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THE SEARCH FOR TRUTH IN THE LEGAL PROCESS AND THE EXTRAJUDICIAL FACTORS IN THE PRODUCTION AND EVALUATION OF ORAL EVIDENCE

A BUSCA DA VERDADE NO PROCESSO E OS FATORES EXTRAJURÍDICOS NA PRODUÇÃO E VALORAÇÃO DA PROVA ORAL

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RESUMO

O artigo tem por objetivo analisar se existe um padrão científico para a busca da verdade do processo judicial, bem como se há critérios para se adentar na discussão de possíveis estados subjetivos na produção e valoração da prova acerca dos fatos controversos em uma relação processual. A metodologia, de ordem teórica, com o suporte da abordagem qualitativa, terá como critério uma análise do estado da arte da praxe forense brasileira, notadamente no que diz respeito à prova oral, aliado a conhecimentos advindos de outras áreas do conhecimento. A finalidade é elucidar as limitações cognitivas das testemunhas e dos vieses cognitivos dos julgadores ao valorar a prova.

Palavras-Chave: Verdade. Processo. Prova. Comportamento Judicial.

ABSTRACT

This article seeks to analyze whether a scientific standard exists to search for truth in the judicial process, and whether there are criteria to enter into the discussion of potential subjective states in the production and valuation of evidence about controversial facts in a procedural legal relationship. The

methodology is theoretical in nature and supported by a qualitative approach. Its criterion is an analysis of the state of the art of the Brazilian forensic practice, particularly regarding parol evidence, associated with knowledge coming from other areas of knowledge. The goal is to clarity the cognitive limitations of witnesses and the cognitive bias of judges when valuating evidence.

KEYWORDS: Truth. Process. Evidence. Judicial Behavior.

INTRODUCTION

The article aims to problematize evidentiary standards and the methods of producing and valuing evidence in the judicial process, especially oral evidence. It seeks to systematize the context of the search of the judge for truth and the subjective states that can influence decision-making. A legal reflection is made on the traditional way developed by the procedural system to produce and value evidence, based on a vision of cognitive neutrality and presumptivism.

The aim is to bring the existing legal problems of the normative model of procedure and an interdisciplinary approach to the analysis of the possible extra-legal interferences identified in the evidential context. Therefore, it is questioned whether the existing evidential model in the judicial process effectively pays attention to the search for truth and to external factors in the production and valuation of evidence that can influence decision-making.

The search for truth in the process has not turned to any kind of technical or scientific approach based on criteria of limited rationality. In the same way, the evidential context in a court case, especially in the production and evaluation of oral evidence, does not involve other areas of knowledge. The psychology of testimony presents thematic and methodological suggestions that have been consolidated in the scientific environment.

The article will be developed from an analysis of the general theory of law, initially constructed with a positivist bias, and a comparison will be made with the contemporary studies that are carried out to assess judicial behavior, especially in a judicial process that seeks to reconstruct the truth that occurred in the phenomenal world and which, for this purpose, has several parties involved, including witnesses.

1 THE DEMOCRATIC RULE OF LAW

In a Democratic Rule of Law, an initial analysis of its integral elements is essential in order to arrive at a procedural model that is in line with the Federal Constitution. The Constitutional or Rule of Law, in which rights of the citizens are established, powers are divided and legality is respected, takes on a social position, to the detriment of the liberalism of yesteryear (BONAVIDES, 2018. p. 139).

According to J. J. Gomes Canotilho, "Constitutionalism is the theory (or ideology) that erects the principle of limited government indispensable to the guarantee of rights into a structuring dimension of the political and social organization of a community" (CANOTILHO, 2003. p. 100). Fundamental rights and freedoms are mechanisms for controlling this state activity, and social rights demand more proactive conduct from the State.

With regard to democracy, the emergence of which dates back to Ancient Greece, its enduring nature does not imply identity of concept over time. In its origins, it sought to be the government of the people and for the people, based on the idea of freedom. Since its advent, democracy has always been the target of the most varied criticisms, which sought to gauge whether it was the best or the worst of regimes. Those opposed to the regime at the time argued that in a system where everyone was in charge, no one would obey.

In capitalist states, the democratic principle is realized in different degrees: legislative function to a high degree; administrative function to a medium degree; and judicial function to a low degree. The rule of law stipulates that administrative and judicial functions should be determined as far as possible by general rules of law, in order to avoid arbitrariness (KELSEN, 2000. p. 269).

After this brief analysis of the Democratic State, we move on to the study of law. Law, broadly speaking, establishes a set of mandatory rules and principles to regulate coexistence in society. Through the legal norm, the world of "should-be" is established, which is guided by the culture, ethics and morals of a given historical context, as it reflects a value judgment (axiological).

The discussion of the State from a legal point of view involves normativity, in the sense of obligation, of imposition, so that individuals are compelled by a sovereign authority (KELSEN, 2005. p. 273). Failure to comply with this imposition leads to a legal sanction, which implies the application of a penalty to the individual who has acted against the desirable interests of the State.

One point that should be highlighted is that law and morality are connected but independent institutes. According to classical doctrine, Law would be the

"ethical minimum", in such a way that, representatively, they are equivalent to concentric circles, with the larger circle corresponding to Morality and the smaller circle to Law (REALE, 2009. p. 46). The main distinction between the institutes is that Morality cannot be imposed on citizens, unlike Law, which is enforceable (REALE, 2000. p.8).

The State and the Law follow three fundamental directions: the technical-formal, the sociological and the culturalist (REALE, 2009. p. 2). The technical-formal direction is based on School of Pure Law of Hans Kelsen, which establishes that Law is a science whose object is the study of norms and must be separated from other sciences (KELSEN, 2009. p. 1).

In turn, the sociological approach sees law as a social fact, and norms reflect the context of a certain conjuncture in society (REALE, 2009. p. 2). In relation to the dimension of legal culturalism, "[...] it integrates contemporary historicism and applies, in the study of the State and the Law, the fundamental principles of Axiology, that is, the theory of values according to the degrees of social evolution" (REALE, 2000. p. 8).

The combination of the three fundamental directions of the State and Law forms the so-called three-dimensional theory, which draws its founding elements from each of the schools: fact, value and norm (REALE, 2009. p. 65). There is a dialectic of implication, i.e. one dimension interferes with the other, without there being any confrontation between them. The three-dimensional theory considers law to be a historical-cultural element, i.e. the fruit of the conceptions of society (REALE, 2010, p. 57).

Law needs the existence of a State in order to have a solid basis for application. Likewise, the institutionalization of power and the concentration of its exercise in a few agents require the intersection of the Law. In turn, coercion, which is necessary for the survival of the State, requires parameters that are surrounded by the Law, which delimits state action (MIRANDA, 2019. p. 6-7).

In order to analyze the perspective of the Rule of Law and its vicissitudes in the current scenario, it is necessary to go into detail about the analysis of the Law as a social phenomenon and contemporary to the edition of legal norms. The legal system is the set of rules that structure the system. Norms should not be seen in isolation, but in the systematic context of the legal system. According to Miguel Reale, a legal norm or rule is "a propositional structure that enunciates a form of organization or conduct, which must be followed in an objective and obligatory manner" (REALE, 2009. p. 95).

This analysis of the Democratic Rule of Law, from a more classical perspective, is reproduced in a judicial process, which is seen as an instrument for satisfying the material right. In order for the subjective right of action to be exercised, certain parameters are established so that fundamental rights and guarantees are respected. When establishing methods for obtaining the substantive right, among other criteria, the proof of facts that gives rise to the normative framework and justifies the claim is defined. This brings us to the analysis of proof and truth in the judicial process.

2 EVIDENCE AND TRUTH IN LEGAL PROCEEDINGS

Evidence is analyzed in the most diverse areas of knowledge, such as the legal field, logic, epistemology and psychology. From a legal perspective, proof has a threefold meaning: as an activity, a means and a result. The first dimension is analyzed as the act of proving, which refers to the burden of proof. The second meaning refers to the instruments available in the legal system to prove a certain fact, such as testimonial, documentary or expert evidence. Finally, the purpose of evidence is to form the conviction of the judge.

The contact of the judge with the evidence occurs throughout the process, from the moment the evidence is requested by the party, goes through the admissibility trial and is then produced in the process and, in the end, evaluated by the magistrate. In relation to this last stage, the legal system adopts the system of motivated judgment or rational persuasion, which states that there is freedom to evaluate the evidence, but with the need to explain the reasons for the judgment.

The activity of evaluating evidence is complex and the challenge is to delimit the discretion granted to the magistrate, so that the parties can exercise effective control over the judicial decision. Jordi Ferrer Beltrán analyzes the joint result of evidentiary activity in terms of propositional attitudes, which can be developed into three models. According to the author, the first model consists of linking the proposition to the belief of the judge in its truth; the second links proof to a proposition of knowledge; and the third presupposes linking proof of a proposition to acceptance of its truth (BELTRÁN, 2017. p. 85-86).

The traditional perception of evidence uses the discourse of the search of the judge for truth as its primary objective, and there is even a classic distinction between the search for real or material truth and formal or procedural truth (RUÇO, 2017. p. 115). The former is used more frequently in criminal

proceedings, on the grounds that legal assets are more relevant in this state instrument. On the other hand, in civil proceedings, it is content with the truth existing in the process (BELTRÁN, 2017. p. 67).

This view is outdated, as it is currently held that the truth in the process is a utopia, as what exists is an approximate, relative or probable correspondence (TARUFO, 2014. p. 29). Piero Calamandrei, in a classic work that portrays the problems of justice, points out that there are three dimensions to the truth in the process and that it can appear differently depending on the angle from which it is observed (CALAMANDREI, 2000. p. 122).

This search for truth, in a way, ends up being relativized in the process in certain contexts, because there is in the legal system what has been called a reduction in the requirements of proof (MARINONI; ARENHART, 2015. p. 247), which culminates in allowing subjective states (TRINDADE, 2016, p. 17-18) in the valuation of evidence by the judge, such as indications and presumptions, notably judicial presumptions also known as maxims of experience or rules of experience (STEIN, 1999, p. 27).

In this context of the impossibility of obtaining the truth, as well as the legal provision of the system for, in certain cases, allowing the use of subjective states to produce and value evidence, we are looking to see if the procedural system has an effective methodology for carrying out procedural activities that will have a value burden and could influence the decision making of the magistrate.

Most of the time, the object of the evidence is controversial and relevant facts. With regard to testimonial evidence, as there is a clipping of past facts (BELTRÁN, 2007. p. 32), the use of the memory of people who are questioned in court is salutary, so that it is possible to inquire about its fallibility (SOUSA, 2017. p. 24-25), as it is subject to forgetfulness and contamination. While this fallibility of the witness must be a fact to be considered, there are also extra-legal factors that can be taken into account by the judge, because our rationality is limited.

The methodologies inherent in the search for truth and the production and evaluation of oral evidence are poorly developed in judicial decision-making. Furthermore, the theory of judicial decision-making, considered in isolation, does not solve the problem. Although the argumentative context of justification helps in the search for the stability of the law, based on judicial decisions that scrutinize the arguments put forward in the decision, the context of discovery remains somewhat enigmatic.

In this context, there is, for example, the construction, in criminal proceedings, through the jurisprudence of the Superior Court of Justice, which has a consolidated understanding to the effect that between the thesis supported by the word of the victim and the factual allegations of the accused, the former must prevail in crimes committed on the sly. A study of the judgments on the subject, however, shows no methodology or justification, apart from the nature of the crime and the quality of the victim, to justify this action.

IPEA Report No. 59 - Scientific advances in the psychology of testimony applied to personal recognition and forensic testimony - diagnosed, in various regions of Brazil and with actors from different institutions (police, Public Prosecutor's Office and the Judiciary): i) the lack of scientificity attributed to oral evidence; and ii) the lack of a method for collecting, storing and using it[1].

This context increases the potential for miscarriages of justice, according to data from the Innocence Project, which listed testimonial evidence as the frequent cause of wrongful convictions. On the website of the Project, it is possible to see cases involving people who have been mistaken for committing a wide variety of crimes.

The justification for this work is the lack of minimum methodological criteria to give oral evidence and evidence dependent on memory the scientific character that has long been demanded by the thematic area of study relating to this area of human activity.

3 JUDICIAL BEHAVIOR AND POSSIBLE EXTRA-LEGAL FACTORS

The analysis of the judicial behavior enters the realm of other areas of law, such as behavioral economics and experimental psychology. These situations reflect the influence of legal and extra-legal factors that affect the decision-making process, including orthodox legal material (rules, binding precedents and dogma); the subjectivity of judges (background, moral values, ideology); and the interaction between judges and other agents (other colleagues, the executive branch, the legislative branch, the press and public opinion).

The traditional model known as legalistic (MELLO, 2011. p. 691) is one in which the judge uses orthodox legal material to make his decision. According to this model, the decision-making process is formed without any major interference from other actors in the formation of the judge's conviction. Based

[1] Pesquisa disponível em http://repositorio.ipea.gov.br/bitstream/11058/8866/1/bapi_17_cap_6.pdfAcesso em 24 ago 2024.

on this understanding, which goes back to traditional legal culture, other lines of thought emerged which began to point out, from the 20th century onwards, possible influences on decision-making, whether through politics (FRIEDMAN, 2005. p. 271), ideology or even the norm itself. Some models have been constructed, including the one developed by the North American legal realism, which envisages intuitive judgment, which is guided by a "hunch" or guess (HUTCHESON, 1929, p. 275-276)[2].

There is also the attitudinal or ideological model, which foresees the existence of possible political and ideological biases in decision-making. This model is well explored in the context of the US where there are two parties (Democrats and Republicans) (MELLO, 2015. p. 57) and the president appoints the "Justice" according to his ideology (POSNER, 2008. p. 20).

Finally, there is the strategic model in which decision-making is based on a viable set of alternatives, in the light of rational choices and game theory. With regard to the first theory, judges would have certain objectives and would take action according to what they believe is most likely to achieve this objective. As far as game theory is concerned, there is a dependence on the actions of third parties, and the magistrate will take their attitude based on the attitudes they expect from others. This model undergoes an analysis of behavioral economics and is based on Cass R. Sustein and Daniel Kahneman[3].

Still in this context of extra-legal factors, public opinion can be considered as an external agent that can influence decision-making. In Constitutional Courts, this position is analyzed from the perspective of a reserve of credibility and the building of political capital. This situation is more evident in cases of structural processes involving political elites[4].

Based on the recognition that there are extra-legal factors that can influence decision-making, the aim is to focus on the judicial process, with a view to identify that neutrality in the search for truth, as the purpose of evidence, may

[2] Também neste sentido: HAIDT, Jonathan A Psicologia Moral e o Direito: Como as intuições direcionam o raciocínio, o julgamento e a busca por evidências. O Direito e suas Interfaces com a Psicologia e a Neurociência. In: NOJIRI, Sergio (org). Curitiba: Apris, 2019.

[3] Vale destacar as seguintes obras destes autores: THALER, Richard H; SUNSTEIN, Cass R. Nudge. Como tomar melhores decisões sobre saúde, dinheiro e felicidade. Tradução Ângelo Lessa. São Paulo: Companhia das Letras, 2019 e KANHEMAN, Daniel. Rápido e devagar. Duas formas de pensar. São Paulo: Companhia das Letras, 2012. Ainda: TVERSKY, Amos; KAHNEMAN, Daniel. The framing of decisions and the psychology of choice. In: ELSTER, Jon. Rational choice. Nova York: New York University, 1986, p. 123-141.

[4] Vale destacar a tese defendida por André Rufino do Vale na Universidade de Brasília que destaca, por meio de entrevista com Ministros do Supremo Tribunal Federal, a possível interferência da opinião pública nos julgamentos. (VALE, André Rufino do. Argumentação constitucional: um estudo sobre a deliberação nos Tribunais Constitucionais. 2015. Tese (Doutorado em Direito – Universidade de Brasília p. 322-325). Disponível em: https://repositorio.unb.br/bitstream/10482/18043/3/2015_AndreRufinodoVale.pdf Acesso em: 24 de ago de 2024.

not be dissociated from subjectivism. In the same sense, the existing body of evidence in a case, whether in its production and/or valuation, can present biases in the procedural narratives (TARUFFO, 2016. p. 73).

In this context, it is possible to see that there is no effective legal concern with the procedure for producing evidence, especially oral evidence, because the procedural actors have no idea what kind of questions are appropriate, or what methodologies can be used to make it easier to remember a certain event.

The capacities and limits of human memory are not taken into account, as it is not observed that memory goes through several stages. The study of memory-dependent evidence is vast and, in this field, the study of memory and techniques for perceiving truth and falsehood spreads into other areas of knowledge (CECCONELLO, William Weber; AVILA, Gustavo Noronha de; MILNITSKY, Lilian. 2018. p. 1.064).

In this context of oral evidence, the psychology of testimony emerges as a method for better effectiveness in the production of evidence in the process, because undeniably the testimony of a witness requires the reconstruction of facts, which can vary in time according to the durability of the procedure. Memory is incomplete because the individual cannot pay attention to everything that is important from the point of view of an investigation (SOUSA, 2017. p. 10-11).

In turn, in the context of valuing oral evidence, it is also possible for the magistrate to make value judgments, which, in a way, denotes a preconceived analysis of a certain fact, whether through beliefs, convictions or ideologies. In addition to this possible prejudice, there are also subjective aspects of the person giving the testimony that could be taken into consideration for a positive or negative judgment of their version of the facts (RAMOS, 2018, p. 48-49 and ALMEIDA, Gabriela Perissinotto de; NOJIRI, Sérgio, 2018, p. 828-829).

FINAL CONSIDERATIONS

The aim was to analyze judicial behavior in the light of procedural aspects, especially evidentiary aspects, at the moments when evidence is produced in court and evaluated by the judge. In this procedural journey, various extra-legal factors can arise which influence decision-making. The methodological focus was on oral evidence, with a view to a brief analysis of the psychology of testimony and the biases that can influence the decision maker.

The disciplines of general legal theory often overlook an extra-legal vision and reproduce the legal system from an ideal perspective. The construction of norms aimed at legal certainty is an essential element for the stability of the law; however, an interdisciplinary analysis must not be forgotten, as there is a direct connection between law and other areas of knowledge.

The justice system has not yet effectively taken into account these extra-legal elements that have repercussions in a judicial process, because the legal systems still reproduce this ideal of the search for truth in the law of evidence and bring the idea of cognitive neutrality into their content. At certain times, albeit sporadically, he recognizes some subjectivism in the production and evaluation of evidence, but does not go into a more specific discussion.

Therefore, this article has sought to demonstrate that extra-legal aspects must be assessed for a more complete and comprehensive analysis of the judicial process. These aspects are evidenced by theories that seek to describe judicial behavior beyond strict legality. The current scenario regarding this analysis is incipient in the Brazilian legal system, which has not paid attention to establishing a scientific standard for the search for truth in the judicial process, as well as creating criteria for entering into the discussion of possible subjective states in the production and valuation of evidence about the controversial facts in a procedural relationship.

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