https://dx.doi.org/10.22161/ijaers.6.6.20 ISSN: 2349-6495(P) | 2456-1908(O)

The effectiveness and legitimacy of the institute Special Testmony in Brazil and memory

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Abstract— *In this work, we analyze provisions of Law 13,431, from April 4, 2017, which instituted the so-called Special Testimony for the judicial hearing of children and adolescents victims or witnesses of violence, aimed at minimizing the psychological consequences of their participation in the production of oral evidences, as advised by the Federal Council of Psychology, through a technical note, in which it opposes to such procedure, considering that it contributes to the "revictimization" of children who are victims of violence. The main objective was to analyze the effectiveness and legitimacy of the institute, as a guarantor of the rights of these children and adolescents. The approach was interdisciplinary, oriented mainly by theoretical postulates of the fields of memory, psychoanalysis and discourse studies, from which we mobilized some operational concepts*

Keywords— ***Criminal Procedure, Memory, Testimony, Violence.***

I. INTRODUCTION

In this work, we discuss the institute of the "special testimony", formerly named "testimony without harm", instituted by Law 13,431 of April 4, 2017, seeking to verify the effectiveness and legitimacy of this procedure as mean of production of legal truth, from the analysis of its compatibility with the principles that guide the practice of psychology as a profession and with the nature of truth objectified by this practice / science and with the nature of the truth proper to the legal field.

The "special testimony" aims to minimize the psychological impacts resulting from the hearing of children and adolescents, victims or witnesses of violence, for purposes of criminal procedural instruction. However, among other allegations, the Federal Council of Psychology (CFP) maintains in the Technical Note 1/2018 / GTEC / CG that the consequences of implementing this procedure would be opposite to those sought by the ordinary legislator, since, instead of guaranteeing protection to the psychological integrity of the minor, it would end up exposing him to a situation of stress and suffering, making him relive the situation of violence suffered or witnessed

We have, therefore, two sciences or practical arts, directly involved in the accomplishment of the special process of hearing of children and adolescents, instituted by Law 13.431 / 2017, psychology and law, which have different views about the legal discipline conferred to this modality of production of oral evidence, stating formulations on the subject that sometimes contradict each other in relation to the legitimacy of the institute.

II. MATERIAL AND METHODS

The *corpus* of the present analysis is basically composed of two documents: i) the text of the Law 13,431 / 2017, which disciplined the institute of Special Testimony; and ii) The Technical Note nº 1/2018 / GTEC / CG, of the Federal Council of Psychology, which stated a contrary position to the provisions of the above mentioned legal statute, which regulates the Special Testimony.

Because it is a question situated at a point of interaction between the science of Law, more precisely the Criminal Procedural Law, and the Psychology, which despite having points of convergence, present different opinions regarding the hearing of children and adolescents victim or a witness to violence, we opted for an interdisciplinary, as well as a dogmatic and qualitative approach of the *corpus*, from a perspective of analysis of the means of production of truth in the juridical sphere, to which we use, besides works from the field of law, postulates of Foucault ([1974] 2002), and from the prism of memory, when we mobilized the theories of Bergon ([1896] 1999) and Freud ([1896] 1977).

https://dx.doi.org/10.22161/ijaers.6.6.20 *ISSN: 2349-6495(P) | 2456-1908(O)*

Foucault (1974) states that there are two forms of truth: the "scientific" truth, internal or intrinsic, which is corrected by its own principles of regulation, as in science, and external truth or extrinsic, which is formed in societies in various positions, according to determinated "rules of the game", which give birth to certain forms of subjectivity, certain domains of object and types of knowledge.

The legal system of production of truth that prevails today and in which the Brazilian Code of Criminal Procedure is based is derived from what Foucault (1974) calls *examen*, which strongly influenced another system that he identified as "inquiry" and which contrasts with the so-called regime or game of evidence (*épreuve*), in which the criminal procedure was a kind of combat between families, characterized by the absence of a representative of society and the lack of hearing of those who witnessed and / or experienced the events, or by the non-attribution of value of evidence to their testimony

The juridical form of production of the truth that Foucault ([1974] 2002) calls inquiry was based, as well as the examination, by a rational search of the real dynamics of the facts, and was described by the author, from the analysis of the tragedy Oedipus- King, of the Greek playwright Sophocles, as a process of appropriation of the gauging of truth, which was previously on the divine level by the people, through the juxtaposition of scattered fragments, among which the testimony stands out, which assumes, in the tragedy Sophocles, the role of central proof, being that it is through the witness, as was through the testimony that the truth about the life of Oedipus was established.

In the Brazilian criminal procedure system (CPP, art. 155), the evaluation of the evidence is guided by rational persuasion or by the free justified conviction of the judge, a system in which the magistrate has ample freedom in the appreciation of the collection of evidence, being able, in his judgment, to attribute to each evidence produced in the process the value that he deems most appropriate. He must, however, state in the judgment the reasons for his conviction, justifying the burden of proof attributed to each element of conviction relied on in the decision.

The Code of Criminal Procedure in force contemplates several means of collecting of evidences, listed, not exhaustively, in its Title VII, art. 159 to 250. Among those, two are relevant to our work; the testimonial evidence and the offended statements, which may be the object of the so-called Special Testimony. Those means of evidence, in addition to being taken orally, have several common characteristics, more extensively disciplined in the articles that govern the production of testimonial evidence, among which two are of greater importance for this study: objectivity and retrospectivity.

Objectivity implies the absence of considerations of subjective, evaluative nature on the part of the subject of evidence. This characteristic is expressly disciplined in art. 213, of the Code of Criminal Procedure, *in verbis*: "the judge will not allow the witness to express his personal appreciation, except when inseparable from the narrative of fact."

Retrospectivity, however, implies that the oral evidence will be about facts that are necessarily past; therefore, that can be stored in the memory of the subject of evidence (witness, offended or accused). Adressing the word "memory" as a polysemic term, endowed with different meanings, it is necessary that we discuss some questions related to the mnemonic phenomenon to which the characteristic of retrospectivity of the oral evidence is linked.

The core of Bergson's conception of memory ([1896] 1999) rests on the concept of duration. For this author, it is impossible to conceive time as an orderly succession of facts, with well-defined intervals. In his words: "The division [of temporal flow] is a work of the imagination, which has the function of fixing the moving images of our ordinary experience, like the instantaneous lightning that illuminates during the night a scene of storm" (BERGSON, [1896] 1999, 221).

In his studies, Bergson ([1896] 1999) further differentiates "perception", derived from the senses, from "remembering", anchored in the memory constituted of facts and experiences lived previously. He asserts, however, that such concepts are merely ideal, since the perception, arising from matter (image), is always permeated by memories, in a kind of active present, in which a series of consciences are evoked to help the present moment, whereas, likewise, there is no pure remembrance, since memories are always brought to the surface, bent over a materiality and, therefore, crossed by a perception. Fonseca-Silva (2007) states, referring to Bergson ([1896] 1999), that "the author argues that all perception occurs in a certain duration (name given by the author to time) and implies the intersection with memory, which, linked to a conception of non-spatialized time, accompanies us throughout our lives, maintaining kept in a complete state of virtuality, since it is updated according to present situations and interests (Fonseca-Silva, 2007, p. 15). There is, therefore, in the memory theory developed by Bergson ([1896] 1999), the recognition of the existence of a process of re-signification of the past facts, when evoked in the present, because of the nuances of the

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current perception, which is always aided by the by the affectivity and the conjectures of the present events.

Freud ([1896] 1977), in Letter 52, while also addressing the question of memory, states: "our psychic mechanism has been formed by a process of stratification: the material present in the form of traces of memory would being subjected, from time to time, to a rearrangement according to new circumstances - to a retranscription" (Freud [1896] 1977, *apud* Fonseca-Silva (2007, p. 15).

We see, then, that, like Bergson ([1896] 1999), also Freud ([1896] 1977) shares the understanding that there is an actualization, a reframing, a rearrangement of memory in the present moment, so that memory cannot be taken as an indefectible picture of past events. This issue becomes more relevant when such rearrangements of memory occur in relation to legally relevant facts, such as those sought to have access through the collection of statements from witnesses or the offended.

III. RESULTS AND DISCUSSION

The testimonial evidence, as we have seen, assumes decisive role with the emergence of the "inquiry": according to Foucault ([1974] 2002), the Oedipus Tyrannus tragedy marks a transition movement of the verification of the truth that was previously on the divine level, passed to the ruling class and then to the lower classes, thus settling the way in which people obtained the power to judge their own monarchs, through the testimony.

Attributable even to the occupant of the lowest rank in the social hierarchy, the testimony becomes a sound medium for demonstration of truth, in a retrospective condition, turned to the past events, allowing its verification through the intellectual activity, in the sense of linking the statements.

However, the possibility that the testimony contained distortions and / or inaccuracies did not go unnoticed by the Law. In the old Roman provisions on the judicial evidence collection, was established the axiom *testis unus testis nullus*, according to which the evidentiary validity of a single testimony is null and void. This aphorism was not, however, supported by Brazilian law, since, in our system, the validity of the single testimony is admitted.

Malatesta (1996, p. 319), discussing the testimony, states that: "the foundation of the affirmation of the person in general, and of the testimony in particular, is the presumption that men perceive and narrate the truth, a presumption based, in turn, on the general experience of humanity, which shows how in reality and in the greatest number of cases, man is truthful; truthful by the natural tendency of intelligence, which finds, in fact, more easily than in lies, the satisfaction of a good which is innate.

Still according to the author, this belief in human trustworthiness rules all social relations and without it there would be no possible intellectual progress, since the acquisition of knowledge presupposes faith in the observations and experiences of others. It points, however, to two conditions of credibility, in regard to the person of the witness: first, that he is not mistaken; second, that she does not intent to deceive the judge.

The first of these conditions presupposes the concrete possibility that the witness is mistaken because of distortions in relation to the perception of the witnessed event, as well as because of the (non) preservation of the remembrance.

In regard to this last aspect, according to Giacomolli and Gesu (2008), from an interview granted by Izquierdo, researcher in the area of memory physiology, to the Argentine Journal of Neuroscience (RAN), entitled *The Memory*, which, according to Izquierdo: "in the early hours of its acquisition, declarative memories of long duration are susceptible to interference by numerous factors, from cranial trauma or convulsive electroshocks, to an enormous variety of drugs, and even to the occurrence of other memories. Furthermore, exposure to a new environment within the first hour after acquisition may seriously disrupt or even cancel the definitive formation of a long-lasting memory (Giacomolli and Gesu, 2008, p. 443).

Therefore, even if the witness really believes that he is declaring the truth in his testimony, there is a concrete possibility that the narrated events include divergences from what has actually happened, or even that they do not keep any similarity with the facts occurred, which may result from the phenomenon of perception, which, as we have seen with Bergson ([1896] 1999), is permeated by remembrance.

It is not undisputed, in the jurisprudence of our courts or in the specialized legal literature, that an evidence from an eventual witness or offender shall be attributed the value of an absolute proof, to the detriment of other equally acceptable evidences, taking away from the accused his constitutionally guaranteed presumption of innocence and imposing on him the consequent criminal penalty, notwithstanding jurisprudential precedents that restrain the validity of an evidence to its consistency with other evidentiary elements.

However, there is no denying that such reports are, in many cases, a large part of the body of evidence, with a strong influence on the conviction of the judge, which is why a closer analysis of the so-called Special Testimony

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becomes imperative, which is done in the next topic, in which we discuss the legitimacy of this institute as a protective measure of children and adolescent victims of violence.

According to its preamble, the Law No. 13.431 / 2017 "establishes the system of guaranteeing the rights of children and adolescents who are victims or witnesses of violence and amends Law No. 8,069, of July 13, 1990 (Statute for Children and Adolescents)".

With the adoption of this system, a Special Testimony was instituted, which implied altering the procedure for collecting testimony of children and adolescents for purposes of criminal investigation and criminal procedural instruction, seeking to minimize the harmful consequences of their re-exposure to the criminal facts from wich they were victims or witnesses. Therefore, the Law 13,431 / 2017 changes the dynamics of the collection of statements, which began to be performed by professionals qualified for this purpose, replacing the usual procedure, which used to be presided over by the magistrate, and necessarily in his presence and the parties acting in the process. The art. 12, caput, of the Law 13,431/2017, establishes that the special testimony will be collected according to the following procedure:

I - Specialized professionals will inform the child or adolescent about the taking of the special testimony, informing them of their rights and the procedures to be adopted and planning their participation, being forbidden to them read the complaint or other procedural documents;

II - The child or adolescent is assured the free narrative about the situation of violence, and the specialized professional can intervene when necessary, using techniques that allow the elucidation of the facts;

III - In the course of the judicial process, the special testimony will be transmitted in real time to the courtroom, preserving secrecy;

IV - upon completion of the procedure provided for in item II of this article, the judge, after consulting the Public Prosecutor's Office, the counselor and the technical assistants, shall evaluate the pertinence of supplementary questions, organized collectively;

V - The professional can adapt the questions to the language of better understanding for the child or adolescent;

VI - The special testimony will be recorded in audio and video.

Although the law does not indicate the technical qualification required by the professional who will conduct the Special Testimony, referring to him just as "specialized professional", it is understood that, given the nature of the intervention and the legal purpose of protecting the any damage resulting from the conduct of his or her hearing and the remembrance of the criminal acts of which he or she was a victim or witness, such *munus* shall fall on a professional qualified to evaluate the psychic consequences of the collection of the testimony, which requires knowledge and skills pertaining to the area of Psychology.

Notwithstanding that the purpose of the law is to protect the declarant from possible harmful consequences of his / her re-exposure to the criminal acts suffered or witnessed, through the performance of a professional that leads the hearing in the least harmful way possible, the Federal Counsel of Psychology (CFP) has manifested itself, as already seen , contrary to the adoption of the procedure, by means of Technical Note No. 1/2018 / GTEC / CG, expressly recommending that psychologists and psychologists "do not participate in the inquiry of children through special testimony", with the argument that " in the name of protection, the special testimony violates the right of children and adolescents who are the object of preponderant evidence in criminal proceedings, disregarding their peculiar situation as a developing person and their dignity and “that is not the attribution of the psychologist to perform special testimony for it harms confidentiality and professional autonomy."

Discussing on the "testimony without harm", a proposal that served as an inspiration for the current Special Testimony, Conte (2009, p. 74) establishes a series of questions:

When a child is asked to tell about an experience that is of the traumatic order for it, can we use a criterion of truth (objective), leaving aside the enigma of the subjective event that has not yet been dealt with psychically? Is truth a possible category to be thought of, when the event was not translated, repressed, and forgotten? When the event is still an enigma in search of a meaning, doesn’t it opens up the possibility of the symbolic?

In the proposal of the testimony without damage two questions are at stake, the search for truth, when the implication of this talk is the arrest of the abuser, usually a relative; the second question is that in view of the non-forgetfulness of the traumatic situation, speaking assumes the dimension of act, putting the event back on the scene.

Thus, the demand for validity in the child's report, when it is exposed to a testimony, evidences a paradox, since it must reveal and hide. Reveal what was asked for the investigation (the objective truth) and hide what happened (the subjective experience of pain, shame and passivity). Speaking appears as a symptom, because it

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seeks to reveal the truth (the said) when the psychic (the unsaid) suffering is what overflows. The necessary gap between the spoken and the unspoken can occur in a context of listening to the child, otherwise we can speak of re-victimization.

In other words, what the author argues is that, given the peculiarity of the fact experienced by the child or adolescent, which would still lack processing by its psychic apparatus, enabling repression (confinement of what happened at the level of the unconscious) or elaboration / signification of the event, the submission of the victim to the act of the testimony would imply in a situation of not forgetting the traumatic experience, which, consequently, would lead to a situation of re-victimization of the child or adolescent.

It is also necessary to observe, with Freud (*apud* CONTE, 2009, 73), that "psychic reality is a particular form of existence that must not be confused with material reality", that is, what has been recorded in the psyche of the victim, so as to be capable of remembrance (evocation), does not necessarily keep perfect symmetry with what actually occurred (material reality), thus being the Special Testimony consisting of misleading accounts, not because of the will of the victim to misrepresent the facts, but because of the memory failures to which it is subject and which we discussed above.

Thus, the question of the legitimacy of the institute of Special Testimony finds its focal point in the necessary balance between values equally protected in the Federal Constitution: on the one hand, the dignity of the developing human person (in this case, child or adolescent victim or witness to violence) and, on the other hand, the guarantee of effective criminal protection, which obliges the State to repress the crimes that are subject to its jurisdiction, since it has a monopoly of the power to punish, being disallowed to individuals, except in situations provided by law (legitimate defense, state of necessity, etc) to promote "justice with one's own hands".

IV. CONCLUSION

The views expressed in texts concerning juridical science as well in the texts on psychology show that, although both sciences seek the truth, the material content of the terminology is distinct in each of these areas of knowledge In the field of law, it is characterized as external truth, linked to the real dynamics of facts that have some relevance to the application of laws, whereas Psychology deals with the "psychic truth", internal to the individual, which does not necessarily manifests strict coincidence with the real dynamics of the facts, being more related to the perceptions and representations made by the individual concerning the facts he experiences.

The practice of violence against children and adolescents is a real fact that inspires the need for effective action by the State, in guaranteeing the effective protection of these human beings in particular condition of development. However, regarding the subject of the present study, the purpose of protection is found in both poles of the discussion presented above, which is related to the legitimacy of the Special Testimony. The authors of Law 13.431 / 2017 defend that the institute integrates a system that guarantees the rights of the child and adolescent victim or witness of violence, while the Federal Council of Psychology argues that the defense of these rights is given by not adopting the institute, since it violates the special situation of these “people in development."

That being so, and considering that, for the necessary imposition of a criminal sanction on the perpetrators, there is a legal requirement to produce adequate and sufficient evidence to establish the judge's conviction for the culpability of the accused, it is reckless to legality prevent the victims to provide testimony in the judicial context. It is imperative that an attempt is made to harmonize between the defense of the psychic integrity of these subjects and the possibility of producing oral evidence with their participation, so as not to allow its perpetrators go unpunished.

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