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

Marco Aurélio Fernandes Galduróz Filho
PhD in Labor Law from the University of Buenos Aires (UBA). Master in Culture and Legal Security from``Universidade de Girona``-ESP (UdG) and Genoa-ITA (UniGe). Professor of Philosophy of Law, Labor Law and Labor Procedure. Lawyer

Ricardo Pereira de Freitas Guimarães
PhD in labor law from PUC-SP, professor of the master's and doctoral programs at FADISP, holder of chair 81 of the Brazilian Academy of Labor Law and member of the São Paulo Academy of Legal Articles. Author of numerous books and articles; Lawyer

Abstract: This paper presents a perspective on the need to revisit the classic rules for applying the burden of proof, especially in the social context of the postmodern era, that is, under the precept of a self-referential society, within a methodological perspective of protecting people in vulnerable conditions. The object is an analysis of the concept of autopoiesis found in Michel Foucault and its possible 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 itself, as well as the necessary standard for discharging that original burden, bringing an effective possibility of stabilization and an adequate response to the effects of a historical and social imbalance, with direct repercussions on judicial decisions.
Keywords: Evidence; Truth; Vulnerability; Valuation; Autopoiesis.

INTRODUCTION

The sociological, political, philosophical and artistic movement known as postmodernity, together with liberalism, after the inflection of the 1970s, brings a great generational challenge regarding the standard of truth necessary for legal and procedural protection, especially for workers, those in conditions of minority and vulnerability, such as blacks, women, indigenous peoples, people with disabilities, sexual orientation, among others.

The social mechanism for stabilizing conflicts has as its founding point the process, with the instrumental purpose of investigating and rationalizing the corresponding violation. In this path, the mechanisms of proof are structuring elements in the granting or not of the substantive right.

There is no doubt that, through the 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 the evidence, especially in the phase of evaluating the judge.

Thus, through the current panopticon, the direct consequences of the movements exposed in the theory of evidence are undoubtedly present, with a direct impact on the procedural investigation models, conceiving that the evidentiary theory itself must bring to light the element exposed by Michel Foucault when listing the autopoietic system, defined as a network of production of components and structures. As the transmitter of its own communication, it operates, for this very reason, in a self-referential way, with the implication of self-organization: elements produced in the same system. It results 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 avoid dialogue with its environment, emphasizing that it is not an end in itself.

Given the unquestionable situation that the judicial system needs to adapt, as it cannot remain distant from a necessary effective response to pressing issues in society and in the workplace, such as sexual harassment.

The issue itself, in light of the judicial discussion, can no longer be viewed through the simple classical rules of application of 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-discussion of the necessary standard of truth.

The object to be protected is precisely the material right resulting from the violation. Furthermore, the object of protection is completed in 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 evidentiary theory, as well as the spectrum of truth that is sought to be met in the judicial process, under the premise of effectively resolving 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, as is the judicial process, but rather the opportunity to discuss the real needs that evidentiary theory must meet correlated 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 the philosophical and sociological perspective, especially in the collective aspect, maximizing the effects of the standard of truth necessary for an assessment with a greater probability of success, reaching the proximity of a fullness in the internal and external justification of a decision.

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

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 the object of, first, 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.

In 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)[1]

The effect of the test-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, which is 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) The need for an intended social end, regardless of the means; b) deception of the agents who act in the process, due to some manipulated and/or adulterated element. Thus, the challenging framework brings to the surface the re-discussion of a conception of truth, especially how necessary it is for the resolution of an issue brought to court.

1. "Thehypothesis I propose is that cyberculture brings the co-presence of messages back into their context, as it did in oral societies, but on another scale, in a completely different orbit. The new universality no longer depends on the self-sufficiency of texts, on a fixation and independence of meanings. It is constructed and extended through the interconnection of messages among themselves, through their permanent link with the virtual communities in creation, and gives them varied meanings in a permanent renewal."

Structurally, as mentioned, we live in the era of the stabilization of a narrative, regardless of logic or truth, especially when it starts from a fact to its establishment (narrative). Michele Taruffo mentions (True phobia: A dialogue about proof and truth, 2017) as a concept of "true phobia", 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 classic 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 understanding that are especially current about minorities that are under the conception of a structural prejudice.

Here I must add an addendum on how illegalities are repressed, in this idea of rapid sharing of information, through cyberculture established as a structuring element of freedom.

I repeat, the theory of evidence cannot be immune to such a concept, raising the question that the current challenge in the process is the acceptance or not of illegality, especially resulting from the phobia of truth, a founding element of narrative control.

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

THE SOCIAL SCENARIO, EVIDENCE AND ITS VALUATION IN JUDICIAL DECISIONS

Skepticism and self-referentiality in today's society undoubtedly bring a form of individual resolution and within the personal concept of problems.

There is no belief 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, just like art always portraying history, I remember a story by François Rabelais (1494-1553), a French Renaissance writer, author of Gargantua and Pantagruel (), which is quite current, in the self-referential society, there is an idea of disbelief in justice, specifically in evidentiary rationing, especially in the purification/ evaluation of evidence.

Rabelais studied law in Poitiers before studying medicine, which means he had the ability to mention the intersectionality of subjects, which is evident in the aforementioned story, when he imagined a giant drunkard, Gargantua, whose equally huge son, Pantagruel, lives a series of adventures, starting with his own education, which brings innovation to the pedagogy of the time, such as physical education and sports.

In the story, Judge Bridoye ruled on cases based on the luck of the draw. Judge Bridoye ruled based on luck because modern people like brevity. Rabelais makes the judge explain his procedure, in a very witty way. He also shows how the judge made decisions, justifying them, allowing time to make the decision sweeter and more bearable.

Rabelais is hostile to all the court staff, without exception, regarding the fact that he sucked the parties' money very hard and continuously. For Rabelais, the process is

something despicable, and he said: "The true etymology of the process is that he must have full bags."

For Rabelais, Judge Bridoye was at least quite sincere[2], 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 a great deal of irony, the valuation of evidence. It seems to us that nothing could be more current than what is exposed here.

PROOF AND TRUTH IN THE PROCESS

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

Law is not immune, as stated, nor is evidentiary theory, since it is the first to be violated in this phase of narrative control.

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

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

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

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

1) Considering that every phenomenon of proof is understood and regulated in legal norms (not necessarily means of proof), so that it is only worthwhile to systematize and examine the means of proof.

2) Only validating regulated evidence, excluding atypical ones.

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

The introductory line mentioned already shows the size of the structural challenge to be overcome.

It must also be noted that the concept in question is not immune to criticism, especially in the wonderful discussion between Michelle Taruffo and Bruno Cavallone (True phobia: A dialogue about proof and truth) as an initial founding factor in the discussion about the burden of proof in the post-truth era. 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 Calamandrei's idea: "Calamandrei, who in the famous monograph Proceedings and Justice rightly stated that "the purpose of the process is not solely the search for truth; the purpose of the process is something more, it is justice, of which the determination of truth is solely a premise". And he draws attention to a current problem in postmodernity, specifically when with

2. *"(...)knowing the antinomies and contradictions of laws, edicts, customs and ordinances; aware of the fraud of the infernal slanderer, who often transfigures himself into a messenger of light through his ministers, wicked lawyers, counselors, attorneys and others of the like, transforms black into white, fantastically makes it appear to one party and the other that they are in the right (as you know, there is no cause so bad that it does not find a lawyer, if this were not the case, there wouldnever be lawsuits in the world)."*

the available means, within the evolution of cyberculture, one incurs the error of interpretation by mixing past events and modern criteria: "Rückschluss, this is the usual error of interpreting past events with modern criteria", This is the challenge for measuring the evidence, but this must go beyond the question of rules of the burden of proof.

RULES OF BURDEN OF PROOF

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 post-truth moment.

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

The conception of the need to resolve demands on a large scale, as well as meeting the existential minimum, through the correction of decisions, is also decisive for the discussion.

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 cases related to moral harassment and more than three thousand related to sexual harassment were filed in the Labor Court throughout the country. [3]

In this sense, the same court shows that sexual harassment records have risen again, after the pandemic subsided and in-person work gradually resumed. In 2019, 2,805 cases were filed in Labor Courts across the country. In 2020, the records showed a slight drop to 2,455 cases. However, the 2021 figures indicated an upward trend, with 3,049 new cases filed, an average of 254 victims seeking justice per month. [4]

With the concept in question, a major problem arises regarding the evidentiary issue, since, as explained, most of the time the act itself occurs hidden with the harasser in closed environments and without the prospect of material evidence.

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

In this regard, it is important to point out that in 2004, 85% of the lawsuits filed with the Paris Council of Prud'hommes alleged some type of moral harassment. Of these, however, only 5% resulted in a conviction for harassment. [5]

In the same vein, two-thirds of sexual harassment lawsuits in the federal administration end without punishment.[6]

In other words, we are facing a huge gap between the search for protection and its implementation, a huge gap that undoubtedly occurs in the existential aspect, as well as a need to question what our objective would

3. 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-de-assedio-moral-no-brasil. Accessed on June 2, 2023.

4. 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-em-2021.Accessed on June 4, 2023.

5. 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.

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

be as jurists and possible drivers of an improvement in society.

It is worth reiterating that there is no way for the discussion not to slip into the issue of evidence and truth, from a macro perspective, without the determinism of pure and simple resolution of the lawsuit.

The classic rule of distribution of the burden of proof does not allow for the real implementation of the resolution of the lawsuit, protecting the rights of the victim, when belonging to the minority.

There is no doubt that 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, expressing an emotion). Thus, 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 done from the perspective of three ways: a) constitutive; b) normative; c) descriptive.

There is no preponderance, but rather a qualitative assessment, within the phase of evaluating the evidence.

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

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

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

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

It must be stated from the outset that there is no assessment of truth here either. It is a process of evaluating the legal consequence, that is, an exercise in subsumption.

Furthermore, it is necessary to clearly distinguish between the force 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, that in order to determine 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 to truth or falsehood, that is, we are dealing with the evaluation of the value of the fact, and not of the fact itself and its enunciative consequence. The situation in question generates, from a first perspective, direct criticism among those who believe in the difference between material truth and another, formal one. For (Taruffo, 2014) here we are faced with the set of elements, procedures and rationalizations, through which that reconstruction is elaborated, 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 interpretation in contrary sense, to deny the assimilation it is enough to admit that the fact "x" was not proven in the process, even when the statement that affirms its occurrence is true, here a clear possibility of the mere distribution of the burden of proof. The situation under discussion will already bring up a problem, which we will anticipate,

regarding the possibility of the existence of a probative nexus, a specific circumstance for applying 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, in the event of an allegation of violation of the rights of people in vulnerable conditions.

In view of the brief description of the models of statements that underlie the theory and the corresponding assessment of evidence, we move forward in the issue of evidence and truth, from the perspective of the lack of specific regulation, under the precept of an analysis of the need for the judgment 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 that it is proven that p, used to refer to the result of the set of evidentiary activities developed in favor of or against the conclusion p (in view of the different specific means of proof used in the process).

And we arrive at the point of analysis of it being proven that p, as true.

Along these lines, there is the possibility of interpreting the lack of difference between evidence and truth. Evidence, in itself, would be the judicial verification, by 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, while the second is from the perspective that the erroneous collection of evidence cannot be ruled out due to a lack of respect for the appropriate procedural means.

Thus, the discussion between Cavallone and Taruffo brings up an element of fundamental relevance, specifically what would be the direction of the evidence at the time of its collection in the procedural stage. Cavallone's question, with a good dose of irony, is quite clear: "The most important aspect of the new conception of evidence is the clear recognition of the discovery of the truth about the facts of the case as the end to which the acquisition of evidence was directed." Thus, this "victory of rationalism over mysticism" (True phobia: A Dialogue on Evidence and Truth)

The conception is complemented by the discussion between the application of the rule of the burden of proof as anti-epistemic and the precept of *non liquet.*[7]

The criticism is of fundamental relevance, since the concept of resolving the case solely on the basis of the rules for distributing the burden of proof does not appear to bring, in the post-modern period, the slightest social pacification.

It is argued that, in our humble understanding, the rules for distributing evidence, as well as their exceptions, such as the dynamic distribution of evidence, must be epistemic, argumentative reinforcements, but not absolute, a symptom, in fact, of the aforementioned true phobia.

In fact, through the aforementioned rule there is an incentive for the party to bring elements that lead to a positive assessment

7. (...) very frequently, whenever, not considering one or more disputedfacts proven, the judge decides by applying the rule of judgment 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 the judgment of fact in any modern legal system (and, moreover, the non liquet of the Roman judge was even worse from this point of view, because it entailed the renunciation of deciding, even if the decision was eventually in conformity with the "reality of the facts"). Now, my disagreement on this point does not derive from a preconceived sympathy for all evidentiary prohibitions, but only from the conviction that the rules under examination only indirectly have an "epistemic function", and are instead substantial rules (as evidenced also by their location in civil codes of Napoleonic derivation), aimed at promoting the formation of contracts in writing, as a guarantee of the certainty of legal business relations; "an opinion that is also widely held in doctrine." (True phobia: A Dialogue on Proof and Truth)

of their argument, but, let us repeat, it is an epistemological conglomerate.

The fundamental point is that the judgment, by itself, through mechanisms for distributing the burden of proof, even within motivated rational persuasion, raises a major problem regarding the protection of minorities, exemplifying situations of sexual harassment in the workplace, as the founding principle of the theory.

AUTOPOIESIS AS A PROTECTION MECHANISM FOR EVIDENCE THEORY

In view of the aforementioned crisis, as well as the lack of protection through the assessment of the classical rules of evidentiary distribution, in the context exposed, we must move forward to the possibility of the need to recognize Autopoiesis in evidentiary theory.

There is no doubt that, beyond all the conceptions of Law, the one that comes closest to a theoretical agreement is that it is language. Every theoretical and procedural basis of legal science is based on language, whether formal or informal, emphasizing that, this last model, despite encountering obstacles from those more conservative in the legal structure, has fundamental relevance in the model of application of the norm.

In order to avoid theoretical omission, in contrast to the element discussed above, according to Heidegger's perception in his work (Being and Time) - things present themselves with a meaning, emphasizing that they allow us to dispense with language, in an existential digression of being is.

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

To this end, one must bring a conception of Michel Foucault when listing Luhmannian communication, through the word autopoiesis that refers to an autopoietic system, defined as a network of production of components and structures. As the transmitter of its own communication, it operates, for this very reason, 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 its own capacity to introduce changes to its internal system that ensure its survival. In particular, systems theory considers the legal system capable of managing relations between its own elements with different levels of complexity of the environment and specific normativity capable of reaching levels of generalization higher than those of other normative systems.

There is also an undeniable need to adopt the concept of "hypercycle", denoting that the various components of the legal system (legal procedure, legal act, legal norm, legal dogma) operate in a differentiated but mutually complementary manner. Only the combination of these components contributes to managing requests 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 the variation of legislation; 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 the components that make up the legal system, ensures 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 a value-based analysis of evidence, the model itself must be taken into consideration, under the macro conception of the three key introductory 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 objective of reducing gender inequality.

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

c) The variation element is the most difficult, since it clashes with a conservative human conception, as well as a distorted vision of self-protection and reservation of domain, and is indeed serious when it comes to a change that disfavors those who dominate the narrative, as well as those endowed with privileges of race, gender and sexual orientation, for example.

Even so, it is undeniable that the clamor and the winds of change will generate, including, a necessary legal provision, of a procedural nature, with the purpose of valuing differently from the pure and simple assessment of the classic rule of the burden of proof, under the precept of who has or has not discharged this.

Advancing the proposal, under Foucault's understanding, the autopoietic law model does not only have a theoretical basis. The change in perspective of the autopoietic reference has practical consequences and the possibility of defending the survival of every autopoietic system depends on it, 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 here, a readjustment or new application of the burden of proof distribution model is necessary when we have situations involving minorities.

The idea conceived by Foucault, in fact, provides an accurate diagnosis of the resistance to applying the proposal, from a perspective of encounter/disagreement: "The autopoietic legal system, in short, collaborates in the encounter of two distinct sensibilities: the sensitivity of legal operators, always more disoriented on the decision-making level due to the undeniable distance between the real functioning of the law and its own expectations; and the sensitivity of sociologists, who seek to frame in a broader vision of legal reality the problems considered insoluble due to the inadequacy of a strictly formal normativism. "

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

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

In view of the sociological and philosophical interpretation described, we must consider in this topic the issue of the burden of proof and the assessment of evidence, 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 the work, the conception used 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 have a specific transcription in the Consolidation of Labor Laws, especially after the legislative reform of November 2017. [8]

Thus, the rule of classical distribution was adopted, that is, the proponent had to prove the fact constituting his right and the defendant had to prove the fact impeding, modifying or extinguishing the author's right.

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

The predictability of the dynamic distribution of evidence is also raised, in specific cases, given the difficulty of the party fulfilling the burden and the greater ease of proof by the party that did not originally hold the burden, through a specific judicial attribution.

The rule in question, in view of the aforementioned discussion of proof and truth, is directly linked to the principle of non liquet, emphasizing that the corresponding distribution of the burden of proof brings the possibility of resolving lawsuits on a large scale, especially generating the 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.

It is also unquestionable that we cannot distance ourselves from reality, emphasizing that the affront to the rights of minorities occurs in a camouflaged manner, making it extremely difficult to obtain testimonial evidence, for example.

8. Article 818. The burden of proof lies with: (As it was amended by Law number 13,467 of 2017)
I - the claimant, as to the fact constituting his right; (Included by Law number 13,467 of 2017)
II - the defendant, as to the existence of a fact that prevents, modifies or extinguishes the claimant's right. (Included by Law number 13,467 of 2017)
§ 1 In cases provided for by law or in view of peculiarities of the case related to the impossibility or excessive difficulty of fulfilling the burden under this article or to the greater ease of obtaining proof of the contrary fact, the court may assign the burden of proof differently, provided that it does so by means of a 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 issued before the opening of the investigation and, at the request of the party, will imply the postponement of the hearing and will allow the facts to be proven by any means permitted 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 discharge of the burden by the party is impossible or excessively difficult.

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

We begin by seeking a possible response and paying special attention to a minimum sense 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.

For example, in a case of sexual harassment in the workplace, by giving greater or lesser weight to the victim's word, there will be a significant difference in the assessment of evidence and, consequently, the increase or not of the convictions.

There are empirical elements to suggest that the chances of a woman not reporting harassment are much greater than doing so in an untruthful manner, imputing a false fact, noting that distrusting the victim's word, in itself, is 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 based on 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 evidentiary framework, that is, that personal testimony does not serve solely and exclusively as a possibility of self-harm, through confession, but rather that it is an active element in line with the possibility of externally substantiating and justifying the sentence, in line with other elements.

But the stabilization phase, which occurs through jurisprudence, demands a readjustment of an establishment of greater probability of truth, without forgetting Taruffo's criterion, as an element of a rational analysis of the evidence, through (Taruffo, 2014): "*1 - the truthfulness of the determination of the facts is a necessary condition (but obviously not sufficient) 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 the readjustment of the valuation, from a perspective of responsibility for the other (LÉVINAS) in cases of violation of minority rights in the work environment.

The proposal is that the *ratio decidendi* must present in a fragmented manner the set of sufficient evidence for the greatest probability of truth, especially by reducing the standard of the constitutive fact itself, but with the adoption of evidence as sufficient elements for granting legal protection.

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

France has a practice of giving the defendant the burden of discharging the allegation of harassment, provided that the plaintiff generates facts in the proceedings that may give rise to the presumption of the corresponding harassment. [9]

9. "Article L 122-52 of the Labor Code provides that the employee must establish the facts that allow the presumption of the existence of harassment.
This is consistent with our civil and criminal procedures - the alleged harasser benefits from the presumption of innocence.
The plaintiff employee will have to establish the materiality of the precise and consistent factual elements that he presents in support 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 Portuguese Labor Code (article 29, combined with article 25, 5) also does not fail to address the non-application of the simple classical rule, raising the inversion of the burden of proof, weighing the legal-procedural position of the employer, when the alleged harassment constitutes typical discriminatory conduct.

In this same sense, it is worth mentioning the case law, specifically the Porto Court of Appeal Ruling 3819/08, decided on 02.02.09:

> "(...) The European Union signed an agreement between member countries, approving the reversal of the burden of proof in cases of sexual harassment.
>
> The French legislator followed the same path in the law that prohibits moral harassment in the workplace. The reversal of the burden of proof is permitted, reverting to the aggressor the burden of proving the non-existence of harassment, to the extent that the author of the action has already presented sufficient elements to allow the presumption of veracity of the facts narrated in the initial claim." (Psychological Terror in the Workplace)

This indicates sufficiently strong elements for the possibility of adequate protection for those in vulnerable conditions, with a readjustment of the interpretation of the classic rule of distribution of 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.

Therefore, correction within the law itself becomes viable, emphasizing 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 forth by Foucault with his three elements that induce correction of the law itself, that is, through the triad selection, stabilization and variation.

Evidence is not an element in itself, there is a purpose, undoubtedly existential, which cannot simply punish those who have greater difficulty in bringing the fact substantiated in a framework full of elements, when it occurs far from everyone's eyes, with few traces. Post-truth cannot be an obstacle to the necessary readjustment, given the elements of correction already in place in the system itself, emphasizing that the challenge for the judiciary is also to face post-truth, which feeds on the deconstruction of truth.

In this element, care must be taken to ensure that there is no inappropriate confusion between evidence and truth, but rather to focus on proposing a readjustment of evidentiary assessment, with a view to responsibility for the other, a more existential term, but with a humanistic nature, which 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, later, during 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.

The judge will then form his conviction."

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