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REVOCATION OF ART. 305 OF THE MILITARY CRIMINAL PROCESS CODE IN FRONT OF THE CONSTITUTIONAL GUARANTEE OF THE RIGHT TO SILENCE

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Introduction

The present legal reflection, relevant in the military criminal doctrine and jurisprudence, deals with the protection and interpretation of the Brazilian Judiciary Power regarding the fundamental right to silence, especially its applicability in controversial issues in the *praxis* of Federal Military Justice.

Compelled by the Supreme Court, the Superior Military Court was forced to change his precedents to safeguard the right to silence of defendants and also witnesses who, when were questioned in the police phase or inquired by a judge confess a crime or made prove against themselves, since the article 305 of the Military Criminal Procedure Code, the Decree no. 1,002, of 10/21/1969, established:

> *"Before starting the interrogation, the judge will observe the accused that, although he is not obliged to answer the questions put to him, his silence may be interpreted on detriment of his own defense".*

In fact, in its final part the device contained a strong subjective charge, with an anti-guarantee bias that came up against postulates fundamentalized and standardized as rigids by the Political Charter. Certainly, the grammatical interpretation of the military procedural text deviated from the constitutional precept inscribed in item LXIII of article 5th of the Constitution, which ensures to the prisoner and to the accused the right of non-self-incriminating: *Litteris*: "*the prisoner will be informed of his rights, including the right to remain silent, being assured to him family assistance and a lawyer*."

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I. The Supreme Court Jurisprudence about the constitutional right to silence in the context of military criminal proceedings: the repeal of article 305 of the Military Procedural Code

The Federal Military Justice had long argued about the affront of art. 305 of the Military Criminal Procedural Code to the right to silence highlighted by the maximum text, in view of its commandment to construe unconstitutional interpretation of the accused's refusal to speak in interrogation, which, according to the law, could possibly be unfavorable to him.

The matter was brought to the analysis of the Judiciary Power in the judgment of Appeal nº. 2008.01.05099-3 / RJ, in the Superior Military Court, according to the protocol of the 97th Judgment Session of 12/9/2009[1]. The matter challenged by the Federal Public Defender in preliminary seat required the declaration of unconstitutionality by material distortion in face of the Lex Magna.

The STM, by majority, accepted and declared its revocation, considering that to keep silent is a guarantee of all defendants, and under no circumstances should be interpreted at their disadvantage.

At the same time, in *Habeas Corpus* nº 103.686 / RJ[2], the Brazilian Supreme Federal Court was urged to express its opinion on the matter and, although it did not explicitly confirm the revocation of the procedural precept appreciated in the Appeal as the judgment remained restricted to appreciate the *meritum causae* of the *writ*, did not oppose to the declaration of the Superior Military Court, reason why it was tacitly endorsed.

It is essential to note that the Supreme Federal Court, as an appeal and constitutional Tribunal, placed on the top of the Brazilian Judiciary Branch, had been standing in defense of this guarantee for decades, both in the context of ordinary and in the military criminal proceedings.

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[1] *"APPEAL. BODILY INJURY. REPEAL OF ART. 305 OF CPPM IN FACE OF THE FEDERAL CONSTITUTION, 1988. EFFECT INTER PARTES. POSSIBILITY. PRESCRIPT OCCURRENCE. MINOR CODEFENDANTS. –The effect of the lapse of time to impose a punishment has been observed in the case of the codefendants that were minor at the time of the offense. - In view of the incompatibility with the constitutional dictates, it was declared the repeal of art. 305 of the Military Criminal Procedure Code by the Federal Constitution, since the accused's silence, during the interrogation cannot under any circumstances be interpreted to his detriment, according to the provisions of art. 5th, LXIII, of the Constitution. Inter party effect. - The doctrine and the jurisprudence understand that it must be considered as an interruptive cause for the calculation of the prescription not the date contained in the Sentence itself but that of its publication. - The conviction of the older age defendant at the time of the crime was maintained with authorship and materiality of the crime regarding the commission of bodily injuries remaining. Concession of "sursis". - PRELIMINARY ACCEPTED. - APPEL PARTIALLY PROVIDED. - UNANIMOUS DECISION".* (SUPERIOR MILITARY COURT. Appeal nº 2008.01.050993-3 / RJ. Rapporteur: Justice Maria Elizabeth Guimarães Teixeira Rocha. Publication: 12/16/2009).

[2] FEDERAL COURT OF JUSTICE. Habeas Corpus nº 103.686/RJ. Rapporteur: Justice Dias Toffoli. Published in DJe 9/3/2012.

However, in doing so, it restricted the nullity of the criminal proceeding to a previous and case-by-case analysis of the damage demonstration, according to the brocade "pas de nullité sans grief", since the lack of warning or the signature of the declaration regarding the guarantee is not capable to nullify the evidence produced, especially of the interrogation if the defendant has been assisted by a legally constituted defense. Precedent of the Supreme Federal Court.[3]

In this sense the *Pretorium Excelsior* implicitly had settled for a long time the right to silence, consequence of non-self-incrimination, as a fundamental guarantee which configures the defendant's subjective right in the criminal process; then the agent's secrecy cannot be interpreted in an unfavorable way to his / her prejudice.

In an emblematic leading case, the Supreme Court highlighted its importance, as well as the impossibility of detrimental hermeneutics on the part of the magistrate against the defendant who falls silently[4].

For this reason, the presumption of innocence sculpted in item LVII of article 5th of the Brazilian Constitution supports the criminal process not only during the formation of the evidence set and the "*persecutio criminis*", but also until the verdict of guilt or innocence. As a result, the presumed indicted can remain silent

[3]"*PENAL. CRIMINAL PROCEDURE. APPEAL IN HABEAS CORPUS. PROCESSUAL NULLITIES. MILITARY CRIMINAL PROCESS. INTERROGATION. AMPLE DEFENSE AND CONTRADITORY. PRESENCE OF THE DEFENDER. ABSENCE OF WARNING ABOUT THE RIGHT TO SILENCE. DEFENSES THAT PRESENT THEIR VERSION OF THE FACTS. ABSENCE OF PROOF OF DAMAGE. LAWYER CHANGE WITHOUT DEFENDANTS CONSENT. FACT THAT CANNOT BE ATTRIBUTED TO THE JUDICIARY POWER. "PAS DE NULLITÉ SANS GRIEF." ABSENCE OF ABUSE OF POWER, ILLEGALITY OR TERATOLOGY ABLE TO DISCONSTITUTE THE SOVEREIGNLY OF THE STARE DECISIS. APPEAL NOT PROVIDED. 1. The guarantees of ample defense and contradictory remain observed, so cannot be successful the argument that the lack of warning in the interrogation about the defendants' right to remain silent would be a cause of nullity apt to annul the entire criminal process, in the cases in which that the health of the act is corroborated by the presence of a defender during the act, and by the choice made by the defendants to, instead of using the right to silence, externalize their own version of the facts, contradicting the accusations that were made to them, as defensive strategy consent. 2. The lack of warning about the right to silence does not lead to the automatic annulment of the interrogation or testimony, and it is necessary to observe the other circumstances of the specific case to verify whether or not there was an illegal constraint.* (Precedents: HC 88.950 / RS, Rapporteur: Justice Marco Aurélio, Trial on 9/25/2007, HC 78.708 / SP; Rapporteur: Justice Sepúlveda Pertence, Trial on 3/9/1999; RHC 79.973 / MG, Rapporteur: Justice Nelson Jobim, Trial on 5/23/2000.) 7. Appeal not provided." (RHC 107915 / SP - SÃO PAULO - APPEAL IN HABEAS CORPUS - Rapporteur: JUSTICE LUIZ FUX - Judgment: 10/25/2011).

[4]*In verbis: "The right to silence, which ensures a non-production prove or evidence against the defendant is a pilar of the system for the protection of individual rights and materializes one of the expressions of the principle of the dignity of the human person. […]. The prisoner's right - strictly speaking, the accused's right - to remain silent is an expression of the principle of non-self-incrimination. [...] Thus, it is a law applicable not only at the time of imprisonment, but it permeates the entire criminal process. As noted by Justice Pertence in a magnificent vote on HC 78.708, of which he was the rapporteur (DJ of 4/16/1999), "the right to information of the faculty to remain silent has gained constitutional dignity - from its most eloquent contemporary statement in Miranda vs. Arizona (384 US 436, 1966), transparent historical source of its consecration in the Brazilian Constitution - as an irreplaceable instrument of the real effectiveness of the relevant guarantee against self-incrimination – "nemo tenetur prodere seipsum, quia nemo tenere detegere turpitudinem suam" -, that the planetary persistence of police abuses continues to lose its topicality*". SUPREME FEDERAL COURT. Habeas Corpus nº 80.949. Rapporteur: Justice Sepúlveda Pertence. Published in the DJe of 12/14/2001.

or even lie to prevent the production of evidence or prove against himself, and such prerogative, under no circumstances, can cause him legal damages.

Furthermore, the ample defense provided by the art. XI, n. 1 of the Universal Declaration of Human Rights ensures that:

> "(...) *every man accused of a criminal act has the right to be presumed innocent until his guilt has been proven in accordance with the law, in a public trial in which he has been assured of all the guarantees necessary for his defense*".

The principiology of the Brazilian Fundamental Law promulgated in 1988, established among judges and jurists the doctrinal consensus that the muteness of the defendant cannot result in a negative judgment of value by the judge, because everyone has the right to be silent in their own benefit.

The vertical incompatibility of art. 305 of the Procedure Military Code against the Brazilian Constitution handled with the juridical phenomenon of the reception of the *infra* constitutional norms. Since the law is material and formally compatible with the *Lex Magna,* it is accepted by the legal order. However, if the hierarchical non-conformity of the past legal rule is verified the revocation is configured according to the brocade *"lex posterior derogate lex priori*". Have been said that the proposition of an Action of Unconstitutionality in the Supreme Court regarding the normative acts prior to its validity is not allowed. Consequently, the Military Court had to consider that the article 305 was materially non-conforming to the supervening Political Charter, as settled by the Supreme Court, revoking it. In other words, the incompatibility between the previous law and the later Constitution is solved in the Brazilian system by the revocation of the first and not by the judicial declaration of its unconstitutionality [5].

In the end, considering the conflict of rules over time and the normative hierarchy, the effective affront of art. 305 to the Brazilian Charter was evident, that is why the Federal Military Court, based on strong jurisprudence declared by the Supreme Tribunal, was compelled to revoke it from the current procedural rules.

II. The guarantee of the right to silence in the inquisitorial and judicial phase to witnesses and defendants

In the same vein, also to safeguard the constitutional guarantee under analysis, the Supreme Federal Court decided to confirm the right to silence for witnesses and not only for the accused in the context of military criminal proceedings. Thus, they should be warned of the right to remain silent before their

[5]By the way, the SUPREME FEDERAL COURT decision in the Action of Unconstitutionality nº 74-8 / RN, supports the "revocation" explained above. Rapporteur: Justice Celso de Mello. Published in DJ 25/09/1992. RTJ 143/3.
Other decisions: SUPREME FEDERAL COURT. Appeal in Habeas Corpus nº 122279/RJ. Rapporteur: Justice Gilmar Mendes. Published in DJe 30/10/214; SUPREME FEDERAL COURT. Habeas Corpus nº 79812. Rapporteur: Justice Celso de Mello. Published in DJ 16/02/2001.

inquiries during the inquisitorial phase and the judicial process in order to preserve themselves from non-self-incrimination.

It should be noted that the position was not the one adopted by the jurisprudence of the Superior Military Tribunal, a Court with jurisdiction to process and prosecute military crimes, committed by the military or civilian, within the scope of the Armed Forces (Army, Navy and Air Force). It is a federal criminal specialized Justice, which integrates the Brazilian Judiciary since de Constitution of 1934.

In fact, the Military Court used to reject all preliminaries argued by the defendants' defenses. The parties systematically pleaded for the nullity of all criminal proceedings promoted by the Military Prosecutor's Office, due to the criminal denunciation being based solely and exclusively on a testimonial hearing provided without the warning of the constitutional guarantee of silence.[6] Absurdly, the witnesses heard in a military police investigation and under the commitment to tell the truth, without any warning of having the right to be silent, worse, under penalty of to commit the crime of false testimony, reported facts that violated their own rights and ended up being denounced for possible offenses.

In this context, the Public Defender's Office insistently postulated the procedural nullity, which was not accepted by the Military Justice, as quoted below:

> *"I - Preliminary of procedural nullity. The assumption of defect in the phase of the Police Inquiry as a result of subpoena and the first statements as a witness, of those who came to confess the crime, does not hold, since the statements were signed by free will and be ratified in later inquiries as indicted as well as in the interrogation in Court. Preliminary rejected, unanimously"*[7].

[6]SUPERIOR MILITARY COURT. Habeas Corpus nº 135-73.2010.7.00.0000/RN. Rapporteur: Justice Maria Elizabeth Guimarães Teixeira Rocha. Published: 03/03/2011; SUPERIOR MILITARY COURT. Habeas Corpus nº 132-21.2010.7.00.0000/RN. Rapporteur: Justice Maria Elizabeth Guimarães Teixeira Rocha. Published:18/02/2011; SUPERIOR MILITARY COURT. Habeas Corpus nº 16-10.2013.7.00.0000. Rapporteur: Justice Maria Elizabeth Guimarães Teixeira Rocha. Published:15/03/2013.

[7]"DEFENSE APPEAL. ART. 172 OF THE PENAL MILITARY CODE. PRELIMINARY: INCOMPETENCE OF MILITARY JUSTICE. PROCEDURAL NULLITY. UNCONSTITUTIONALITY OF ART. 172 OF MILITARY CODE. REJECTION. MERIT: ATYPICITY. ABSOLUTION. DISMISSAL *OF THE APPEAL. I - Preliminary of incompetence of the Federal Military Justice to prosecute and judge civilians. The matter has already been pacified within the scope of the STM and the Supreme Court in order to recognize the competence of the specialized penal justice to judge military crimes perpetrated by civilians if the conditions of article 92, item I, of the Military Penal Code are verified, as well the art. 124, "caput", of the Federal Constitution. Preliminary rejected, unanimously. II - Preliminary of procedural nullity. The assumption of defect in the phase of the Police Inquiry as a result of subpoena and the first statements as a witness, of those who came to confess the crime, does not hold, since the statements were signed freely, with no defect of will. which came to be ratified in later inquiries as indicted as well as in the interrogation in court. Preliminary rejected, unanimously. III - Preliminary of unconstitutionality of article 172 of the CPM. The crimes foreseen in the military penal legislation were compatible with the article 124 of the Federal Constitution, as already declared by the Highest Court and by precedents of the Superior Military Court, adding in this case the literally of article 142, § 3 of the Magna Carta. In this case, the use of uniforms and patents are prerogative of members of the Armed Forces. Unanimous rejection. IV - On merit, the thesis of lack of intention to demonstrate the atypical nature of the conduct is not supported by*

The dispute was sent, in an appeal to the Supreme Federal Court, for involving constitutional rights and the guarantee to remain silent in criminal proceedings and was recognized its extension to both legal situations: defendants and witnesses[8].

In this regard, even though the witness in Tribunal is legally obliged to declare the truth under penalty of perjury, certainly is not an absolute rule. Principles and values must be considered as a way of achieving practical agreement and harmonization with the constitutional standards, so laws must be interpreted and applied in this exact juridical measure.

As stated, the *Lex Fundamentalis* was responsible for expanding the list of obligations in the context of criminal proceedings. The validity of the Political Charter, a result of a National Constituent Assembly legitimately elected by the Brazilian people, dispelled divergences by establishing a long list of civil and criminal assurances. Thus, no one will be deprived of the defense for being silent for their own benefit, nor will silence matter in prior condemnation.

Obviously, the exercise of non-self-incrimination is not restricted to the interrogation of a person formally accused, it is legally acceptable to spread such a prerogative throughout the investigative and procedural *iter* within the parameters of the due legal process, in which it is ensured not only to the accused, but to any person who may be damaged by eventual declarations - even the one impelled to testify as a witness. It´s evident, the "*nemo tenetur se detegere"* protects the witness with identical breadth and spectrum since its scope is to prevent the facilitation of his own conviction by the interrogation or production of evidence against himself. It is a basic principle of the full exercise of guarantees peculiar to the Democratic Rule of Law.

The STM jurisprudence violated explicitly a right protected by a *magna* clause, which functions as a true rule to the postulate of probationary freedom that prevailed in the Brazilian criminal process. In essence, remain silent is related to: 1) absence of duty to collaborate with the investigation or criminal procedural instruction; 2) the right not to declare against oneself; 3) the right not to confess; and 4) the right not to speak the truth.

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law. The kind of deceit required by art. 172 of the Penal Code is generic, not specific, as it does not require any intentional complement to improve the crime of improper use of uniform. Appeal devoid. Unanimous Decision." (SUPERIOR MILITARY COURT. Appeal nº. 0000107- 80.2013.7.03.0303 / RS. Rapporteur: Justice José Coêlho Ferreira. Published: DJe 04/08/2016.

[8]*HABEAS CORPUS. CRIMINAL PROCEDURE. NULLITY. INOBSERVANCE TO THE RIGHT TO SILENCE. "NEMO TENETUR DETEGERE". FLAGRANT ILLEGALITY. MISUSE OF MILITARY UNIFORM. ORDER GRANTED I - It is solid the jurisprudence in the Supreme Federal Court that the investigated or accused person may remain silent, avoiding self-incrimination. II - The testimony of the patient, heard as a witness in the inquisitorial phase, was collected without observing her right to remain silent. II - Order granted."* (SUPREME FEDERAL COURT. Habeas Corpus nº 136.331 / RS. Reporting by Justice Ricardo Lewandowski. Judgment published on 6/13/2017). Available at: file: /// C: / Users / User / Downloads / FTS% 20Right% 20ao% 20sil% C3% AAncio% 20 (2) .pdf. Accessed on 3/25/2021.

According to modern constitutional doctrine, the evidential production and the search for truth finds limits in the individual guarantees of a man and must be guided by the moral rules of society, which govern the activities of the State and citizens.

In this scenario, must be mentioned not only the prohibited, inadmissible, or illegitimate evidence/ prove that violates procedural norms and constitutional principles but also the illicit one which offends the same provisions.

At last, in relation to the duty of warning the right to silence as a norm that guides public agents, it is necessary to register the Miranda Warnings, which impose imperative rules on the police officer who carries out the arrest of the citizen such as: the duty (functional obligation and requirement for regular imprisonment) to read all his rights, under penalty of damage to the collection of eventual evidential material. According to the US Supreme Court, reference for Brazilian jurisprudence, the mere absence of this formality would be sufficient to invalidate the statements made by the prisoner including in relation to confession as well as the resulting or derived evidence.

It is important to emphasize that only the criminal evidence/prove produced in Court by the criminal prosecution body under the aegis of the constitutional guarantee of the contradictory and a proper judicial defense can have sufficient legal effectiveness to legitimize the issuance of a condemnatory decree. Consequently, the elements obtained in police investigations, unilateral and inquisitive - although sufficient to offer the accusation by the Public Prosecutor's -, are not enough to justify a condemnatory sentence by Judiciary.

Conclusion

In conclusion, the right to silence and non-self-incrimination provided for the Federal Constitution, are also internationally recognized in International Human Rights Agreements and Treaties adopted by Brazil[9]; as a result, these guarantees are mandatorily imposed on the national courts. For sure, the adequacy of Criminal Science to reality is an arduous mission for the judges, requiring new understanding and punctual hermeneutic methods to correct distortions. An evolutionary exegesis must contemplate previously unpredictable legal situations.

The Brazilian Military Justice safeguarding the right to silence, measure imposed by the Federal Constitution, established an equitable and egalitarian judicial appreciation, and gave an efficient and fair response to the society.

[9]The American Human Rights Convention (San José of Costa Rica Pact) was internalized in the Brazilian legal positivity by Decree nº 678, on November 6, 1992, and is in force with the status of *supra* legal norm. In: http://www.planalto.gov.br/ccivil_03/decreto/d0678.htm. Access: April 4th, 20121.