The use of executive measures and the adequacy system of the 2015 code of Civil Procedure

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1 INTRODUCTION

BASIC NOTIONS ABOUT EXECUTIVE PROCEDURAL GUARDIANSHIP

Before advancing on the theme proposed for analysis in this article, it is necessary to formulate some preliminary notions that allow for the exercise of the necessary critical legal reasoning about executive protection and its nuances.

First of all, it is necessary to understand the scope of the process as a purely legal function, which aims to ensure rights and the application of the law, and its meta-legal function, which turns, for example, also to the social pacification[1] . The most current doctrine recognizes as being a requirement of life in society the existence of the jurisdictional function, materialized from the process, aiming at the elimination of conflicts between its components and, eventually, of the respective dissatisfactions[2] that they may have, whether in the face of a situation of uncertainty or of transgression of rights, where the latter situation will require, in addition to the recognition of the right, its effective practical protection, where the incidence of the executive jurisdictional protection will have greater emphasis.

The object of analysis of this study is precisely the jurisdictional protection aimed at the satisfaction of the right: the executive protection, commonly referred to in legal circles as execution and/or enforcement proceedings.

Cândido Rangel Dinamarco[3] has already warned that the use of the word execution, either by the doctrine or by the legislation itself, has two different connotations and, therefore, one should be aware of the context in which it is applied. One of the possible meanings would be relative to a certain result of ordinary and spontaneous practices, such as, for example, the fulfillment of an obligation provided for in a

[1] DINAMARCO, Cândido Rangel. *Instituições de direito processual civil: volume I*. 10th ed. revised and updated. São Paulo, Malheiros. Year: 2020. p. 163.
[2] DINAMARCO, Cândido Rangel. *Instituições de direito processual civil: volume I*. 10th ed. revised and updated. São Paulo, Malheiros. Year: 2020. p. 164.
[3] DINAMARCO, Cândido Rangel. *Civil execution*. 3rd ed., revised, updated and expanded. São Paulo, Malheiros. Year: 1993. p. 109.

contract. The act of performance, therefore, in this sense, refers to the very action of the subject obliged to fulfill a certain obligation, which does so, that is, it is the fulfillment of an obligation.

Just for conceptualization purposes, the concept of compliance is the fulfillment of the purpose effectively pursued by the subjects[4] of the bond relation. This is a functionalized way of identifying the fulfillment, freeing oneself from the old conceptual ties that only saw the fulfillment if the obligation was performed in the exact form delimited in the bond instrument. Under this perspective, not only the main duty of the obligation should be observed for the characterization of the compliance, but all the other attached duties, also called secondary by the doctrine, which may influence the legal relationship[5] and that can be extracted from the characteristics and circumstances surrounding the obligation itself.

Another conception, however, has always been directed to a set of activities that aims to overcome the state of default - practical ineffectiveness of the rule or crisis of cooperation[6] - and achieve the result naturally expected. In this particular case it is the jurisdictional executive activity, whose scope becomes the accomplishment of the content of the legal rule whose validity has been ratified by means of prior cognitive activity of the Judiciary (*v.g.* condemnatory sentence) or which the legislation itself has conferred enforceability (*v.g.* private contract signed by two witnesses)[7] .

Marcelo Abelha Rodrigues explains that "the executive jurisdictional guardianship must be understood as all state protection by means of the process that has as its purpose the realization, the implementation, the concretion of a legal situation"[8] , thus confirming that it is the available means for the Judicial Power to act directly in the private sphere of individuals, materializing the effects of the legal situations they require, sometimes due to the crisis of uncertainty or sometimes due to the lack of cooperation from the interested parties.

2 THE RIGHT TO ADEQUATE JUDICIAL PROTECTION AND THE TECHNIQUE FOR EFFECTIVENESS OF JUDICIAL DETERMINATIONS

The 2015 Code of Civil Procedure enshrines as one of the missions of the State - represented by the Judge - within the scope of judicial proceedings the adoption of procedural techniques necessary to enforce the decisions rendered within the legal-procedural relationship (*see* Article 139, IV).

[4] SCHREIBER, Anderson. *Manual of contemporary civil law*. 3rd ed. rev. e ampl. São Paulo, Saraiva Education. Year: 2020. p. 344.
[5] FAORO, Guilherme de Mello Franco. As novas fronteiras do inadimplemento: critérios para um exame funcional da distinção entre mora e inadimplemento absoluto. *In*: Terra, Aline de Miranda Valverde; Gisela Sampaio da Cruz Guedes (Org.). *Inexecução das obrigações: pressupostos*, evolução e remédios. Rio de Janeiro: Editora Processo, 2020, v. 1, p. 5.
[6] ROSADO, Marcelo da Rocha. *Executive techniques for the tutelage of pecuniary obligations in the Brazilian civil process:* general executive clause and the principle of efficiency. Londrina, Thoth. Year: 2021. p. 36.
[7] ROSADO, Marcelo da Rocha. *Executive techniques for the tutelage of pecuniary obligations in the Brazilian civil process:* general executive clause and the principle of efficiency. Londrina, Thoth. Year: 2021. p. 38-39.
[8] RODRIGUES, Marcelo Abelha. *Execution for a determined amount against a solvent debtor*. São Paulo, Foco. Year: 2021. p. 7.

This is the well-known general clause of enforcement of judicial decisions, an innovation of the *new* legislation, which aims to provide adequate means for the provision - effective - of judicial protection, which, as already mentioned, is not completed with the mere delivery of the sentence. After all, as pointed out by Luiz Guilherme Marinoni[9] , there would be no greater contradiction in affirming that there is a fundamental right to obtain a jurisdictional protection, but its execution would not be circumscribed to this guarantee of the jurisdictional party.

Now, it is clear that the right to a satisfactory - executive - procedural technique is inserted in the fundamental right to judicial protection, especially in the logic implemented by the Civil Procedure Code of 2015, in which the right of action began to be designed by the legislator and the enforcers from a constitutional perspective.

Article 1 of the Code of Civil Procedure already announces this commitment of the *new* procedural legislation, where the duty to interpret procedural rules from a constitutionalized point of view is expressly consecrated. Thus, the right of action is no longer reduced to the possibility of being in court or to receive a judgment on the merits, but also to the use of the appropriate procedural technique to obtain the State's protection of the material right claimed .[10]

That is why we state that, according to the current system, it is not right to conceive the right of action as the right to judicial protection, only. The best technique for interpreting this fundamental right requires the recognition, in fact, of the right to adequate jurisdictional protection[11] and the availability of all the techniques for the effectiveness of the jurisdictional protection. This would be the reason why article 4 of the current Code of Civil Procedure has the wording it has today, especially with regard to the provision for the use of satisfactory techniques[12] .

Furthermore, it is precisely in order to meet the primacy of the provision of adequate judicial protection that the general clause of effectiveness of judicial decisions is expressly present in the current model of civil procedure.

2.1 THE TRADITIONAL MEANS OF PROVIDING EXECUTIVE JUDICIAL PROTECTION

In the scope of Brazilian procedural legislation, the execution of the executive activity has always been privileged after ample cognition by the Judiciary on the judicialized matter. This implied the use of executive techniques only in a "final phase" of the judicial process, which - many times - did not allow the adequate protection of the material right from the judicial function.

[9] MARINONI, Luiz Guilherme. *Procedural protection and protection of rights*. 6th ed. revised and updated. São Paulo, Revista dos Tribunais. Year: 2019. p. 140.
[10] MARINONI, Luiz Guilherme; ARENHART, Sergio Cruz; MITIDIERO, Daniel. *Civil procedure course:* protection of rights through common procedure. 7th ed. revised and updated. São Paulo, Thomson Reuters. Year: 2021. p. 787.
[11] NERY JUNIOR, Nelson. *Principles of the process in the federal constitution*. 13th ed. revised, updated and expanded. São Paulo, Editora Revista dos Tribunais. Year: 2017. p. 214.
[12] ARRUDA, Alvim. *New civil judicial litigation in the CPC/15*. São Paulo, Editora Revista dos Tribunais. Year: 2016. p. 340.

This logic arose from the concern in not admitting the use of executive mechanisms without the existence of legal certainty as to the right being challenged[13] .

In this vein, the phase of compliance with the sentence and, subsequently, from the social pressures of the bourgeois class, began to admit that some documents were equated to sentences and would be sufficient to instruct the so-called execution processes[14] , these were the appropriate procedures and procedural moments for the incidence of the executive techniques.

Currently, executive protection also observes these procedures for its incidence, as provided in the special part of the 2015 Code of Civil Procedure, in its Book I, Title II, reserved for the sentence enforcement procedure, and Book II, Title I, reserved for the enforcement procedure.

It is important to emphasize that there is a significant difference between the execution procedure based on an extrajudicial execution instrument and the execution procedure for a judicial execution instrument/compliance with judgment. In the latter, there has already been discussion and exercise of ample judicial cognition on the challenged matter, while in the execution of an extrajudicial enforcement instrument, what we have is only a legally qualified document that may give rise to the use of the enforcement techniques[15] .

Therefore, the legislator's position should be the same when allowing the defendant in the course of executive proceedings based on a legally qualified document to use more varied defensive arguments (*ex* Article 917 of the Code of Civil Procedure) than those that have already been previously submitted to the scrutiny of the Judiciary Branch and are facing, at a second moment, the executive protection based on a judicial execution instrument (*see* Article 525, § 1 of the Code of Civil Procedure).

Notwithstanding this, as it is already known, the procedures provided by the legislator for the enforcement of the executive protection have always been below the expectations of the legal community and of the subjects, obviously. It is only right that the *new* legislation made room for an agreement between the parties on the best procedure and the imposition of the duty of the enforcer of the law to find, in light of the peculiarities of the concrete case, the most adequate executive means[16] .

2.2 THE GENERAL CLAUSE OF ENFORCEMENT OF JUDICIAL DECISIONS

Given the insufficiency of the rigid procedural system, the *new* legislation adopted the provision of open clauses that allow the procedure to be made more flexible, whether by the parties or by determination

[13] MARINONI, Luiz Guilherme; ARENHART, Sergio Cruz; MITIDIERO, Daniel. *Civil procedure course:* protection of rights through common procedure. 7th ed. revised and updated. São Paulo, Thomson Reuters. Year: 2021. p. 756.
[14] MARINONI, Luiz Guilherme; ARENHART, Sergio Cruz; MITIDIERO, Daniel. *Civil procedure course:* protection of rights through common procedure. 7th ed. revised and updated. São Paulo, Thomson Reuters. Year: 2021. p. 759.
[15] MARINONI, Luiz Guilherme; ARENHART, Sergio Cruz; MITIDIERO, Daniel. *Civil procedure course:* protection of rights through common procedure. 7th ed. revised and updated. São Paulo, Thomson Reuters. Year: 2021. p. 760.
[16] RODRIGUES, Marcelo Abelha. *Execution for a determined amount against a solvent debtor*. São Paulo, Foco. Year: 2021. p. 51.

of the judge himself, especially in the choice of the most appropriate executive measure for the case under analysis.

Mazzei and Gonçalves[17] are emphatic in affirming that the current procedural system allows for the flexibilization of procedural enforcement techniques, not only in the scope of importing and exporting techniques between the enforcement process and the execution of a sentence, but with regard to the entire universe of special enforcement procedures existing in the legal system, respecting premises such as adequacy, proportionality, and complementarity.

This characteristic of the executive procedure denotes, precisely, the possibility of making the executive procedural measures more flexible, not only internally to the process, but also externally, that is, directly influencing the executed party's assets.

It is not incorrect to maintain that the judge is no longer bound exclusively to the conviction to pay in order to be able to interfere in the enforcer/debtor's patrimonial sphere, since he can now use the executive technique as a way to enforce the previous judicial decision, even if not necessarily linked to an obligation to pay.[18]

This is precisely the power conferred by the general clause of effectiveness of decisions. The judge, as the decision-making authority, enjoying his asymmetric position in the legal-procedural relationship with the parties[19] , may - and should - make use of the appropriate and necessary means for the confirmation of the practical result expected from his decisions.

It is, moreover, a reflection of the principle of adequacy of the procedure inserted as a duty of the judge as manager of the process, who must act to adapt the procedure and, consequently, its techniques, with a view to providing adequate and effective judicial protection to the case under analysis.[20]

Thus, the judge may use inductive, coercive, mandatory or subrogation measures to enforce the content of the decision command issued, but it remains to be understood what these measures are.

The inductive and coercive measures present very close concepts and, for this reason, will be approached immediately. A coercive measure is understood as that in which the judge coerces the subject of the jurisdictional order to comply with the obligation that was imposed, under penalty of some kind of sanction[21] . Most commonly, we see the hypothesis of a coercive measure linked to the application of a fine for non-compliance (*astreinte*). Thus, note that the content of the coercive measure only has the power to

[17] MAZZEI, Rodrigo; GONÇALVES, Tiago Figueiredo. Ensaio sobre o processo de execução e o cumprimento de sentença como bases de importação e exportação no transporte de técnicas processuais. *In:* DE ASSIS, Araken; BRUSCHI, Gilberto Gomes (coord.). *Processo de execução e cumprimento de sentença: temas atuais e controvertidos*. São Paulo, Thonsom Reuters Brazil. Year: 2020. p. 20-22.

[18] MARINONI, Luiz Guilherme; ARENHART, Sergio Cruz; MITIDIERO, Daniel. *Civil procedure course:* protection of rights through common procedure. 7th ed. revised and updated. São Paulo, Thomson Reuters. Year: 2021. 790.

[19] MITIDERO, Daniel. *Collaboration in the civil process of the model to the process*. 4ª ed. rev., atual. e ampl. São Paulo, Thomson Reuters. Year: 2019. p. 172-173.

[20] REDONDO, Bruno Garcia. *Adequacy of the procedure by the judge*. Salvador, JusPodivm. Year: 2017. p. 133.

[21] MEIRELES, Edilton. Executive Guardianship: subrogatory, coercive, mandatory and inductive measures in the Civil Procedure Code of 2015. *In*: *Revista de Processo*. Vol. 247. Digital version. September, 2015. São Paulo, Thomsom Reuters Brazil. Digital version. p. 5.

harm the debtor-obligor even more in case he fails to comply with his obligation. On the other hand, the inductive measures also aim at coercing the obligor to the fulfillment of the obligation imposed, but in a milder or softened form, that is, it offers a certain situation of advantage in case the obligor performs what was imposed on him[22] . An excellent example of a legal inducement is the reduction in the amount of the attorney's fees due in the cases of execution for a sum certain in which the debtor makes the payment within three days (*pursuant to* article 827, paragraph 1 of the Code of Civil Procedure).

Subrogatory measures are those in which the judge himself uses a practice that fully substitutes, or in an equivalent manner, the provision that should be fulfilled by the obligor, in such a way as to enable the effectiveness of the decision content[23] .

Finally, the injunction is that which imposes on the obligated party the command to comply with the decision, under penalty of incurring in the crime of disobedience (art. 330 of the Penal Code), besides constituting an act against the dignity of justice, punishable by a fine.

These are examples of the measures that the Judiciary can use to enforce its decisions, and there is no doubt that the subject is not exhausted in these lines, since each measure has its own peculiarities, whose analysis would be beyond the scope of this study.

2.3 CONTROL OF EXECUTIVE MEASURES

The fact is that, if on the one hand the model of the process admits the use of various executive techniques to confirm the terms of the sentence, it would not be licit in any other way to remove from the defendant the right to contest and, by oblique means, to control the acts against him.

When dealing with the appropriate means to solve the cooperation crisis of a concrete case, it is through the idea of proportionality that one must verify if the use of the technique is in accordance with the concrete case or if it reveals an inefficient tool or, eventually, only burdensome to the executed[24] .

It is worth remembering that the logic that permeates the executive procedure is not only that which is aimed at satisfying the creditor's interest or the obligation, but also that which ensures the least *onerosity* for the debtor (*ex* art. 805 of the Code of Civil Procedure).

The criterion of proportionality serves, in this scope, as an adequate mechanism to curb the actions of the Judiciary that are not in tune with the purposes proposed[25] . In particular, in the *new* procedural legislation, the postulate of proportionality has gained prominence in the scope of the fundamental rules of the process, being expressly provided for in article 8 of the Code of Civil Procedure.

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[22] MEIRELES, Edilton. Executive Guardianship: subrogatory, coercive, mandatory and inductive measures in the Civil Procedure Code of 2015. *In*: *Revista de Processo*. Vol. 247. Digital version. September, 2015. São Paulo, Thomsom Reuters Brazil. Digital version. p. 8.

[23] MEIRELES, Edilton. Executive Guardianship: subrogatory, coercive, mandatory and inductive measures in the Civil Procedure Code of 2015. *In*: *Revista de Processo*. Vol. 247. Digital version. September, 2015. São Paulo, Thomsom Reuters Brazil. Digital version. p. 4.

[24] MITIDIERO, Daniel. *Processo civil*. São Paulo, Thomson Reuters. Year: 2021. p. 220.

[25] ÁVILA, Humberto. *Teoria dos princípios da definição à aplicação dos princípios jurídicos*. 20ª ed. rev. e atual. São Paulo, Malheiros. Year: 2021. p. 208.

It was not in vain that the legislator provided in the same device the primacy of efficiency and proportionality in the application of the legal system. The use of the proportionality criterion to select the technique - application of the law - aims to ensure greater efficiency to the process and adherence to what is understood as due legal process[26] .

According to the lessons of Humberto Ávila[27] , the assessment of proportionality in the choice of a certain measure must necessarily involve the analysis of the possibility of the measure chosen to meet the purpose proposed by the enforcer of the law, whether a less restrictive measure could be adopted in substitution for the one chosen, and whether the negative effects of the measure adopted are justified.

It is what is commonly defined as the analysis of the appropriateness, necessity, and proportionality in the strict sense[28] of the chosen measure.

To leave no doubt, it is imperative to highlight the teachings of Paulo Mendes de Oliveira on the previous analysis of the chosen procedural measure that the magistrate should make to confirm that it is a proportional measure:

> [...] in the first place, it must be an adequate means for the adequate provision of justice, that is, one that provides substantial access to justice, preserving the procedural guarantees of the litigants, In second place, the measure adopted must be, among the possible paths, the one that confers the least possible restriction on fundamental rights, that is, if there is more than one equally adequate measure to reach the end, one must choose the softer one with regard to the fundamental rights in conflict. Finally, one must weigh the legal goods that are being protected and those that will be restricted, in order to verify if the former are more valuable and if their promotion will not result in excessive restriction of the latter, justifying the measure.[29]

In fact, the proportionality of the enforcement measure, together with the principle of less onerosity for the debtor (article 805 of the Code of Civil Procedure), are not intended to limit the use of enforcement measures, but to ensure a fair and reasonable treatment in the judicial process.[30]

Thus, any kind of obstacle guided by the principle of less burden or proportionality that the creditor and the judge may face in the enforcement procedure for the implementation of enforcement measures must be seen as an essential limit to restrain the discretion - avoid excesses - that are incompatible with the due legal process.[31]

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[26] WAMBIER, Luiz Rodrigues; TALAMINI, Eduardo. *Curso avançado de processo civil, volume* 1. 20ª ed. rev., atual. e ampl. São Paulo, Thomson Reuters. Year: 2021. p. 85-86.
[27] ÁVILA, Humberto. *Teoria dos princípios da definição à aplicação dos princípios jurídicos*. 20ª ed. rev. e atual. São Paulo, Malheiros. Year: 2021. p. 210.
[28] *Supra*.
[29] DE OLIVEIRA, Paulo Mendes. *Segurança jurídica e processo da rigidez a flexibilização* processual. São Paulo, Thomson Reuters. Year: 2018. p. 284-285.
[30] ROSADO, Marcelo da Rocha. *Executive techniques for the tutelage of pecuniary obligations in the Brazilian civil process:* general executive clause and the principle of efficiency. Londrina, Thoth. Year: 2021. p. 176.
[31] ROSADO, Marcelo da Rocha. *Executive techniques for the tutelage of pecuniary obligations in the Brazilian civil process:* general executive clause and the principle of efficiency. Londrina, Thoth. Year: 2021. p. 177.

3 BRIEF CLOSING

In view of all that has been exposed, it is allowed to bring up some brief conclusions, without the commitment of having exhausted the proposed theme.

(I) The right of action gives its holder the right to obtain from the State a response to a situation of uncertainty or crisis of cooperation, encompassing both the right to receive the requested response and the enforcement of his right through appropriate procedural techniques;

(II) The logic of the 2015 Code of Civil Procedure is different from its predecessor, introducing open clauses that allow the judge to apply to the concrete case executive techniques that best apply to the cases, as a way to allow the effective adequate jurisdictional guardianship of the material right.

(III) The choice of the adequate procedural technique, however, must necessarily observe the limits for imposing enforcement measures, especially the proportionality criterion and the principle of less onerosity for the executed party.

(IV) Respecting the criteria for selecting the most adequate technique is to give life to the postulate of article 8 of the Code of Civil Procedure in all its aspects, fundamentally in what concerns the respect for the dignity of the human person, effectiveness, proportionality, common good, and legality.

(V) This is the teleological matrix that should surround the operators of the Law in their mission to seek and deliver adequate judicial protection through due process of law, especially in the choice of the executive technique proportional to the case.

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