was hypo-sufficient enough to receive this benefit. The argument put forward by the party behind this refusal was precisely the allegation that complying with the order of the magistrate would mean producing evidence against them. The court in question dismissed the argument

[14] TJPR; AgInstr 0013221-34.2020.8.16.0000; Curitiba; Quarta Câmara Cível; Relª Juíza Cristiane Santos Leite; Julg. 28/03/2021; DJPR 29/03/2021 e TJPE; Ap-RN 0000675-81.1998.8.17.0810; Rel. Des. Jorge Americo Pereira de Lira; Julg. 06/02/2018; DJEPE 16/02/2018

of the party because it would be its responsibility to demonstrate the situation that would give rise to the granting of the gratuity requested[15].

And it is precisely on the basis of this concern (i.e. avoiding the unreasonable use of the article 379 of the Civil Procedure Law) that it is worth stating that

> A nova regra contida no art. 379 do CPC exigirá cuidadosa interpretação sistemática. Bem ao contrário de autorizar o uso de artifícios maliciosos, o que destoaria de todo o sistema processual, que prega a boa-fé, a lealdade, a colaboração e a contribuição das partes com a busca da verdade, a nova norma está a orientar a interpretação da conduta das partes no processo. (GUIMARÃES, 2017, p. 6)

It is therefore essential to establish a minimum parameter for the application of this rule.

In this respect, a historical understanding - still minimal - of the right to non-self-incrimination provides significant support for a proper hermeneutic understanding of the procedural provision that this work deals with.

As discussed in the section 2 of this text, the right of an accused person to remain silent was an advance in terms of a broad defense and adversarial proceedings, against contexts that either allowed torture as a way of extracting convictions, or gave the defendant's silence a weight against his defense intentions. It is essential here to bear in mind the presumption of non-guilt that guides criminal sanctions law, making it inadmissible for the silence of the accused to shift the burden of proof against him.

Differently from this context, in the context of civil procedure, it should be borne in mind that the article 379 of the Code is part of the rules of a civil procedure that was intended to be collaborative with the advent of the current legal diploma. It should not be forgotten that one of the highlights of the current Civil Procedure Law was the "implementation of a collaborative system, in which the Judge and the parties are called upon to dialog and cooperate with each other" (DINAMARCO and LOPES, 2018, p. 38). And it is in this tone that the current Code, being "for all procedural subjects, is therefore polycentric"

[15] Eis o trecho do julgado que afastou a tese da parte: "4. Mostra-se despropositada a inusitada alegação segundo a qual a determinação de comprovação da alegada hipossuficiência equivaleria a determinar à parte fazer prova contra si. Primeiro porque é dever da parte que requer a benesse da justiça gratuita comprovar a alegada necessidade. Segundo porque essa determinação apenas implicaria produção de prova contra si SE os documentos cuja juntada se determinou revelassem a falsidade da alegada hipossuficiência." In: TJPR; Rec 0024611-98.2020.8.16.0000; Maringá; Oitava Câmara Cível; Rel. Des. Hélio Henrique Lopes Fernandes Lima; Julg. 12/04/2021; DJPR 13/04/2021.

(THEODORO JÚNIOR, NUNES, BAHIA, PEDRON, 2016, p. 107). In the same vein, it is argued that

> as partes podem – e têm o direito – de agir estrategicamente, defendendo, de maneira parcial, os seus direitos e pontos de vista. Entretanto, diante da ótica colaborativa, impõe-se o dever ético, já há muito conhecido, derivado do princípio da boa-fé processual e de seus corolários. Destaca-se, por fim, que o Novo CPC também elevou o grau de participação e influência das partes na preparação e formação do pronunciamento judicial, tornando o processo ainda mais democrático e justo. (COUTO, 2017, p. 6)

The parties must collaborate in the procedural environment. This is established by law. In view of the fulfillment of this duty, it stands to reason that the guarantee that the silence of a party silence (or inaction) will have criminal repercussions against it cannot be ignored or forgotten. Axiomatically, for a code that sets itself up as a place for collaboration, there should be a guarantee in line with the principle of prohibition of self-incrimination. It is in this respect that the prediction that the party may not produce evidence against itself, contained in the wording of the article 379 of the Code of Civil Procedure, comes in handy.

Incidentally, the wording given to this provision is in line with the rule that witnesses are not obliged to testify about facts that cause them serious harm (as set out in the article 448, item I, of the Code of Civil Procedure) and with the rule that the party is not obliged to testify about criminal facts imputed to them (as set out in the article 388, item I, also of the Code of Civil Procedure).

In other words, there is a protective limit in favor of the party so that it can exercise its legal duty to collaborate. This limit, however, does not have the power to empty or remove the rules on the burden of proof that can operate - in the civil sphere - against the same party. Civil disputes continue to be resolved on the basis of the rules governing the burden of proof.

It is within this context that the doctrinal line makes sense, asserting that the limitation set out in the mentioned article 379 must be read in the light of the guarantee of non-self-incrimination, i.e. the party must make use of this right in order not to be subjected to any effect of criminal prosecution (CONCEIÇÃO, 2016, p. 240)[16]. Also in line with this tone, the mentioned provision states that "the purpose of invoking it in civil proceedings is to prevent any evidence that

[16] Também no mesmo sentido foi o enunciado nº 51, do Fórum Permanente de Processualistas Civis: "(art. 378; art. 379) A compatibilização do disposto nestes dispositivos com o art. 5º, LXIII, da CF/1988, assegura à parte, exclusivamente, o direito de não produzir prova contra si em razão de reflexos no ambiente penal".

may be revealed from being used in a criminal case" (NARDELLI, 2015, pp. 16-17). In a similar vein to these notes, there is also a record according to which it is recognized that the right set out in the mentioned provision - that is, the right not to produce evidence against oneself - generally takes place in the criminal procedural sphere; however, it can also apply in civil proceedings, especially when there is no specific discipline to the contrary (GAJARDONI, DELLORE, ROQUE, and OLIVEIRA JR. 2016, pp. 297-298).

We return here to what was written at the end of the Topic 3.1 of this work, regarding the fact that it is not advisable to make loose mentions of the provision studied, given that an application of the provision that the party should not produce evidence against itself, in the civil procedural sphere, in a way that is disconnected from other contextual elements could lead to a misunderstanding of what the legislator designed in the article 379 of the Code of Civil Procedure.

In this respect, it is necessary to combine (a) the criminal dimension of the guarantee of the right not to self-incrimination, especially in view of the fact that the silence of the accused or defendant in criminal proceedings is not enough to resolve the burden on the prosecution, with (b) the dimension of the obligation of the parties to collaborate in civil proceedings, without forgetting that in this procedural mode there is a rule of evidentiary burden that affects the resolution of judgments (unlike criminal proceedings).

It is important to situate the right to silence (or inaction) within these coordinates outlined above so as not to lead to confused applications of the provision set out in the article 379 of the Code of Civil Procedure.

Within this spectrum, the approaches to the right of the party not to produce evidence against itself demonstrated in the item 3.1 of this work, made in a loose manner and without a harmonious note with the postulates indicated above, as seen in the judgments visited, do not contribute to the construction of an adequate and well-established understanding in favor of the legal provision under comment.

5 CONCLUSIVE CONSIDERATIONS

Considering that evidence is a fundamental point in the process, it is extremely important to study the legal provision that the party has the right not to produce evidence against him or herself, set out in the article 379, caput, of the Code of Civil Procedure, an innovation of the Procedural Diploma of 2015.

In this work, we have tried to find parameters for a correct reading of the legal provision in question, looking for the most appropriate interpretation of the article in question.

After a brief assessment of the historical perspective of the right of the party not to produce evidence against itself, as well as an evaluation of doctrinal excerpts and judgments from Brazilian courts, it is important to detail the following considerations by way of conclusion regarding the application of the article 379 of the Code of Civil Procedure, with regard to the section in which it guarantees the right of the party not to produce evidence against itself:

(1) historically, the right to silence has been a breakthrough in terms of criminal procedural protection for the accused, whether in scenarios that allowed torture (and used it) as a way of building convictions, or in scenarios that gave the silence of the defendant in criminal proceedings a weight against the defense itself;

(2) the right of a party not to produce evidence against itself cannot be interpreted in civil proceedings in the same way as the right not to self-incrimination in criminal proceedings;

(3) several judgments in Brazilian Courts show that the Courts do not make a well-systematized cut regarding the provision contained in the article 379 of the Code of Civil Procedure, and there is a lack of standard for reading and interpreting the rule;

(4) the wording of the article 379 of the Code of Civil Procedure must be seen in context in order to avoid using this legal provision inappropriately;

(5) the historical understanding of the right to non-self-incrimination provides significant support for a proper hermeneutic understanding of the procedural provision that this work deals with;

(6) the Code of Civil Procedure establishes a duty of collaboration on the part of the parties; however, there is a protective limit in favor of the party so that it can exercise its legal duty of collaboration;

(7) the limit mentioned above does not have the power to empty or remove the rules on the burden of proof that can operate - in the civil sphere - against the same party;

(8) civil disputes continue to be resolved on the basis of the rules governing the burden of proof;

(9) the limitation set out in the mentioned article 379 must be read in the light of the guarantee of non-self-incrimination, i.e. the party must make use of this right in order not to be subject to any criminal prosecution.

In view of the path taken in the text of this paper, it seems necessary to combine (a) the criminal dimension of the guarantee of the right not to self-incrimination, especially given that the silence of the accused or defendant in criminal proceedings is not enough to resolve the burden on the prosecution (b) with the dimension of the parties' obligation to collaborate in civil proceedings, without forgetting that in this procedural mode there is a rule of evidentiary burden that affects the resolution of judgments.

In accordance with what has been articulated in this text, in order to avoid the interpretation according to which, by reading the legal provision under discussion, one can come to the conclusion that the party can simply avoid carrying out diligence as long as this may imply the production of probative material that is contrary to their interest, the scope of the interpretation of the article 379, caput, of the Code of Civil Procedure has to be based on a historical understanding of the right to non-self-incrimination (connected to criminal proceedings) that will fit within the limits of the collaboration to be provided by the party in civil proceedings.

It is the duty of the party to collaborate, but they cannot be forced to act in such a way as to produce evidence that will have criminal effects against them. This reading of the legal provision in question is rooted in the constitutional nature of the right not to self-incrimination and it is in harmony with the provisions of the Code of Civil Procedure, according to which witnesses are not obliged to testify about facts that cause them serious harm (article 448, item I), and the party is not obliged to testify about criminal facts attributed to them (article 388, item I).

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