




The applicability of the opposing principle in enforcement as a guarantee inherent in the democratic process

A aplicabilidade do princípio do contraditório na execução como garantia inerente ao processo democrático

Abstract

Ana Lúcia Ribeiro Mól¹
 orcid.org/0000-0002-3486-0215

Rita Edite Lopes Borges¹
 orcid.org/0000-0002-6476-6705

Wilson Medeiros Pereira¹
 orcid.org/0000-0002-2380-3098

¹ State University of Montes Claros, Montes Claros, MG, Brazil.

Corresponding author: Ana Lúcia Ribeiro Mól. State University of Montes Claros (Unimontes). Av. Prof. Rui Braga, s/n - Vila Mauricéia, Montes Claros, MG, Brazil. Email: anaribeimol@gmail.com

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Objective: analyzing the extent of the contradictory principle in the process within the Democratic State of Law as a presupposition of full discursiveness among the subjects that participate in it, as well as to dispel a distorted view that may exist as to the possibility of its implementation in this field. **Methods:** the structuring of the text was based on the descriptive method, from documentary research based on doctrines and legislation related to the proposed theme. **Results:** the contradictory principle must be fully applied also in the execution, which must be given considering the main purpose of the executive procedures, which is the satisfaction of a right already agreed upon in an executive title. Within these parameters, all decision-making acts in the execution must be preceded by debate between the procedural subjects, also to prevent the assets of the executed being affected arbitrarily. **Conclusions:** the application of contradictory principle in the execution brings the necessary balance to the executive acts, to guarantee not only the creditor's satisfaction, but also that such claim is given in the least onerous way possible to the debtor, within the current legal standards.

Keywords: Execution. Contradictory. Democratic Law State.

Resumo

Objetivo: analisar a extensão do princípio do contraditório no processo dentro do Estado Democrático de Direito como pressuposto da plena discursividade entre os sujeitos que dele participam, bem como afastar uma visão distorcida que pode existir quanto à possibilidade de sua concretização nessa seara. **Métodos:** a estruturação do texto baseou-se no método descritivo, a partir de pesquisas documentais embasadas em doutrinas e legislações atinentes à temática proposta. **Resultados:** o princípio do contraditório deve ser aplicado de forma plena também na execução, o que deve se dar considerando a principal finalidade dos procedimentos executivos, que é a satisfação de um direito já previamente acertado em um título executivo. Dentro desses parâmetros, todos os atos decisórios na execução devem ser precedidos do debate entre os sujeitos processuais, inclusive para se evitar que o patrimônio do executado seja atingido de forma arbitrária. **Conclusões:** a aplicação do contraditório na execução traz o equilíbrio necessário aos atos executivos, de modo a se garantir não apenas a satisfação do credor, mas também que tal pretensão se dê da forma menos onerosa possível ao devedor, dentro dos padrões legais em vigor.

Palavras-chave: Execução. Contraditório. Estado Democrático de Direito.

INTRODUCTION

From the Liberal State to the Democratic State of Law, passing through the Social State, the process has suffered influences that delimit its function and define its guidelines. Due to the influx of the Democratic State of Law, a model currently adopted by Brazil, the process is seen as a discursive space in which the construction of the decision that will reach the parties is possible, especially because of the guarantee of the adversary.

The relevance of this principled guideline is effective not only by its constitutional provision (art. 5th, LV, CRFB/88), but also by its insertion expressed in the Code of Civil Procedure of 2015 which, in its art. 10, establishes the impossibility of so-called surprise decisions, consistent with the decision-making acts given without the prior participation of the parties, establishing, on the other hand, the guarantee that such participation is effectively reflected in the decision-making acts given throughout the procedural *iter*.

Despite this postmodern view of the process and the emphasis given to the principle of adversarial in the legal system in force, the application of this guideline in the implementation has not been fully implemented, that is and is that its implementation is mitigated several times. The executed does not always have the possibility to participate effectively in the procedural acts that will reach his assets, which denotes the configuration of considerable impacts on individual fundamental rights, to justify the examination of the circumstances in which this occurs.

In this way, a more detailed discussion about the amplitude of the contradictory in the executive demands is necessary, to define the role of this constitutional guarantee in procedures of this nature, which stands out as the objective of this article.

METHODS

The structuring of the text was based on the descriptive method, based on documentary research based on doctrines and legislations related to the proposed theme. The arguments presented in this research were based on Brazilian doctrinators, notably those in civil and constitutional proceedings, as well as on decisions of the national judiciary.

RESULTS AND DISCUSSION

The conception of process in the Liberal, Social and Democratic States of Law

The process, over time, has evolved, in monitoring the development of the State itself. In this sense, it is seen that its conception is no longer analyzed as if it were a mere space for the application of formal legality or the realization of the sovereign will of the judge, to become a procedure that guarantees the principles of adversarial, isonomy and broad defense.

The vision of the process with its clearly guarantor function of the individual interests of life, liberty and property is typical of the Liberal State, when then the judicial body was limited to its attribution to observe, accurately and the provisions of the rules that were components of the legal system, in the resolution of the demand submitted to it¹.

This notion of process prevailed until the outbreak of The First World War, whose end brought with it a social collapse of great proportions, demanding a firmer and more interventionist action of the State. During this period, the outlines of the Social State appear, which turns its focus to strengthening the public sphere, through the guarantee of social rights².

The major changes suffered in the organization and functioning of the State, as well as in the very configuration of society, could not fail to influence the notion of process existing at the time. The process

evolves, then, to an instrument of authority, which lends itself to realizing the essential values of society, through a judge who can perceive the weaknesses and deficiencies of the individual. Taking these circumstances into account, the solution of the concrete hypothesis is made based on the search for the purpose of the norm, to make its application truly efficient, with the pacification of conflicts of interest, even if it was necessary to leave aside the legal certainty of strict compliance with existing legislation¹.

Despite the importance of the propositions presented by the Social State, it reaches a point where they are not able to resolve society's claims, so that, around the 1970s, the state model until then in force begins to absorb new contours, becoming what is often called the Democratic Rule of Law².

The process, under this thought, is conceived as a constitutionalized institution, in which effective popular participation in the construction of decisions is guaranteed, through the guarantee of constitutional due process.

Under this approach, the process no longer only ensures individual interests or only public interests. In fact, all interests now have the possibility of being analyzed by the judging body. However, this analysis takes place in a participatory and discursive manner, through the realization of the fundamental rights and guarantees of the individual, access of all to the judicial function and compliance with the legal system in force³.

Thus, and based on the above experformance, it is possible to perceive that in the conception of process itself there is the influence of the two principles that, together, govern the state model now under analysis: on the one hand the principle of the rule of law, marked mainly, compliance with the law, the distinction of state functions and the setting of essential rights for individuals; and on the other, the principle of the

Democratic State, guided by the presence of the people in the exercise of state power⁴.

All these propositions, whether brought by the principle of the rule of law, or those proposed by the Democratic State, are interpenetrated by the norms dictated by the Constitution⁴ and give the keynote of the postmodern view of the process, which is directed by a discursivity that has not existed in the other state models.

This view of the process also applies to the execution, which must be considered, in postmodernity, as a discursive space aimed at the realization of a previously defined right, in which there must necessarily be observance of the principle of adversary, with the participation of the exercise and the executed in the performance of procedural acts.

The application of this principle in the execution is necessary for the executive procedure to be compatible with the guidelines outlined by the constitutional text and the state model adopted by the country, so that it is possible to speak of a true execution process, conducted in a participatory manner among the procedural subjects.

Despite this understanding, there is still a certain reluctance to admit the application of the contradictory, in full, also in relation to the practice of executive acts, as Ronaldo Brêtas de Carvalho Dias⁵ explains, which is why a more detailed analysis of the issue is necessary.

However, before entering the examination of that point, a brief overview of this procedure must be fixed briefly, as provided for in the 2015 Code of Civil Procedure.

Overview of implementation in the 2015 Code of Civil Procedure

The execution, in the procedural system adopted by the Brazilian Code of Civil Procedure in force, has as main purpose to seek the satisfaction of an obligation, which is already previously agreed in an executive order, whether judicial or extrajudicial. It therefore presupposes the need to require conduct by the opposing party, which may constitute an obligation to do, not do, deliver or pay.

In this sense, already ready, it is possible to perceive the importance of executive protection, the focus of this study, because it would do nothing to help the certainty, liquidity and enforceability of an obligation, without the corresponding possibility of its practical implementation in the discursive space of the process, once not spontaneously fulfilled by the debtor.

To achieve this objective, Brazilian civil procedural law requires the mandatory presence of the executive title. The legal nature of the executive titles does not find unanimity in the doctrine. For the purposes of this study, executive titles are considered to constitute documents representing legal acts to which the law confers legitimacy to initiate an execution.

In those terms, the attribution of the quality of the enforcement order depends on express legal provision. In all of them it is assumed, already at first, to have the right consigned in them, allowing their immediate satisfaction. In the case of judicial executive securities, the debtor's obligation to the creditor is established in a judicial or similar act and is set out in the Code of Civil Procedure 2015 in article 515.

On the other hand, extrajudicial executive titles are composed of acts which, by law, do not need to be submitted in advance to an analysis of the judiciary for the establishment of the defined obligation, there is a presumption that the claim contained in them exists. These documents can be performed, even if there was no previous cognitive procedure⁶.

The existence of one or another title determines the executive procedure to be observed. Thus, based on a judicial enforcement order, as a rule, it should be applied to rules relating to compliance with judgment, which is a large phase after the cognitive stage, concretizing what is now called a syncretic process. It begins from a simple petition, without the necessary fulfillment of the requirements set out in Articles 319 and 320 of the Code of Civil Procedure 2015. On the other hand, in the case of an out-of-court enforcement order, an autonomous enforcement procedure should be instituted, by means of an application, with subsequent service of the executed for the fulfilment of the obligation required.

Such procedures, in their inaugural phase especially, differ heavily. The forms of defense of the executed are also different, and it is possible to enumerate several other points of differentiation between the two.

However, what is intended to be clarified here is that, both in one and the other, being an obligation to pay the right amount, the default by the executed will culminate in the realization of expropriatory acts, with the invasion of his assets for the payment of the enforcer.

Moreover, at this point, the execution underwent one of its main evolutions, at the very moment when it ceased to fall on the person of the debtor, to reach only his patrimony, emerging what the doctrine calls the principle of patrimoniality⁷.

In this respect, the debtor's coercion was left aside through his imprisonment, the degradation of his image and physical punishments, or any other form of private revenge, to obtain the satisfaction of the creditor over his patrimony, with which the principle of the dignity of the human person is reinforced⁸.

Patrimonial liability prevails, which determines the necessary execution of the obligations of the executed on his present and future assets, except only the hypotheses expressly excluded from expropriation.

It is interesting to note that, in recent years, parallel to the principle of patrimoniality, there has been a trend, since the reforms that occurred in the Code of Civil Procedure of 1973 through Laws n. 11,232/2005 and n. 11,382/2006, to the forecasts contained in the Code of Civil Procedure 2015, of institution of measures that do not necessarily reach the assets of the executed, but which aim to impress the idea that it is more advantageous to pay the credit. This occurs, for example, in the imposition of pecuniary penalties, such as article 523, §1, of the Code of Civil Procedure of 2015 and the protest of the final judgment of the judgment, after the deadline for the voluntary payment of the debtor, contained in Art. 517, of the same code.

Despite the great evolution in this area, the executed is not always seen as a true part of the executive demand. This is because the execution is still considered as a process only of the creditor, and the State, through the judicial body, must seek, at any cost, its satisfaction.

In the wake of this thought, the rights and guarantees that may be guaranteed to the debtor are considered as deproatory mechanisms that the law provides to him, preventing the effectiveness of the legal protection enshrined in the enforcement order.

As a way of illustrating the disregard of the principle of adversarial in execution, the menu below, representative of this situation, is transcribe:

MENU: INSTRUMENT ASSESSMENT -
POPULAR ACTION - PROVISIONAL
COMPLIANCE OF SENTENCE -
MUNICIPALITY OF CURVELO - CLAIM
OF CONVERSION OF CASH AND
MONTHLY DISCOUNT ON PAYROLL-
APPROVAL - ABSENCE OF REASONING -

NULLITY OF THE DECISION - NON-OBSERVANCE TO THE CONTRADICTORY - ANALYSIS OF THE REQUEST MADE BY THE ENFORCER PRIOR TO THE SUBPOENA OF THE DEFENDANTS - DISPENSATION OF COMPLIANCE WITH THE RITE OF ARTICLES 520 AND FOLLOWING, OF THE CPC - APPEAL PROCEEDED. Pursuant to Article 93(IX) of the Constitution of the Republic, judicial decisions must bear due sub-technical and legal reasoning, to provide the litigants with access to the reasons for the reception or rejection of their claims and to ensure control of the exercise of judicial power, departing from any arbitrariness in the performance of the alleged activity. Once the violation of the paragraphs of Article 489 of article 489 of the Code of Civil Procedure, which lists the hypotheses of absence of reasoning of judicial decisions, to the extent that the decision obtained without proper confrontation of the facts and grounds presented by the enforcer, characterized the nullity of the "decisum" under appeal. Treatment parity is ensured for litigants in court proceedings. It is the duty of the judge to ensure the contradictory effective, not deciding against one of the parties without it being heard in advance. The acceptance, of plan, of the claims formulated by the enforcer in the exordial, in addition to noting the contradictory, violates the rite provided in Articles 520 and following, of the CPC, behold, the assessment took place prior to the subpoena of those executed. Appeal provided. (TJMG - Aggravation of Instrument-CV 1.0000.20.504803-6/001, Rapporteur: Des. Corrêa Junior, 6th Civil CHAMBER, judgment on 02/09/2021, publication of the summary on 02/12/2021).⁹

However, and contrary to this idea, the interference with the assets of the executed cannot occur irrationally and illegitimately. In reverse, it must occur within a discursive space, with strict observance of the laws applicable to the hypothesis and the principles of due process.

In this area, it is worth mentioning the principle of adversarial, the observance of which is necessary to allow the prior debate between the parties on the issues that will be decided by the judging body, even in the execution process.

It should be emphasized, in this sense, that the lack of merit analysis, in accordance with what is in an executive demand, does not authorize to say that there is no possibility of discussion regarding executive acts, a theme that will be better addressed in the following topic.

The Principle of Adversarial in the Execution

Since a long time, there is no longer question about the indispensable observance of the principle of contradictory in execution, an idea absorbed by the Constitution in force, which is expressed by demanding it in all procedures (art. 5th, LV, CRFB/88). The constitutional text also states that any property restriction is denied without prior observance of the guarantee of due process, which necessarily includes the principle of adversarial proceedings⁵.

Even if there was no constitutional provision under examination, this guideline would persist, since this principle is part of the very definition of what is the process, being one of its instituting principles.

This is because, for the more modern view that deals with the theme, the process is shown as an institution, focused on the realization of the fundamental rights provided for in the constitutional text, based on the effective participation of the parties, in contradictory, broad defense and isonomy³.

Moreover, the place, one cannot speak in proceedings without mentioning the guarantees enclosed in the directive of due constitutional process, among which the principle of adversarial proceedings stands out, which gives it a true democratic feature and, therefore, in line with the state model in force, at the very moment in which it allows the realization of a true dialecticity in the procedural space.

The contradictory, moreover, under this approach, constitutes a guarantee right that must

provide for the practice of all procedural acts, to ensure the discursive constitution of the entire process and decisions to be applied in the specific case¹⁰.

This is also the idea that is evidenced by the predictions contained in the Code of Civil Procedure 2015, which give special emphasis to the principle of contradictory in all procedures, given its inclusion in the chapter referring to the fundamental norms of civil procedure, already in Book I of the code.

Among these predictions, attention is drawn to the content of Article 10 of the Code of Civil Procedure 2015, which establishes the need to be heard the parties prior to the pronouncement of any decision in the process, even if it is a knowable matter of office. Here, there is the principle of adversarial proceedings, in the aspect of sealing the surprise decision and ensuring influence¹¹.

Considering the legal provision under analysis, together with the provisions of Article 5, item LV, of the Constitution, it can be affirmed that the principle of adversarial determines the need for a true comparticipation in the construction of the decision-making act, which can no longer be considered because of the judge's unique performance, but as a corollary of the discursivity fought among all the subjects of the process¹¹, even in the execution.

Its guarantee must be broad, within the purposes and objectives of the executive procedure, to depart from the idea that its application would be restricted to the constitution of the executive order. Moreover, the fact, the contradictory must also be verified in relation to all acts aimed at meeting the obligation set out in the document¹¹.

From this point of view, when one has the denial of the contradictory in the execution, the executive demand becomes a mere chain of procedural acts, aimed at compelling the debtor to fulfill his

obligation before the creditor, departing from the procedural guidelines established by the Democratic State of Law.

Thus, it remains essential to observe it in the execution process, so that it can effectively achieve the participation of both the enforcer and the one executed throughout the procedural procedure.

It should be emphasized, in the meantime, that the fact that there has already been a previous debate about the right hit or that there is already a presumption (relative) about the existence of credit does not mean that there is, likewise, the contradictory in all its fullness also in the execution process.

In fact, this constitutionalized institution allows debate on all the issues raised therein, if they have not been previously discussed before the judging body.

In this sense, the realization of the contradictory is verified in relation to the object of executive protection, allowing the participation of the subjects of the process in the construction of the procedural acts practiced in such demands, with no mitigation in the application of this guideline¹².

On the contrary, in the execution, it is worth emphasizing even more the guarantees inherent to the principle of due process, that is, the practical consequences on the property right of one of the parties are of considerable importance, which requires a greater discursivity around the decisions taken in demands brought for this purpose. In the wake of this thought, only with the guarantee of that principle is that an illegitimate and limitless execution against the debtor's patrimony is avoided, ensuring the very principle of the dignity of the human person¹³.

From this perspective, it must be that the principle of contradictory ends up allowing other principles specific to the execution to be observed, with emphasis on the principle of less burdensomeness. This

last principle softens the idea of satisfaction of the creditor at any cost, establishing the requirement that, if this objective can be achieved in more than one way, that it be observed that it brings fewer negative effects to the debtor. To assess the nuances of this principle and allow its application in the concrete hypothesis, the need to effect, rather, the contradictory, is possible, allowing the hearing of the parties in this regard, especially the executed one, whose arguments must be effectively considered in the conduct of executive acts.

In any case, it should be made clear that there is obviously no discussion here about the right of enforcer, and this debate should take place in the procedural ways proper to this, as is the case in the embargoes on enforcement. Nor is it sought to simply exclude the patrimonial responsibility of that which appears in the passive pole of execution.

What is intended to be made clear is the need for the executed to be informed and have the possibility to react to all acts conducted during the procedural procedure, on equal terms to the exercise, so that it may influence the decisions that will be issued in the specific case, and which aim at, reach its equity¹⁰.

Therefore, it should be ensured that the execution takes place "[...] satisfactorily to both parties, that is, that the right of the enforcer becomes effective and, at the same time, to give in the least burdensome way to their assets [of the debtor], as occurs when the indication of assets to the attachment to the executed has been opportunistized"¹⁰.

Such balance, which must be the keynote of all executions, necessarily permeates the guarantee of the adversarial, which ensures that the interference with the debtor's assets takes place to the exact extent of the creditor's satisfaction, without generating the preponderance of the right of one over the right of the other¹³.

It should be emphasized, even once, that today Brazil adopts the model of the Democratic State of Law, no longer admitting the exacerbated consecration of the debtor's assets, through the maximum protection of his right (Liberal State)¹², or the guarantee, at all costs, of the right of credit of the enforcer, through an effective and patriarchal performance of the fair judge (Social State).

In postmodernity, a true isonomic treatment between the parties must be established, with a view to enabling a balanced, rational and consistent execution with the legal system.

Only in these terms is there a need to talk about an execution in the democratic way, in which the satisfaction of the legitimate right of credit is guaranteed, without overlooking the rights inherent to the parties involved in the process.

CONCLUSION

From the ideas presented, it is perceived that the contradictory is an instituting principle of the process, which gives it the tonic of discursivity and allows the construction of rational decisions, even in the execution process, whose typical purpose is to satisfy a right already defined in an executive title.

Its extent in the execution process is broad, but at the same time it is guided by the objectives sought by the executive procedure, which, however, does not mean that the contradictory, in this hypothesis, is mitigated or does not exist.

In other words, the application of this principle takes place fully within the purpose of satisfying the right of the enforcer. In this sense, its presence is verified especially in the formation of decision-making acts that are delivered throughout the executive procedure, preventing the executed from having his

assets hampered without due process and without his effective participation.

Due to these circumstances, it is considered essential to observe the contradictory in the execution, so that the legitimate implementation of the executive acts is also possible in this space, based on the symmetrical influence of the parties in their construction.

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