THE EFFECTIVENESS OF PROCEDURE *versus* THE CULTURE OF DISOBEDIENCE. THE RULE OF ARTICLE 14 OF THE BRAZILIAN CODE OF CIVIL PROCEDURE

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Without any doubt whatsoever, one of the greatest challenges facing those who study Brazilian civil procedure lies precisely in the matter of the atavistic and endemic resistance to complying with judicial orders.

It is an issue of a cultural nature, difficult to resolve, but which needs to be faced up to, both by legislators and by legal professionals. Unless the judicial decision is given credibility due to its real ability to promote alterations in the empirical world, it is unlikely that the judicial system[1] will achieve its long awaited social legitimacy.

Efforts have been made to provide the procedural system with mechanisms capable of encouraging compliance with judicial decisions and to repel expedients that use loopholes or enable the creation of barriers in order to hinder their effectiveness.

In Brazil the rule contained in article 461 of the Code of Civil Procedure, initially limited only to proceedings aimed at the fulfilment of the obligation to do or not to do something, has meant, to our understanding, a veritable revolution in favour of procedural effectiveness. This rule has given Brazilian judges broad

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powers to cohibit disrespect against decisions or, alternatively, to encourage their immediate fulfilment by the party. This can be perceived in the rule contained in paragraph § 5º of article 461.

Concern, however, remains and such insistence is well founded, since the "result" of the failure to comply is timidly punished, almost exclusively at the penal level, which means that no concrete effect is reached, witness the visible slackness of Brazilian penal norms as a whole, which observe the dismantling of social security, bound by recommendations of cautiousness with regard to the effectiveness of the penal system, by virtue of reasons of a political nature, inherited from the time when the country was subjected to a dictatorial regime[2]. There were so many violations of human rights, in the name of the then prevailing doctrine of national security that, today, Brazil (and its federated States) is completely adrift as far as society's security is concerned. For this reason, in a country that faces daily countless kidnappings, armed attacks and all sorts of misfortunes arising from its opting (?) for carelessness in relation to society's security, the penal punishment of the offence of disobeying judicial orders appears, at the least, to be a joke in doubtful taste.

The solution encountered by the legislators has been, therefore, that of providing the very Code of Civil Procedure with rules capable of promoting, albeit by means of intimidation, the "return" to the idea (basic in the democratic system on which the rule of law is based) that it is necessary to comply with judicial decisions, as a mechanism that is also capable of promoting social pacification, by means of solving localized conflicts (i.e., judicial

[2] In fact, what is clearly perceived is that any proposal to grant greater strictness to the penal system is immediately refuted, as our society still lives with the image of the police dominated state implanted by the military regime. This also inhibits public investment in public security. In the meantime, criminal artefacts evolve and challenge the entire fragile security apparatus in existence today.

proceedings between the plaintiff and the defendant, micro conflicts, the solution of which is of extreme interest to social peace).

Within this legislative course of action, towards the end of 2001 Law No. 10,538 was published, altering – among others – article 14 of the Code of Civil Procedure. This provision originally dealt with the obligations of the parties and their nominees in the proceedings. Now, as a result of the reform, the obligations relating to procedural conduction have been broadened to include, as stated in the new provision, *all those who take part in the proceedings in any way*. Item five, previously nonexistent, has been added and provides for the obligation to *strictly comply with judgemental provisions and not to create obstacles to the fulfilment of judicial provisions, whether they be of a provisional or final nature*, to which everyone is subject and not just the parties or intervenients.

As a result a new procedural figure has been created which previously did not exist in the Brazilian procedural and juridical system, namely that of the person *responsible* for not complying with judicial orders.

It is crystal clear that this new rule has arrived at an appropriate time for Brazilian civil procedures. Today the undeniable conclusion exists (in fact, we have known this for a long time) that the right to access to justice, holding the dignified position of a constitutional norm, means much more than the possibility of being able to obtain "formal" provisions, in other words judicial decisions endowed only potentially with the ability to achieve transformations in the real world.

It is clear in the doctrine of constitutional procedure that the right to justice means the right to access to *effective* jurisdictional protection, in other words, the right to obtain provisions that are really capable of promoting, both on a juridical

and empirical level, the alterations required by the parties and guaranteed by the system.

The yearning for effective access to justice is no longer satisfied by the old and now outdated formal protection of rights. It is necessary, as the doctrine affirms, that jurisdictional protection be accompanied by the ability to produce practical effects, in a timely manner, as otherwise a situation will exist of non-fulfilment of the constitutional guarantee of the right to justice, exactly to the extent that the right to procedure means the right to procedure the result of which is useful ion relation to the reality of the facts.

Contemporary juridical systems need to be endowed with mechanisms capable of guaranteeing the fulfilment of the social requirement for effective access to justice. It is a case of a social demand that is always more accentuated, connected as it is with so many other social demands that are equally relevant and, one can say, indispensable for the full exercise of citizenship. As such, the possibility of access to fair and impartial judiciary bodies, as well as to the effective judicial protection of rights, is situated on the same level as so many other guarantees, as equally relevant as the demands by society for effective services of public health, security, social welfare, etc.

These rights, known as fundamental rights, are placed within the context of the concept of human dignity, the principal on which the structure of the Brazilian state is based (article 1, item III of the Federal Constitution).

The mere recognition of such fundamental rights at the constitutional level, without provision for efficacious instruments for their being effectively put into practice would be, in truth, the same as not having them recognised.

It is common knowledge that procedure has an instrumental nature in relation to the rights that it seeks to ensure in court. This feature of instrumentality indicates that the result of

the activity undertaken in the proceedings must be exactly and precisely that desired by the party that makes use of it, by means of exercising the right to legal action.

The efforts made by Brazilian legislators can be seen in the inclusion in the civil procedural system of mechanisms aimed at achieving effective procedure. The rules relating to the discovery process have been altered so as to build a new model, with emphasis on the adoption, with ever greater scope, of situations in which the Judiciary Power is authorised to accelerate (in relation to the final sentence) the provision of the plaintiff's request, albeit temporarily and partially. There are also the rules relating to the grating of specific protection, prevailing over substitutive protection. Such, for example, are the rules contained in articles 461 and 461-A, the latter of which has recently been added to the Code of Civil Procedure and which broadens the mechanisms of making effective the obligations to do or not to do to include the obligations to deliver. It is clear that for the procedural system the fulfilment of the obligation exactly in the way, manner and scope agreed to by the parties and provided for on the level of material law is a priority.

The substitutive result, or "alternative", such as, for example, sentencing the defaulter to pay losses and damages, which, for a long time, was the general rule, loses ground to the fulfilment of the obligation *in natura*.

The second phase of the reform of the Code of Civil Procedure, undertaken by means of the publication of two laws at the end of 2001 and another in May 2002, brought important innovations in favour of effectiveness, that is to say, with the purpose of providing the civil procedural system with mechanisms capable of enabling the effective fulfilment of the constitutional rule that guarantees access to justice. In this sense, article 14 has been altered by means of the inclusion of a paragraph that has

created the figure of the person responsible for non-fulfilment or for creating obstacles to the effective fulfilment of the judgemental provisions whether they be accelerated or final.

In an article that we published jointly with TERESA ARRUDA ALVIM WAMBIER[3] we argued that the legislators, by making use of the expression judgemental provisions intended to include, in addition, in strict accordance with the new norm, *lato sensu* executive decisions, so that both of the have the noticeable feature, which makes them different from all other categories of sentences, the circumstance of the special virtue of producing effects in the empirical world independently of the formal expedient of the execution proceeding.

As we affirmed in the comments on the new norms, there would be no sense in presuming that the legislators intended to deal *only* with *judgemental provisions*, leaving *lato sensu* executive sentences out of the scope of the new rule contained in article 14, item V and paragraph 1 thereof, since, substantially, both contain the same characteristic element: an order issued by the Judiciary Power to be immediately (i.e., without new proceedings) fulfilled.

Although there are noticeable differences between judgemental provisions and *lato sensu* executive sentences, about which the doctrine is not unanimous, even so, both types are perfectly assimilable with the idea expressed in the new wording. The legislators, in this case, said less than they intended (*dixit minus quam voluit*).

As a result of the new article 14 and the creation of the figure responsible for non-fulfilment or for obstructing the fulfilment of judicial orders, any person who in any way takes part in the proceedings, may be held responsible for obstructing either

[3] *Brief comments on the 2nd phase of the reform of the Code of Civil Procedure,* São Paulo, Editora Revista dos Tribunais, 2002.

totally or partly the result of the judgement, in the manner provided for in paragraph 1 of the article.

The legislators used the word *obstacle*, to refer to the act of creating difficulties for the provisions to be made effective. This word leads us to a series of examples (some of which will be referred to below), that can be resumed in the circumstance of acts being practised or omission being made, whether involuntary or not, the effect of which is to create difficulties or obstacles to the achievement of the practical result intended by the jurisdictional provision or, more specifically, to the production of alterations in the empirical world that should arise from the jurisdictional measures or provisions pleaded for and granted or given by the courts.

It is important to stress that the law does not provide for any supposition for attributing responsibility, other than the conduct referred to previously, that does not require the reasons to be questioned. Responsibility is, therefore, independent of the existence of guilt.

In our opinion, the obstacles to fulfilling the decisions that the new legal wording deals with include bureaucratic difficulties, requirements illegally formulated by civil servants at whatever level of public administration and who will be held personally responsible for their conduct.

The consequence provided for by law as far as the conduct of the responsible person is concerned, rests in the possibility of the judge applying a fine of up to twenty percent of the amount of the lawsuit. In order to set the amount of the fine, the judge must take into consideration the severity of the conduct that caused non-fulfilment or obstruction.

The concept of *severity of conduct* contains a criterion that is linked to the extent of the damages that the conduct has caused in relation to the results that the procedure could have produced.

This is the equation that the judge must use when setting the amount of the fine.

It can be said therefore that there is only a very small margin of judicial freedom in the setting of the fine, which is absolutely restricted. The judge may not take into consideration criteria such as the situation of the person responsible in terms of the procedural juridical relationship, for example. The law does not give greater weight to the party's actions, rather the legislators have preferred to treat everyone in the same way, regardless of whether it is a question of a party or of a third party, or someone who is absolutely outside of the procedural relationship.

Under the new legal wording, all that matters is the observation, by the judge, of the extent of the ineffectiveness of the order. Thus, as we have already affirmed in our comments on this legal provision, if the comissive or omissive conduct of the person responsible results in partial obstruction, the amount of the fine (in relation to the maximum amount permitted) must be equally partial. On the other hand, it is imperious to affirm that if the action or omission of the person responsible results in the total lack of the effectiveness of the decision, the setting of the fine must take into consideration to maximum permitted limit.

The fine shall not revert to the party injured by the conduct of the person responsible, rather, in another interesting innovation provided for in the legal wording modified at the end of 2001, it will return to the Public Coffers. It will be recorded as a debt if it is not paid by the responsible person within the time limit set by the judge who also determined the amount of the fine. Such time limit shall be counted with effect from the final decision.

Reversion in favour of the Public Coffers, whether National or State, shall occur depending on whether it is a case that is being judged by the Federal Justice System or by a Member State Justice System, respectively. Although the law may have been omissive, it is

certain that in the case of proceedings before the Justice System of the Federal District, it will be this unit of the Federation that will be credited with the amount of the fine.

A question that has been posed since the new wording came into force refers to the making of appeals by the party, or in other words, whether the appeal undertaken by any of the parties or interested third parties may give rise to the opportunity to apply the new rule.

As we see it, the act of appealing could never be construed as being capable of obstructing or complicating the effectiveness of jurisdictional orders. If it were admitted that the use of appeals would create some kind of obstacle for the attainment of the effectiveness of the proceedings, then the exercising of the party's rights would be inhibited, which, as we have already affirmed in our comments on the legal wording, would be in absolutely discordance with the principals of ample defence and the due legal proceedings.

Both the Federal Constitution and the Code of Civil Procedure, as well as those laws extravagant in appeal matters, provide for an efficient and well formulated appeal system. As such, the possibility of the parties making use of them must be respected, as long as the presuppositions needed to make the appeal are present.

The reference made in the legal wording to the final or accelerated measures must not induce those who interpret it to conclude that the new rule may only apply if it is a question of *accelerated protection* decisions. Temporary remedies are clearly included within the scope of the provision, since they also accelerate effects (the effects of protection are accelerated).

As we have already affirmed, and as is clearly provided for in law, *all those who take part in the proceedings in any way may be held responsible for creating obstacles to the fulfilment or non-fulfilment of*

judicial provisions. The rule is far-reaching, the only express exception being lawyers, who are subject to their own disciplinary statute and who will answer in the ethics tribunals of the Brazilian Law Association. The exception applies only to the rule contained in item V. All the other obligations set forth in items I to IV of article 14 of the Code of Civil Procedure in relation to lawyers, and in relation to their professional activity in the proceedings, remaining unaltered.

As it is an extremely broad rule and, as we have stated, only excludes lawyers from its rigours, it is certain that *all those who in any way, even if only in a peripheral manner, take part in the proceedings,* will be affected by it, if their conduct so determines. Some examples of this are: the parties (plaintiff, defendant and joint parties), interested third parties, interested intervenients, legal experts, the technical assistants of the parties, bankruptcy trustees, administrative receivers, company liquidators and auctioneers. It is also possible to list other legal professionals, both inside the courts and out (notaries, land registry officials and those of protested bills registries, etc.). In our comments we have dealt with certain situations that may occur in daily legal matters, also as an example we can quote the case of scriveners, clerks or administrative assistants in notaries' offices or in public departments who delay the sending of correspondence or the filing of documents and, by so doing, may cause some kind of obstacle to the fulfilment of the judicial order. One is also lead to think of the cases in which justice officials fail to fulfil writs.

Judges are also subject to the new rule, to the extent that their conduct contributes towards the non-fulfilment of a judicial order given by another judge, whether of equal hierarchical competence or not.

On the other hand, the court recorder may also be affected by the norm, if his conduct as recorder contributes towards the

ineffectiveness of the provision, it being the collegiate body's responsibility to determine the amount of the fine.

The representative of the Public Prosecution Service may also be held responsible for any non-fulfilment or obstruction that leads to the ineffectiveness of a judicial decision.

It is the responsibility of the judge (of the lower court) of the lawsuit who gave the decision that has not been fulfilled (or the fulfilment of which has been obstructed) to set the amount of the fine. In the same way it is the responsibility of the recorder, of the Court that is judging the appeal or action in which it was originated, to apply a fine because of the non-fulfilment of collegiate or monocratic decisions therein.

The ability to appeal against a decision that applies the fine is perfectly sustainable, in the light of the principal of ample defence. The person responsible will make use of the appropriate appeal, with the aim of defending his or her own claim, the purpose of which is to obtain exoneration from the fine set by the court. If the fine has been set by interlocutory judgement, then the person responsible will present an appeal as the aggrieved party. It the fine has been set in adjudication then an appellate review will be appropriate. It is important to emphasize that, in our opinion, the hypothesis of an appeal by an interested third party is not the case in question, as this is a category reserved only for those who appeal as corroborators in the defence of the interests of one of the parties, as authorized by paragraph one of article 499 of the Code of Civil Procedure.

The legitimacy of an appeal made by the person held responsible derives from the existence of their own, autonomous, claim, the purpose of which is to obtain a unique result, unconnected with the result of the judgement of the judicial proceedings, in favour of one party or another.

Above we have presented our considerations, based on preliminary reflections on the new wording of article 14 of the Brazilian Code of Civil Procedure. Whether the manifest intention of the legislators, from the point of view of endowing the system with a mechanism to indirectly encourage the fulfilment of judicial decisions will be complied with only time will tell. Undoubtedly, however, it is an important instrument in favour of procedural effectiveness.