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"EVIDENCE AND ITS VALUATION AS AN ELEMENT OF PROTECTION OF PEOPLE IN VULNERABLE CONDITIONS"

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Abstract: The work has a perspective on the need to revisit the classic rules for applying the burden of proof, especially given the social moment in the post-modern era, that is, under the precept of a referential author society, within a perspective methodological approach to protecting people in vulnerable conditions. The object is based on an analysis of the concept of autopoiesis found in Michel Foucault and its possibility of application in evidentiary theory, with the purpose of a more existential judicial process, with respect to responsibility for the other, valuing the evidence with greater adequacy to the violation in itself, as well as the necessary standard of discharging that original burden, bringing an effective possibility of stabilization and adequate response to the effects of a historical and social imbalance, with direct repercussions on judicial decisions.
Keywords: Proof – Truth - Vulnerability – Valuation - Autopoiesis

INTRODUCTION

The sociological, political, philosophical and artistic movement called post-modernity, together with liberalism, after the inflection of the seventies of the last century brings a great generational challenge regarding the standard of truth necessary for legal and procedural protection, especially of workers, these in minority and vulnerable conditions, such as black people, women, native peoples, people with disabilities, sexual orientation, among others.

The social mechanism for stabilizing conflicts has the process as its founding point, with the instrumental purpose of investigating and rationalizing the corresponding violation. In this sense, proof mechanisms are structuring elements of whether or not material rights are granted.

There is no doubt that, through global movements propagated by an increasingly interconnected and self-referential society, an unprecedented crisis is generated regarding the discussion of truth, a concept used in this work as a mechanism for validating or not validating the evidence, especially in the valuation phase of the magistrate.

Thus, through the current panopticon, the direct consequences of the movements exposed in the theory of proof are undoubted, with a direct reflection on the models of procedural investigation, conceiving that the evidentiary theory itself must bring to light the element exposed by Michel Foucault when listing the autopoietic system, defined as a production network of components and structures. As an emitter of communication itself, it therefore operates in a self-referential way, with the implication of self-organization: elements produced in the same system. It arises from the self-organization of nature and its communication with its environment, as if they were cells of the self-regenerating body. (FOUCAULT, 2022)

The minimum necessary evidentiary standard cannot be avoided from dialogue with its environment, highlighting that it is not an end in itself.

Given the undoubted situation that the judicial system needs adjustments, as it cannot remain far from a necessary effective response to pressing issues in society and the work environment, citing, for example, sexual harassment.

The issue itself, in the face of judicial discussion, can no longer be seen through the simple classical rules for applying the burden of proof, and modern investigation mechanisms must be integrated, as well as the development of a new standard and the premise of re-discussing the necessary standard in truth.

The object to be protected is exactly the material right resulting from the violation. Furthermore, the object of protection consists

of a primary, individual layer, as well as a more in-depth verification of the rights of those minorities established in the socio-structural conception.

This will be the path taken through the presentation and the respective work.

The idea is to open the discussion about the necessary incorporation of elements in the evidentiary theory, as well as the spectrum of truth that seeks to be met in the judicial process, under the premise of effective resolution of social demands, with the guarantee of the existential minimum, as well as the perspective of meeting equality, using a Hegelian conception here.

The objective is not to be an end in itself, like the judicial process, but rather the opportunity to discuss the real needs that the evidentiary theory must meet related to the difficulties and challenges of human relations in post-modernity.

We understand that the discussion will develop through the use of the updated conception of biopolitics, with analysis mechanisms from a philosophical and sociological perspective, especially in the collective aspect, maximizing the effects of the standard of truth necessary for a valuation with a greater probability of success, reaching there is the proximity of completeness in the internal and external justification of a decision.

The model to be followed is analytical-critical, with dialectical elements structured in a chain, through the linking of interconnected materials.

TRUTH AND POST-MODERNITY

It seems to us that from time to time, society undergoes a cyclical behavioral change, in which some truths are accepted as a basic paving rule and, after a certain period always coined by some element of social rupture, pre-established truths dissolve. and are objects of, firstly, the casting of doubts, secondly attacks and, finally, they are partially or totally deconstructed, but not through a scientific and methodological process, but rather through a mechanism of argumentative chauvinism.

On this path, there is no doubt that "cyberculture", through the maximization of orality, in the face of virtual connection networks, generates the possibility of this refoundation of truths, very quickly. (LÉVI, 2010, p. 11)

The effect of the testicle frame generates in postmodernism an unlimited range of information and structural challenges, specifically in the agreement of the basic existential minimum.

In this challenging context, which affects everyone, where everything depends on the control of narratives, the effects of this perspective on Law are deleterious and destructive, highlighting that the process, this as a means and not an end in itself, becomes vulnerable to the above, as well as the materialization and validation of a wide range of illegalities, the result of:

a) Need for an intended social purpose, regardless of the means;

b) mistake by agents working in the process, as a result of some manipulated and/or adulterated element.

Thus, the challenging picture brings to light the re-discussion of a conception of truth, especially how necessary it is to resolve an issue put in court.

Structurally, as mentioned, we live in the era of stabilization of a narrative, regardless of logic or truth, especially when starting from a fact for its establishment (narrative).

Michele Taruffo mentions (Veriphobia: A dialogue about proof and truth, 2017), as a conception "veriphobia", that is, the phobia of truth.

And the direct effect of the entire

externalized context is the reflection that we must make about the theory of evidence, especially how much the classical rules of the burden of proof must be those indicated for the stabilization of a demand in the post-truth era or, as proposed, the rules must be analyzed in the context of the parties and the situation involved, especially with the elements of particularly current understanding regarding minorities that are under the concept of structural harm.

Here I must make an addendum on how illegalism is repressed, in this idea of fast sharing of information, through cyberculture established as a structuring element of freedom.

I repeat, the theory of evidence cannot be immune to such a conception, suggesting that the current challenge in the process is whether or not to accept illegalism, especially arising from the phobia of truth, a fundamental element of narrative control.

The process is directly inserted in the challenge of the century of reestablishing some universal truths, with the aim of maintaining civility and the possibility of coexistence, moving away from a conception of impulsiveness towards stabilization.

THE SOCIAL SCENARIO, EVIDENCE AND ITS ASSESSMENT IN JUDICIAL DECISIONS

Skepticism and self-referentiality in today's society, without a doubt, bring an outfit of individual resolution and within the personal concept of problems.

There are no beliefs in the other or a corresponding responsibility for the other (LÉVINAS, 2008) in this more aggressive return to a romanticism, this time, not idealized.

Within a cyclical aspect, as well as art always portraying history, I remember a short story by François Rabelais (1494-1553), French Renaissance writer, author of Gargantua and Pantagruel (), which appears to be quite current, in a self-referential society, there is an idea of disbelief in justice, specifically in the rationing of evidence, especially in the purification/evaluation of evidence.

Rabelais attended the Law course in Poitiers, before taking the Medicine course, that is, he had the ability to mention the intersectionality of subjects, which was expressed in the aforementioned story, when he imagined a giant drunkard, Gargantua, whose son, also immense, Pantagruel, lives a series of adventures, starting with his own education, which brings innovation in the pedagogy of the time, such as physical education and the practice of sports.

In the story, Judge Bridoye sentenced cases by luck of the dice.[1] Judge Bridoye judged based on luck because modern people like brevity. Rabelais makes the judge explain his procedure, in a very witty step.[2] It is also seen how the judge made decisions, justifying them, allowing time to make the decision sweeter and more bearable.[3]

Rabelais antagonizes all the forum staff,

1. *"(...) They note that luck is very good, honest, useful and necessary for resolving processes and dissensions."*

2. "I do as you do, gentlemen, as is customary in the judiciary, to which our law always requires us to be subject (...). Having thoroughly seen, reviewed, read, re-read, passed and leafed through the complaints, postponements, comparisons, commissions, information, anticipations, productions, allegations, challenges, replies, rejoinders, opinions, orders, interlocutions, rectifications, certificates, delays, deeds, grievances, reservations, ratifications, confrontations, confrontations, libels, handouts, real, compulsory, declinatory, anticipatory letters, evocations, remittances, counter-remittances, write-offs, confessions, suspensions, continuations, and other incidents, provoked by one or the other party (...), I place all the defendant's paperwork at the end of the office and draw lots for him (...). Thatdone, I place the author's paperwork (...) on the other end of the table (...). And then I use my dice (...). I have other very beautiful and harmonious data, which I use, (...). when the matter is clearer, that is: when the paperwork is less."

3. *"(...) I detain, delay and postpone the judgment, so that the process, well ventilated, scrutinized and debated, reaches, through the passage of time, maturity, and so that, after it comes, it becomes more sweetly supported by the parties condemned (...)."*

without exception, by constantly sucking the parties' purses. For Rabelais the process is something despicable, and he expressed it this way: "The true etymology of the process is that it must have its bags full. "

For Rabelais, Judge Bridoye was at least quite sincere, in fact, a movement that postmodernity brings as an indefectible and maximum quality, such as the conception of Nietzsche's vision of ascetic priests (NIETZSCHE, 2017).

Without a doubt, the author criticized, with great irony, the valuation of the evidence. It seems to us that nothing can be more current than what is exposed here.

PROOF AND TRUTH IN THE PROCESS

The discussion is quite old, but under a methodological conception, without a doubt, the conceptual spiral deepens, highlighting that with each new sociological moment the direct effect of the evidentiary standard on the process also changes, specifically through the era of post- true.

The Law is not immune, as said, as is the evidentiary theory, as it is the first to be violated in this phase of narrative control.

Under what conditions will the factual discussion take place? The establishment of this standard is fundamental to advancing understanding and respect for those involved in the process, regarding a commitment to establishing an ethical evidentiary standard.

There is no way to mention evidence, without its valuation, as well as its interpretation mechanisms.

Thus, scholars focus on interpretative decisions and the selection of normative premises for judicial rationing. The problems from determining facts to the effects of selecting factual premises had not been frequently studied, even before the advancement of maximizing post-truth in cyberculture.

Michelle Taruffo, in her brilliant work (The Proof) provides justifications for abandoning this more in-depth study, namely:

1) Consider that every phenomenon of proof is understood and regulated in legal norms (not necessarily means of proof), so that it is only worth systematizing and examining the means of proof.

2) Only validate regulated tests, ruling out atypical ones.

3) Assume the self-sufficient context of the regulation of evidence in the legal aspect and not accept the import of general concepts, especially empirical ones (sociological, psychological, etc.).

The introductory line mentioned already highlights the size of the structural challenge to be scaled.

It must also be noted that the conception in question is not immune from criticism, especially in the wonderful discussion between Michelle Taruffo and Bruno Cavallone (Veriphobia: A dialogue about proof and truth) as an initial founding factor in the discussion about the burden of proof in the post- true.

In this sense, in the same work, Bruno Cavallone brings an initial idea, in that spiral model of revisiting an ideal conception of the search for truth, conceiving the idea of Calamandrei: "Calamandrei, who in the famous monograph Process and justice, justly affirmed that "la The finality of the process is not solely the search for truth; the finality of the process is something more, it is justice, where the determination of truth is solely a premise."

And it draws attention to a current problem in post-modernity, specifically when with the available means, within the evolution of cyberculture, an error of interpretation is

incurred by mixing past events and modern criteria: "Rückschluss, this is, the usual error of interpret past events with modern criteria",

This is the challenge for measuring the evidence, but this must go through the issue of the rules of the burden of proof.

BURDEN OF PROBATION RULES

The fundamental point to be explored is whether the rules for distributing evidence, especially in the classical conception, meet a conception of justice in this period of affront to democratic states of law, in this moment of post-truth.

Advancing the theme, how much the systems in question protect minorities, in the broadest sense of the term, such as racial, gender, sexual orientation, people with disabilities, indigenous peoples, among others.

Also crucial to the discussion is the conception of the need to resolve demands, on a large scale, as well as meeting the existential minimum, through the correction of decisions.

It is important to highlight, a priori, the alarming numbers, as data from the Superior Labor Court (TST), the highest body of Brazilian labor justice, indicate that, in 2021 alone, more than 52 thousand related cases were filed in the Labor Court. moral harassment and more than three thousand related to sexual harassment across the country.[4]

In this sense, the same court shows that sexual harassment records rose again, after the pandemic subsided and the gradual resumption of in-person work. In 2019, 2,805 cases were opened in Labor Courts across the country. In 2020, records showed a slight drop to 2,455 cases. But the 2021 numbers showed an increasing trend as there were 3,049 new actions, an average of 254 victims seeking justice per month.[5]

With the conception in question, a major problem arises regarding the question of evidence, because, as explained above, most of the time the act itself takes place hidden with the harasser in closed environments and without the prospect of material proof, for yes.

The opening of a judicial process on the subject does not guarantee an effective search for the truth or, as we argue, a greater probability of truth.

In this sense, it is important to highlight that, in 2004, 85% of the legal actions distributed to the Conseil des Prud'hommes de Paris alleged some type of moral harassment. Of these, however, only 5% led to a conviction for harassment.[6]

In the same vein, two thirds of sexual harassment cases in the federal administration end without punishment.[7]

In other words, we are facing a large gap between the search for protection and its implementation, a great abyss that, without a doubt, occurs in the existential aspect, as well as a need to question what our objective

4. In 2021, the Labor Court registered more than 52 thousand cases of moral harassment in Brazil.: TRT-13 promotes campaign on moral and sexual harassment during the month of May. Regional Labor Court of the 13th Region (PB). Paraíba, May 3, 2022. Available at: https://www.trt13.jus.br/informe-se/noticias/em-2021-justica-do-trabalho-registrou-mais-de-52-mil-casos-of-moral-harassment-in-brazil. Accessed on June 2nd. 2023.

5. AGUIAR, Caroline; TUNES, Gabriela e VITÓRIA, Vanessa. Brazil had more than 250 cases of sexual harassment at work per month in 2021. SBT News, São Paulo, April 10. 2022. Available at: https://www.sbtnews.com.br/noticia/justica/204188-brasil-teve-mais-de-250-casos-de-assedio-sexual-no-trabalho-por-mes-in-2021. Accessed on June 4th. 2023.

6. BOURGAULT, Julie. Moral harassment in France: a subjective-objective legal concept? Crossed perspectives on public policies aimed at countering violence at work, in Health, society and solidarity. Quebec: Franco-Quebec Observatory of Health and Solidarity, 2006. n. 2. p. 113.

7. TOMAZELLI, Idiana. Two-thirds of sexual harassment cases in the federal public administration end without punishment. Folha de São Paulo, São Paulo, 04 june,2023. Available at: https://www1.folha.uol.com.br/mercado/2022/07/dois-tercos-dos-processos-por-assedio-sexual-na-administracao-federal-terminam-sem-punishment.shtml. Accessed on June 4th,2023.

would be as jurists and possible inducers of an improvement in society.

It is reiterated, there is no possibility of the discussion not slipping into the issue of proof and truth, from a macro aspect, without the determinism of a pure and simple resolution of the demand.

The classic rule for distributing the burden of proof does not allow for the real implementation of the resolution of the demand, protecting the victim's rights, when belonging to a minority.

Undoubtedly, we must resort to multidisciplinary concepts, bringing a conception of force originating from an exact science, such as physics, within the evidentiary theory, with the purpose of what is done when issuing the statement (prescribing a conduct, describing a state of affairs, express an emotion). Therefore, we must use the force p in the aforementioned proposal, brought by professor Jordi Ferrer (Proof and truth in law, 2005).

In this sense, the force of being proven, under the acronym p, must be considered from the perspective of three ways: a) constitutive; b) normative; c) descriptive.

There is no preponderance, but qualitative assessment, within the evidence assessment phase.

We can conceive of the constitutive, through the classical conception, that is, when the judge incorporates that fact into his evidentiary rationing. In this aspect we had as defenders Kelsen and Carnelutti, with the positivist ideal, highlighting that it was a majority in the 20th century.

Here, it must, incidentally, be maintained that it has nothing to do with the truth, reiterating that in Taruffo's words, its pursuit is an ideal of justice. It is the result of a decision-making activity, not a cognitive one. Impossibility of predicating truth or falsehood.

In this sense, the existence of the fallible judge is not denied, therefore the concept of (formal) legal truth is used.

The conception of the Normative Statement is attributed from a perspective of combining facts with the norm.

In fact, it must be stated that there is no real valuation here either. It is a process of evaluating the legal consequence, that is, a subsumption exercise.

Furthermore, the distinction must be clear between the force that is attributed to the statement that expresses the definition and the force that must be attributed to the statements that contain the defined purpose. Here another problem arises, namely, for the determination of the fact and the consequent subsumption, a prior interpretation of the aforementioned statement is necessary.

Finally, the Descriptive Statement must be perceived by the occurrence of a certain fact in a reality external to the process. There would be susceptibility of truth or falsehood, that is, we are dealing with the assessment of the value of the fact, and not the fact itself and its enunciative consequence.

The situation at hand generates, from a first perspective, direct criticism among those who believe in the difference between material truth and another, formal truth.

For (Taruffo, 2014) here we are faced with the set of elements, procedures and rationing, through which that reconstruction is prepared, verified and confirmed as true. It is the process of recovering the instrumental link between the evidence and the truth of the facts.

Thus, under an a contrario sensu interpretation, to deny assimilation it is enough to admit that fact "x" was not proven in the process, even when the statement that states its occurrence is true, here a clear possibility of the mere distribution of the burden of proof.

The situation in question will already bring a problem, which we will anticipate, regarding the possibility of the existence of the probative nexus, a specific circumstance for the application of the dynamic distribution of evidence, a circumstance that would make it difficult, under this analysis, to apply the aforementioned different form of distribution of evidence. proof, in the event of an allegation of violation of the rights of people in vulnerable conditions.

Given the brief description of the models of statements founding the theory and the corresponding valuation of the evidence, we advance in the problem of proof and truth, from the perspective of the lack of specific regulation, under the precept of an analysis of the need for the sentence to be justified internally and externally, according to the doctrine of Robert Alexy in his work (Theory of Legal Argumentation).

In this line, the fundamental premise is to prove that p, using it to refer to the result of the entire evidentiary activity carried out in favor or against the conclusion p (taking into account the different specific means of proof affixed to the process).

And we reach the point of analysis of proving that p is true.

Along these lines, there is the possibility of interpreting the non-existence of a difference between proof and truth. The proof, in itself, would be the judicial confirmation, through the means established by law, of the truth of a controversial fact on which the right sought depends.

Two criticisms must be made, from a logical-legal perspective: the first is the difference between proven facts and facts that actually occurred, the second is the perspective that the erroneous collection of evidence cannot be ruled out, due to a lack of respect for appropriate procedural means.

Thus, the discussion between Cavallone and Taruffo brings an element of fundamental relevance, specifically what would be the direction of the evidence, at the time of its collection in the procedural sphere. Cavallone's questioning, with a good dose of irony, is quite clear: "the most important aspect of the new conception of the tests is the clear recognition of the discovery of the truth about the facts of the case as the end to which the acquisition of the proofs". Thus, this "victory of rationalism over mysticism" (Veriphobia: A dialogue on truth and truth)

The conception is complemented by the discussion between the application of the burden of proof rule as anti-epistemic and the precept of non liquet.[8]

The criticism is of fundamental relevance, because the concept of resolving the process, solely on the rules for distributing the burden of proof, does not appear to bring, in the period of post-modernity, the minimum amount of social pacification.

It is suggested that, in our modest understanding, the rules of evidence distribution, as well as its exceptionalities, such as the dynamic distribution of evidence, must be epistemic, argumentative reinforcements, but not absolute, a symptom, in fact, of the aforementioned veriphobia.

In fact, through the aforementioned rule there is an incentive for the party to bring elements that lead to a positive assessment of their argument, but, again, it is an epistemological conglomerate.

The fundamental point is that the judgment, in itself, through mechanisms of distributing the burden of proof, even within motivated rational persuasion, raises a major problem

8. (...) very frequently, all the times that, not considering one or more controversial facts proven,the judge decides by applying the trial rule of the burden of proof, an anti-epistemic rule par excellence, which could disappear as such, but which constitutes one of the foundations of the regulation of factual judgment in any modern system (and, moreover, the non liquet of the Roman judge was even worse from this point of view, because it entailed the refusal to decide, even if the decision

regarding the protection of minorities, exemplifying situations of sexual harassment in the workplace, such as founding north of the theory.

AUTOPOIESIS AS A PROTECTION MECHANISM FOR PROOF THEORY

Faced with the aforementioned crisis, as well as the lack of protection through the valuation of the classical rules of evidentiary distribution, due to the exposed context, we must move towards the possibility of the need to recognize Autopoiesis in the evidentiary theory.

There is no doubt that, in addition to all conceptions of Law, the one that comes closest to theoretical agreement is that it is language. The entire theoretical and procedural basis of legal science is based on language, whether formal or informal, highlighting that the latter model, although it encounters obstacles from those more conservative in the legal structure, has fundamental relevance in the model of application of the norm.

So that there is no theoretical omission, in contrast to the element set out above, under Heidegger's perception in his work (Being and Time) - things present themselves with a meaning, highlighting that they allow us to dispense with language, in an existential digression of being is.

This time, regardless of the element to be followed, even under the Heideggerian conception, it is necessary to argue for a path of greater procedural benefit, as well as protection of those in vulnerable conditions.

To this end, a conception by Michel Foucault must be brought into consideration when listing Luhmannian communication, through the word autopoiesis which refers to an autopoietic system, defined as a network of production of components and structures. As the sender of his own communication, he therefore operates in a self-referential way. It implies self-organization: elements produced in the same system. It arises from the self-organization of nature and its communication with its environment, as if they were cells of the self-regenerating body ("Alternatives" to Prison)

And Foucault continues his digression of reinvention, when he states that autopoiesis was used in the field of law by systems theory to solve the fundamental problem of externally delimiting the system, this normative-ideological one, in the confrontations of its environment, without excluding one's own capacity. to introduce internal changes that ensure its survival. In particular, systems theory considers the legal system capable of managing the relationships between its own elements with different levels of complexity of the environment and specific normativity capable of reaching levels of generalizations higher than those of other normative systems.

There is no doubt the need to also adopt the concept of "hypercycle", denoting that the different components of the legal system (legal procedure, legal act, legal norm, legal dogmatics) operate in a different, but reciprocally complementary, way. Only the combination of these components competes to manage requests coming from outside the system.

The three functional phases of autopoietic systems are selection, variation and stabilization: the first is typically characterized by administrative structures; the second has to do with variation in legislation;

was eventually in accordance with the "reality of the facts").Now, my disagreement on this point does not stem from a preconceived sympathy for all evidentiary prohibitions, but only from the conviction that the rules under examination have no more than indirectly an "epistemic function," and are instead substantial rules (as It also shows its location in the civil codes of Napoleonic derivation), aimed at promoting the written formation of contracts, as a guarantee of the certainty of legal business relations; opinion that, furthermore, is widely disseminated in the doctrine." (Veriphobia: A dialogue about proof and truth)

the third alludes to the stabilization of jurisprudential procedures. Finally, the phase of self-representation of dogmatic-conceptual structures can be attributed to the doctrine, which seeks to give unity and coherence to systemic integrality. Together, these components form an "internal hypercycle" which, thanks to the synergy of all components that are part of the legal system, ensure an adequate response of autopoietic law to its environment. ("Alternatives" to Prison). In this sense, the table is illustrative:

Autopoietic functions	Internal circuit
Stabilization	Jurisprudence
Selection	Administration
Variation	Legislation
Self-representation	Doctrine

Table 1: The intrasystemic hypercycle of autopoietic Law

Source: Elaborated by the authors

Here it is of fundamental relevance that, from the proposed perspective of an evaluative analysis of the evidence, the model itself must be taken into consideration, under the macro conception of the three introductory key elements, that is:

a) selection (through the administration of the judiciary), with the practical example in Brazil, when the National Council of Justice adopts an indicative resolution on several fronts, with the aim of reducing gender inequality. [9]

b) Stabilization – through jurisprudence, whether in the common law or civil law systems, even if they adopt different models of valuing evidence, but with the correspondence of a similar theory, subjecting, therefore, to decisions being subject to adequate assessment of the proof in the convergent elements of the aforementioned necessary protection for minorities.

c) The variation element is the most difficult, as it comes up against a conservative human conception, as well as a deformed vision of self-protection and reservation of dominance, it is actually serious, when it comes to a change that disadvantages those who dominate the narrative, thus as endowed with privileges of race, gender and sexual orientation, for example.

Even so, there is no doubt that the clamor and the winds of change will even generate a necessary legal provision, of a procedural nature, with the purpose of different valuation than the pure and simple assessment of the classic rule of the burden of proof, under the precept of those who have discharged or not.

Advancing the proposal, under Foucault's understanding, the model of autopoietic law does not only have a theoretical basis. The change in perspective of the autopoietic framework has practical consequences and depends on this the possibility of defending the survival of any autopoietic system which, like the legal system, is endowed with the capacity for self-observation and self-awareness.

In other words, in the precept we are dealing with, a readjustment or new application of the model for distributing the burden of proof is necessary when we have situations involving minorities.

The idea conceived by Foucault, in fact, brings a precise diagnosis of the resistance to applying the proposal, from a perspective of encounter/mismatch: "The autopoietic legal system, in short, contributes to the encounter of two distinct sensibilities: the sensitivity of operators legal, always more disoriented on the decisional level due to the undeniable separation of the real functioning of the law

9 Working Group established by CNJ Ordinance number: 27, of February 2, 2021. Normative Act 0001071-61.2023.2.00.0000 and Recommendation nº 128.

from its own expectations; and the sensitivity of sociologists, who seek to frame problems considered insoluble due to the inadequacy of rigorously formal normativism within a broader vision of legal reality."

The autopoietic reference constitutes a way of representing the law from the perspective of the law itself and, therefore, appears as a case of autopoiesis capable of influencing the reality that it proposes to respect, but it is of fundamental importance to understand the necessary connection of human areas, because the law, by itself, cannot bring resolution and determine which minorities are, even from a perspective of material equality.

THE BURDEN AND VALUATION OF PROOF WHEN THE PROCESS INVOLVES PEOPLE IN VULNERABLE CONDITIONS

Given the sociological and philosophical interpretation described, we must consider in this topic the issue of the burden of proof and the valuation of proof, when the process involves one of the parties involved, such as those belonging to structural minorities, that is, in a vulnerable condition.

Due to a need for the object of work, the conception here will be based on the aspect of the work process;

Therefore, it must be noted that in the Brazilian model, the rules for distributing the burden of proof are imported from the Code of Civil Procedure, but are specifically transcribed in the Consolidation of Labor Laws, especially after the legislative reform of November 2017. [10]

Thus, the rule of classic distribution was adopted, that is, the proponent needs to prove the fact constituting his right and the defendant the fact that impedes, modifies or extinguishes the author's right.

It is worth mentioning that in the labor process the burden is not static, with the characteristic fluidity, especially during the hearing.

It also raises the predictability of the dynamic distribution of evidence, in specific cases, given the difficulty for the party to fulfill the burden and the greater ease of proof for the party that did not originally hold the burden, through specific judicial attribution.

The rule in question, given the already mentioned discussion of proof and truth, is directly linked to the principle of non liquet, highlighting that the corresponding distribution of the burden of proof brings the possibility of resolving demands on a large scale, especially generating external justification of the sentence, from the perspective of the theory of legal argumentation (Robert Alexy), a precept adopted by the Brazilian Code of Procedure.

There is also no doubt that we cannot move away from reality, highlighting that the affront to minority rights occurs in a camouflaged manner, making testimonial evidence extremely difficult, for example.

10 Article 818. The burden of proof lies with: (Wording given by Law number: 13,467, of 2017)

I - To the complainant, regarding the fact constituting his right; (Included by Law number: 13,467, of 2017)

II - to the defendant, regarding the existence of a fact impeding, modifying or extinguishing the claimant's right. (Included by Law number: 13,467, of 2017)

§ 1 In cases provided for by law or in the face of peculiarities of the case related to the impossibility or excessive difficulty of fulfilling the task under this article or to the greater ease of obtaining proof of the contrary fact, the court may assign the burden of proof in a manner otherwise, as long as it does so by reasoned decision, in which case it must give the party the opportunity to discharge the burden assigned to it. (Included by Law number: 13,467, of 2017)

§ 2 The decision referred to in § 1 of this article must be given before the opening of the investigation and, at the request of the party, will imply the postponement of the hearing and will make it possible to prove the facts by any means admitted by law. (Included by Law number: 13,467, of 2017)

§ 3 The decision referred to in § 1 of this article cannot create a situation in which the party›s performance of the task is impossible or excessively difficult.

And here we come to the fundamental point, namely, how to reconcile the rules for distributing evidence, as well as its subsequent valuation, moving away from non liquet, but at the same time not generating the feeling of the judiciary's inability to deal with situations of affront, in the work environment, of those people in conditions of historical vulnerability.

We set out, seeking a possibility of response and special attention to a minimum sensation of justice, through the possibility of direct application of the concept of autopoiesis.

In this sense, there is no doubt that the issue itself is a social choice and any choice will potentially be subject to errors in specific cases.

As an example, in a case of sexual harassment in the workplace, when giving greater or lesser weight to the victim's words, there will be a large difference in the evidential value and, consequently, the increase or not of convictions.

Empirical elements persist to believe that the chance of a woman not reporting harassment is much greater than doing so in an untruthful way, imputing a false fact, highlighting that distrust of the victim's words, in itself, proves veriphobic.

Autopoiesis suggests that we go through the three phases already mentioned, through identification in the example in question.

In this sense, the selection element is the need to improve the administration of the judiciary, that is, this stabilizing power must be the active channel for changing the configuration and understandings regarding the possibility of better interpretation of situations without a strictly conservative framework. probative, that is, that the personal statement does not serve solely and exclusively as a possibility of harm to oneself, through confession, but rather that it is an active element in line with the possibility of substantiating and externally justifying the sentence, in line with other elements.

The stabilization phase, which takes place through jurisprudence, demands a readjustment of an establishment of a greater probability of truth, without forgetting Taruffo's criterion, as an element of a rational analysis of the evidence, through the (Taruffo, 2014): "*1 - The veracity of the determination of the facts is a necessary (but – obviously – not sufficient) condition for the justice of the decision; 2 – Fair procedure; 3 – Correct interpretation and application of the rule that regulates the case.* "

Thus, the conception of jurisprudence becomes fundamental for the stabilization of readjustment of valuation, from a perspective of responsibility for the other (LÉVINAS) in cases of violation of minority rights in the workplace.

The proposal is that the ratio decidendi brings in a fragmented way the set of evidence sufficient for the greatest probability of truth, especially reducing the standard of the constitutive fact itself, but with the adoption of evidence as sufficient elements for the granting of judicial protection.

Finally, regarding the element of variation, it is necessary to briefly raise some legislation that already brings the topic from a protective perspective for people in vulnerable conditions.

France has the practice of giving the defendant the burden of dissolving the allegation of harassment, as long as the plaintiff generates facts in the process that could give rise to the presumption of corresponding harassment. [11]

The Portuguese Labor Code (article 29,

11 "Article L 122-52 of the Labor Code requires the employee to establish the facts which allow the existence of harassment to be presumed.

This is in accordance with our civil and criminal procedures - the alleged harasser benefits from the presumption of innocence. The requesting employee must establish the materiality of the precise and consistent factual elements that he presents in support

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combined with article 25, 5) also does not omit regarding the non-application of the simple classic rule, resulting in the reversal of the burden of proof, weighing on the legal-procedural position of the employer, when the alleged harassment constitutes typical discriminatory conduct.

In the same sense, it is worth bringing to light the jurisprudence, specifically the Porto Relation Decision 3819/08, judged on 02.02.09:

> "(...) the European Union signed an agreement between member countries, approving the reversal of the burden of proof in the case of sexual harassment.
>
> The French legislator followed the same direction, in the law that curbs moral harassment at work. The reversal of the burden of proof is permitted, with the burden of proving the non-existence of harassment being placed on the aggressor, as long as the plaintiff has already presented sufficient evidence to allow the presumption of veracity of the facts narrated in the initial petition." (Psychological Terror at Work)

Thus, sufficient strong elements are indicated for the possibility of adequate protection for those in vulnerable conditions, with a readjustment of the interpretation of the classical rule itself for distributing the burden of proof.

CONCLUSION

It is noted that, given the context presented, through the aforementioned autopoiesis, there is the possibility of adopting the classical theory of distribution of the burden of proof, but with a reconfiguration of its valuation and the standard that enables a greater incidence of conviction against those who attack the rights of minorities in the workplace.

Thus, correction within the law itself becomes viable, highlighting that the valuation of evidence can indeed be an object of truth, regardless of the need to merely assess whether or not there was a direct discharge of the burden of proof.

In this scenario, the proposal set out by Foucault with its three elements that induce correction of law itself, that is, through the triad of selection, stabilization and variation.

Proof is not an element in itself, there is a purpose, undoubtedly existential, which cannot simply punish those who have the greatest difficulty in bringing the fact to fruition in a framework full of elements, when it takes place away from everyone's eyes, with few traces.

Post-truth, too, cannot be an obstacle to the necessary readjustment, given the elements of correction already placed in the system itself, highlighting that the challenge for the judiciary is also to face post-truth, which feeds on the deconstruction of truth.

In this element, care is taken to ensure that there is no inappropriate confusion between proof and truth, but rather the focus when proposing a readjustment of the probative valuation, with a view of responsibility towards the other, a more existential term, but with a humanistic nature, It will undoubtedly determine the extent to which real social stabilization will be possible, as well as adequate protection for those in vulnerable conditions, especially within the work environment and, subsequently, in the course of proceedings.

Therefore, it is time for true autopoiesis in evidentiary theory, as a social choice, recipient of a real commitment from the judiciary, under the mantle of effective existential responsibility.

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of his allegations.

In view of these elements, it is up to the defendant to prove that his actions are justified by reasons unrelated to any harassment. The judge will then form his conviction."

REFERENCES

1. AGUIAR, Caroline; TUNES, Gabriela e VITÓRIA, Vanessa. Brasil teve mais de 250 casos de assédio sexual no trabalho por mês em 2021. SBT News, São Paulo, 10 de abr. de 2022. Disponível em: https://www.sbtnews.com.br/noticia/justica/204188-brasil-teve-mais-de-250-casos-de-assedio-sexual-no-trabalho-por-mes-em-2021. Acesso em 04 de jun. de 2023.

2. ALEXY, Roberty. Teoria da Argumentação Jurídica. 4ª ed. Rio de Janeiro: Forense, 2017.

3. BOURGAULT, Julie. Le harcèlement moral en France: un concept juridique subjectif-objectif? Regards croisés sur les politiques publiques visant à contrer la violence au travail, in Santé, société et solidarité. Québéc: Observatoire franco-québécois de la santé et de la solidarité, 2006. n. 2. p. 113.

4. CARNELUTTI, Francesco. A Prova Civil. São Paulo: Editora Pillares, 2016.

5. FERRER BELTRÁN, Jordi. Prueba y verdad en el derecho. Madrid: Marcial Pons, 2005.

6. FOUCAULT, Michel. "Alternativas" à Prisão. Petrópolis: Vozes, 2022.

7. GUEDES, Marcia Novaes. Terror Psicológico no Trabalho. 3ª ed. São Paulo: LTR, 2008.

8. HEIDEGGER, Martin. Ser e Tempo. Petrópolis: Vozes, 2015.

9. LÉVY, Pierre. Cibercultura. 3ª ed. Tradução: Carlos Irineu da Costa. São Paulo: Editora 34, 2010.

10. LÉVINAS, Emmanuel. Totalidade e Infinito. 1ª ed. Coimbra: Editora Almedina - Edições 70, 2008.

11. NIETZSCHE, Friedrich. Genealogia da Moral. São Paulo: Martin Claret, 2017.

12. RABELAIS, François. Gargantua e Pantagruel. São Paulo: Editora 34, 2021.

13. TARUFFO, Michele. A Prova. Rio de Janeiro: Marcial Pons, 2014.

14. IDEM. Verifobia: Un diálogo sobre prueba y verdad. Madrid: Editores, 2017.

15. TOMAZELLI, Idiana. Dois terços dos processos por assédio sexual na administração pública federal terminam sem punição. Folha de S.Paulo, São Paulo, 04 de jun. De 2023. Disponível em: https://www1.folha.uol.com.br/mercado/2022/07/dois-tercos-dos-processos-por-assedio-sexual-na-administracao-federal-terminam-sem-punicao.shtml. Acesso em 04 de jun. De 2023.