THE RIGHT TO SILENCE IN BRAZIL AND IN THE USA: PROPOSALS

O DIREITO AO SILÊNCIO NO BRASIL E NOS EUA: PROPOSTAS

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ABSTRACT

After a brief incursion by the Brazilian legislature, especially the provisions of the Criminal Procedure Code as well as the analyzing of some trials in the Supreme Court pertaining to the right to information on the right to silence (habeas corpus n. 78.708-1 São Paulo), this paper aims to give a brief analysis of the leading American case Miranda v. Arizona 386 (1966) and concludes that it is possible to use the American precedent to reinterpret Article 5, LXIII, in the Constitution of the Federative Republic of Brazil using what has been called transconstitutionalization, a phenomenon that allows dialogue between judges and courts of various different legal systems interlaced in world society. This reinterpretation requires different legal operators to adopt certain measures in order to protect the privilege of non self-incrimination. The author lists these steps among others, which aim to give clear warning to the defendant on the right to silence before questioning (Miranda Warning).

KEYWORDS: Right to silence; Miranda v. Arizona 386 (1966); Miranda Warning; Transconstitutionalism.

RESUMO

Após uma breve incursão pela legislação brasileira, especialmente, pelo disposto no Código de Processo Penal e analisando ainda alguns julgados do Supremo Tribunal Federal pertinentes ao direito à informação sobre o direito ao silêncio (habeas corpus n. 78.708-1 São Paulo), o artigo traz uma breve análise do *leading case* americano Miranda v. Arizona 386 (1966) e conclui que é possível utilizar o precedente americano para reinterpretar o artigo 5º, LXIII, da Constituição da República Federativa do Brasil, a partir da transconstitucionalização, fenômeno que permite um diálogo entre juízes e tribunais de ordens jurídicas diversas e entrelaçadas, na sociedade mundial. Essa reinterpretação obriga os diversos operadores jurídicos a adotar certas providências no resguardo do privilégio da não auto-incriminação, providências estas que o autor enumera no texto, dentre outras, a de dar um aviso claro ao preso antes de sua inquirição sobre o direito ao silêncio (Miranda Warning).

PALAVRAS-CHAVE: Direito ao silêncio; Miranda v. Arizona 386 (1966); Aviso Miranda; Transconstitutionalismo.

INTRODUCTION

Since the 1960s, films and TV series (*Law and Order*, for example) popularized a standard American police procedure. Whenever an arrest occurs, police officers read the accused his rights as follows: You have the right to remain silent, anything you say can and will be used against you in court of law. You have the right to an attorney ... But what is this warning and where does it come from? And

is there anything like it in Brazil, or should there be? This paper deals especially with this warning.

In 1966, an immigrant is accused of kidnapping and rape in the state of Arizona in the United States. He is recognized, arrested and convicted for the crimes. The Supreme Court of the United States, however, believes that the proceedings should have been annulled because the police did not read convicted Ernesto Miranda his rights, obliged by the *Bill of Rights*.

In fact, the Warren court - which revolutionized American constitutional rights between 1953-1969 and later would have its judicial liberalism challenged in the Nixon election campaign (MORO, 2001, p. 337-353) - established a clear role for the police (with consequences for prosecutors and judges) in implementing the 5th and 6th amendments to the US Constitution, ratified by Congress in 1791. A person when arrested or remanded in custody should be warned that it is clearly not required to answer questions from the police and will be assisted by an attorney; if the person cannot afford an attorney, the state will provide one. This warning should be given before the inquiry and if the defendant decided to answer the questions, those answers should be the result of free choice accordingly. *He answered because he wanted to*. If early, clear and effective warning is not given by the police, an eventual confession of the crime would not be accepted by the American Justice. This warning was not expressly foreseen in the *Bill of Rights*, but the privilege against self-incrimination and the right to assistance from an attorney would only become a reality if the police informed the defendant. Today, this warning has become standard practice for the American police and its wording varies somewhat from state to state in the federation. However, in times of terrorism, the debate on the Miranda Warning rekindles[1].

And in Brazil? Differently, the obligation to inform the prisoner is expressed in the Federal Constitution, constituting a fundamental right provided for in art. 5.º, LXIII, "the accused shall be informed of their rights, including the right to remain silent and

[1] The Obama administration's announcement that it planned to question the Boston Marathon bombing suspect for a period without first reading him the Miranda warning of his right to remain silent and have a lawyer present has revived a constitutionally charged debate over the handling of terrorism cases in the criminal justice system (SAVAGE, 2015).

will be assured family assistance and counsel." However, this warning of the right to remain silent is only given during interrogation by police authorities such as Police Chiefs on the occasion of someone being arrested in the act of the crime or formal questioning at hearings. Just before being interrogated, the defendant is advised that he may remain silent. However, sometimes the defendant has already been in custody for hours and the police, in an attempt to discover more evidence of the crime or uncover other crimes, ask the defendant questions which are often repeated without any warning that he does not have to answer them. Firstly, the person is arrested by police investigators, military police soldiers, federal police officers or civil guards who ask about the crime, who committed it and even about other crimes etc. Then, often, many hours later, he is presented to the Police Chief, the authority who will formalize the arrest and prepare the relevant documentation. This is when the defendant is notified that he could remain silent. Obviously, this ends up not helping the defendant very much, because he has already told the police officers who arrested him everything he had to say, so the right to remain silent after he has already said everything has no effect whatsoever. This justifies the fact that this is currently an issue for both Brazil and the United States.

After a brief analysis of the leading American case Miranda v. Arizona 386 (1966), we propose that the American precedent can be incorporated in Brazil. This is thanks to a phenomenon dealt with by Professor Marcelo Neves, an important professor of law at the University of Brasilia: transconstitutionalism proposes, among other things, that it is possible for a legal system to open up its decisions and considerations to others. For example, the Brazilian court could learn from decisions made by the United States courts (and *vice versa*) and thus solve problems in common. Considering data published by the Criminal Justice Network on profile arrests in 2010 and 2011, which shows that most Brazilian offenders are between 18 and 25 years of age and have not completed primary school, alerts us to whether or not they effectively know and understand that they may remain silent when arrested. If they do not know, the police could advise that the Constitution has something to offer them: the right to remain silent. It is up to the police to investigate and provide evidence for prosecution, resisting the temptation to urge the defendant to confess.

This willingness to open the precedent of Miranda v. Arizona 386 can be observed in some trials in the Supreme Court. In 1999, an unprecedented topic is

brought to the highest court in Brazil in which the Minister Sepúlveda Pertence raises questions regarding the precedent cited in (HC 78. 708- 1 São Paulo). In 2014, Minister Gilmar Mendes also gives significant and enlightening vote on the matter and the precedent of Miranda v. Arizona 386 resurfaces. It seems, to the Supreme Court that if no warning of the right to silence was given, then it will have to declare nullity in accordance with the defendant's position, if the defendant remained silent or not and if the judge used his statements to convict him.

Another problem is the need to inform the defendant that he has the right to counsel and that this will be provided if he cannot afford it. On the technical defense guarantee, the constitutional guarantee of art. 5 *has not yet materialized*: if the defendant is able to pay for an attorney he will have one to defend him; if he does not have one, he will be heard without any assistance of counsel in a police station.

This paper, has no intention to exhaust the topic, instead simply intends to shed light on the subject and to submit suggestions. The author wants to stimulate a protective action, in the same way that every action must begin with reflection. After a brief incursion in the Brazilian legislature and on trials in the Supreme Court, with an explicit reference to facts under consideration by the court, we propose that Brazil incorporates the American solution, adapting to its reality the Miranda Warning. Other proposals are also being put forward in the sense that it is necessary to implement the Constitution of the republic in what it already has as fundamental and that it is not enough to simply have the guarantee written down and not followed or used in the country each and every day.

1- THE RIGHT TO SILENCE AND ITS WARNING: BRAZIL

Articles 98 and 99 of the Criminal Procedure Code in the first instance (Law: 29th November 1832) had nothing about the right to remain silent. Only after reading the parts which proved the crime had been committed, the judge would ask the accused about his/her alibi (*Where were you at the time in which the crime is said to have occurred?*) referring to people (*Do you know the people who have testified against you?*), if affirmative. (*How long have you known them?*), the falsity of

imputation (*Do you have any particular reason that might attribute to the complaint or accusation?*). Finally inviting him/her to indicate evidence of his/her innocence (*Do you have facts to allege or evidence to justify these facts or prove your innocence?*). The term would be read and signed.

In 1941, President Getúlio Vargas announced the Decree-Law 3.689, establishing the new Code of Criminal Procedure, still in force. This law, which today has become a federal law, on the contrary, states in Article 186 that before the interrogation the judge should issue a warning to the defendant, which is, that although you are not obliged to answer the questions, your silence may be interpreted as prejudicial. It was concluded that it was better that the defendant answer the questions, or "[...] the defendant is not required to respond. But you may want to answer because not doing so could give the court the impression that your silence means you are really guilty because you are unable to explain the facts." (TORNAGHI, 1967, v. 3, p. 814, our translation).

In 1988, with the re-democratization of Brazil, the matter received absolute diverse treatment: read inc. LXIII of art. 5 of the Federal Constitution, **"the accused shall be informed of their rights including the right to remain silent and will be assured family assistance and counsel"** (emphasis added). In 2003, Article 186 was amended by Law 10.792, giving wording that best expressed how the Constitution treated the matter, verbatim:

> Art. 186. Once duly explained and made aware of the full content of the indictment, **the accused shall be informed by the judge, before starting the interrogation, of his /her right to remain silent and not answer questions being asked.** (emphasis added)
>
> Sole paragraph. Silence which will not matter in confession cannot be construed as prejudicial to defense.

Internationally, the American Convention on Human Rights, or Pact of San José, Costa Rica, proclaims in art. 8, 2, g, "the right not to be compelled to be a witness against himself or to plead guilty."

> The right to silence, whose origin is rooted in the Middle Ages and early Renaissance (HADDAD, 2000, p. 141), is the national version of the privilege against self-incrimination of Anglo-American law. [...] its aim is not a supposed right to lie, as can still be noted in some doctrines, but to protect from harassment and intimidation historically waged against the defendants by the State and also acts of an inquisitive nature. [...] The principle also acts on the protection of the physical integrity of the defendant to the extent that expressly authorizes his non participation in the formation of guilt. And that, in our judgment, being most relevant in effectively controlling the quality and reliability of probative facts, as well as in controlling the motivation of judicial decisions, above all those which convict (OLIVEIRA, 2012, p. 377-379, our translation).

Incidentally, the topic *the right to silence* has been discussed by the Supreme Court on several occasions. It was stated that it had no objection to the principle of confidential telephone conversations or the recording of talk between prisoners and police officers, but the right to silence (habeas corpus n.º 69.818, of 11.03.1992) could not annul legal proceedings if the silence did not constitute a basis for conviction supported by other evidence (habeas corpus n.º 75.616, of 7.10.1997) that there was no crime of disobedience in refusing to provide autographs for examination (habeas corpus n.º 77.135, of 8.9.1998) and finally, that the defendant has the right to lie in his/her statements (habeas corpus n.º 75.257, of 17.6.1997).

In 1999, at the trial of habeas corpus n.º 78.708-1 São Paulo, the Supreme Court faces for the first time the issue, **the right to information on the right to silence**. In this case, police investigators received a tip that a man was dealing drugs inside a building in the city of São Paulo which led to the successful arrest of "Alvaro", a man with similar physical characteristics described by the informant who was on his way to a bar with four microdots of LSD (Lysergic acid diethylamide, hallucinogen banned in Brazil) in his wallet. "Alvaro" admitted that he kept marijuana inside the building where he resides and where the police seized a portion of the drug. He also indicated to the police another apartment in the same building where another man "Ricardo" lived. There the police found a brick of marijuana resulting in his arrest. "Alvaro" said he had purchased the drug portions from a man known as "Paulo", residing in a flat in the same street, which led to the seizure of another amount of marijuana. In this last place there were two other people, among them a teenager, all of whom were drug users. The circumstances of the arrest and the amount of drugs seized evidenced that the case should be treated as drug trafficking which led to "Alvaro" being convicted and sentenced to three years in prison,

according to the old art. 12 Law 6.368/1976 (law against the use of illegal substances).

The defense argued that the sentence was invalid because it was based on illegal evidence, resulting from the information provided to the police and obtained before the defendant had been told that he could remain silent. The arrest of the defendant occurred at around 12:40pm on 11 September 1997 and, only ten hours later while the arrest records were being typed the prisoner was informed by the police that he could remain silent which was a flagrant violation of art. 5, LXIII and LVI of the Federal Constitution since the sentence was based on illegal evidence originating from the information provided by the offender to the police without first being advised of the right to remain silent. Refuting that it was mere irregularity, the defense invoked the Antonio Scarance Fernandes thesis presented at a lecture during the 3rd national meeting of lawyers specialized in crime in São Paulo:

> On that memorable occasion the notable professor stated irrefutably that if the accused is made aware during the drafting of the police report of his constitutional right to remain silent and opts to exercise that right nothing that he may have said before or since the time of his arrest may be used against him in sentencing. Unless if said before. In other words, at the time of his arrest when informed of that right. (BRAZIL, 1999, p. 880-881, our translation).

Minister Sepúlveda Pertence declared:

> [...] The right to be informed of the right to remain silent won constitutional dignity from certainly the most eloquent contemporary statement from Miranda vs. Arizona (384 US 436 (1966), a transparent historical source which consecrated this right in the Brazilian Constitution – an irreplaceable tool because of the real effectiveness of the very old guarantee against self-incrimination - **nemo tenetur prodere se ipsum, quia nemo tenere detegere turpitudinem suam** - that the planetary persistence against police abuse does not lose current resistance (BRAZIL, 1999, p 885-886, our translation).

Another legal precedent in the American Supreme Court was invoked - Escobedo vs. Illinois 378 US 78 (1964), on the subject of implementation of the 5th Amendment of the Constitution, quoted in "The court of Warren," in the book by Leda

Boechat, Ed Brazilian Civilization , 1991, p. 204 - to remember that the effectiveness of the criminal justice system cannot depend on the waiver of constitutional rights through ignorance or by citizens.

Citing Theodomiro Dias Neto - who in his monograph "The right to silence: treating German and American Rights", Brazilian Journal of Criminal Sciences, 1997 n. 19/179, 192 - the judge stated that there is a risk to be avoided: that the police interested in the efficiency of investigation spend more time than necessary getting preliminary information which delays the start of the statement. 'In view of this, argues Rogall, so that the statement of the right to silence can meet its goals it is necessary for this to occur as soon as possible' (NETO apud BRAZIL, 1999, p. 887, our translation). This concern with the warning of the right to silence being informed as soon as possible is present in Miranda vs. Arizona when the American Supreme Court established the famous *Miranda Rules* that apply "from when the respondent is in custody or in any other way in which he is deprived of his freedom" (BRAZIL, 1999, p. 887, our translation).

The omission of the warning of the right to remain silent at the right time would cause nullity, determining the disregard of the collected information and other incriminating evidence derived there from. However, for the recognition of nullity the loss must be shown to be measured from the accused's behavior who can choose silence or offer a version of events, negative or positive developments, respectively, of the principle of legal defense. In the present case of habeas corpus now being dealt with, the accused remained silent in his formal interrogation during which could he have claimed that he had provided information to the police without being advised, which he did not do. On the contrary, the accused gave his version of events to the judge that he was only a drug user and had signed the papers which were presented to him without knowing what he had signed. Thus, agreeing that had opted for active intervention and not for his right to silence. Without any demonstration of injury, the Supreme Court rejected the order. It can be said that this trial is the leading case in the matter.

In 2007, the right to information on the right to silence is again the subject of discussion in the Supreme Court, at the trial of habeas corpus n. 88950-6 RS: it was considered that the defendant, a military official, was not warned that he could

remain silent; however, being a sufficiently enlightened person he chose to answer the questions he was asked. This time, there was also no need to talk about nullity.

> [...] No less correct that the actual situation is to be considered, highlighting the educational level of the involved and posture assumed during the investigation [...] seated when questioned in the military police investigation he was alerted to the right to assistance of counsel but expressed desire to be interrogated immediately and have the session recorded. [...] More than that, compared to the 1st Audit the 3rd Circuit of Military Justice, the defendant was warned about his constitutional rights including of course his right to remain silent and as it seems assisted by the defense constituted - now the plaintiff was heard and confirmed the full text of the statement rendered during the investigation maintaining denial of authorship (sheet 147) (BRAZIL, 2007, p 428-429, our translation).

In 2014 the subject right to information on the right to silence- returns to the consideration of the Supreme Court. This is the judgment of the ordinary appeal in habeas corpus n. 122,279 Rio de Janeiro, reported by Minister Gilmar Mendes. Specifically, a soldier of the Brazilian army stole a cellular phone from another military inside a military school. After giving his version as a witness in which he is obliged to tell the truth he then asked the person in charge of the military police inquiry to disregard what he had said and confessed to the theft. Supported solely on the confession of the accused, the Military Public Ministry denounced him according to sentence incurred in the military crime of art. 240 of the Military Penal Code (simple theft). The Attorney General's Office opted for the provision of an ordinary appeal in which it declared the complaint inept, stating that another complaint should be presented with other sources of evidence (BRAZIL, 2014, p. 3-4). With considerations on the special significance of fundamental rights in the Constitution, Mendes stressed the importance of the right to silence, "it is the cornerstone in the protection system of individual rights and embodies one of the expressions of the principle of human dignity" (BRAZIL, p. 6, our translation). Citing the vote reported in the records of 78.708 HC, 1999, the magistrate mentions the Miranda rules, as stated, taken from the precedent of the US Supreme Court in Miranda vs. Arizona (384 US 436, 1966):

> while in custody at the station or otherwise deprived of his freedom of action in any significant way (BRAZIL, 2014, p. 6, our translation).

He considered that like the United States, democratic countries generally recognize the right to silence giving the example of Spain (art. 242) and Japan (art. 38), that signed up in their respective constitutions. The Min. Gilmar Mendes asserts that even being absent from the fundamental Law, Germany recognizes it as derived from the rule of law, human dignity and the free development of personality and in legal terms, the right to information on the right to silence as provided for in art. 136 of the German Code of Criminal Procedure. Citing some of the trial from the Praetor Excelso - HC 68 929, of 10.22.1991, HC 69 818, of 03.11.1992, and especially the HC 78,708 – the Minister Gilmar Mendes concludes the right to information on the right to silence. :

> From the analysis of those judged, we can conclude that the right to timely information on the fact of being able to remain silent is scope to ensure the accused can choose between remaining silent and active intervention. The choice of the latter means that the accused waives his right to remain silent and the consequences of the lack of timely information about his right. (BRAZIL, 2014, p. 8, our translation).

The lack of warning about the right to silence makes any proof provided by the accused unlawful in formal questioning or 'informal chat' written clandestinely or not (HC 80,949, rel. Sepúlveda Pertence, DJ 14.12.2001). Thus, the appeal was accepted to declare the ineptitude of the complaint, without prejudice to any other to be presented with new evidence. From the doctrine and quoted trial, we can extract the basic conformation of the right to information on the right to silence in Brazil.

2- THE RIGHT TO SILENCE AND ITS WARNING: USA

The Supreme Court of the United States, the highest court in the United States of America, often speaks on fundamental rights, which shows its concern for individual rights and the individual freedom of people. Regarding the criminal sphere and especially the rights of the accused. These rights are founded on two amendments in the Constitution of the United States, respectively, the fifth and the

sixth: among other rights, one that guarantees the privilege against self-incrimination and that the accused can be defended by counsel. As follows:

> The Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> The Sixth Amendment: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense”

These two are part of the so-called *Bill of Rights*, composed of the first ten amendments in the Constitution of the United States. The placement of such rights at the top of the normative pyramid serves as a defense against possible excesses of legislators. Initially, it can be said that the guarantees embodied in them were bound to the jurisdiction of the Union (Twining v. State, 211 US 78 (1908)), although today imposed on federal states so that a minimum standard of civilization is respected (SEROUSSI, 2006, p. 100). They protect residents and visitors from the United States and are the source for the main Supreme Court decisions. Although the Fifth Amendment was submitted to Congress in 1789 and ratified in 1791 it only gained effectiveness in the last century. Bottino explains:

> Although legislative productions of the eighteenth and nineteenth centuries, the 5th and 14th amendments were not exploited to their fullest until the 60s of the twentieth century. The change of understanding only occurred in the midst of the campaign for equal civil rights in the US, known as the civil rights movement, the period of greatest effervescence occurred between 1955 and 1965. In the case of sealing self-incrimination, the recognition that it was a fundamental guarantee for every American citizen is enshrined in the case Miranda v. Arizona, 384 U.S. 436 (1966) (2015, p. 12, our translation).

In turn, the case Miranda v. Arizona, 384 US 436 (1966) refers to the arrest of Mexican immigrant Ernesto Miranda at his home in the city of Phoenix, in Arizona, on March 13, 1963, identified by a young woman who accused him of kidnapping and rape. Sixty-two hours later, Miranda confessed the facts, without having been warned about his privilege against self-incrimination and so not in accordance with the 5th Amendment (VAQUERO, 2012, p. 34). In the Court of Phoenix, as well as in the trial of his appeal by the Supreme Court of Arizona, it was considered that the evidence there had been validly obtained and Miranda was sentenced to a term of imprisonment from 20 to 30 years, for each of the offenses. On June 13, 1966, by 5 votes to 4 in favor of the accused, the Supreme Court of the United States held that Miranda had been pressured into self incrimination and determined the role of the police in protecting the rights of the accused arising from the 5th and 6th Amendments of constitution of the United States: give clear and effective information about rights, information that became known as the Miranda Warning popularized in movies and in TV series, a statement which is made to persons placed in custody or imprisoned by the police: *You have the right to remain silent. Anything you say or do can and will be used against you in court of law. You have the right to speak to an attorney. If you cannot afford an attorney, one will be appointed for you. Do you understand these rights as they have been read to you?*. Without an official written form, the Miranda Warning suffers slight variations in several States. For example, in the state of New Jersey, Nevada, Oklahoma and Alaska, where the police department added the following sentence: *"we have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court."* Although there are more complex situations to establish when a person is in custody (KAMISAR, 1968, p. 335), it is understood that this is the situation when one believes one is not free to leave the place where one is being questioned by police.

Confessions enjoy great probative value and evidently create situations in which questions can be asked easily which lead to the temptation to put pressure on the person being interrogated including frightening the person if he/she insists on not cooperating. The case Miranda v. Arizona, 384 US 436 [1966] - demonstrates the role of the police when they take a person into custody. After giving the Miranda Warning the privilege against self-incrimination effectively comes into action. We can still extract from the case cited:

a) So that prosecutors can use custodial police interrogation - understood as any questioning conducted by law enforcement officers after a person is taken into custody or imprisoned – they must demonstrate that clear and effective measures were taken to protect the privilege against self incrimination. Without such measures, it cannot be claimed that the statements made by the accused are the result of their freedom of choice and thus cannot be used in criminal proceedings;

b) In the absence of other measures, it can be said that the privilege against self-incrimination was observed if the person in custody before his cross-examination, was clearly advised that he could remain silent, that anything that he said would be used against him in court of law, that he was entitled to an attorney and that if he could not afford an attorney one would be appointed to represent him. Finally, the accused must be asked if he understood the warning given for each one of his rights and if having understood questioning could then proceed;

c) At any time, the accused may say that he wishes to remain silent at which time his interrogation should be terminated;

d) If the defendant requests an attorney he should not be asked any questions until the attorney is present;

e) If an interrogation is done without the presence of an attorney, the State must sufficiently demonstrate that the accused waived consciously and intelligently the right to an attorney;

f) The accused may invoke their right to remain silent after answering a few questions; having answered does not mean he has renounced the guarantee against self-incrimination;

g) If the accused is alone and informs that he does not wish to be questioned in this circumstance, the inquiry should not proceed. It is known that the police station environment is intimidating and, in itself, works to undermine the guarantee against self-incrimination;

h) The necessary warnings and the waiver of an attorney are, in the absence of a fully effective equivalent, prerequisites for the admissibility of any statement, prosecution or defense, made by a defendant.

The rule of Miranda Warning, however, is not absolute. We highlight the public safety exception established in New York v. Quarles, 467 U.S. 649 (1984). On September 11 1980, a woman told police officers from New York

that she had just been raped by a black man wearing a jacket with yellow letters on the back. She said that the rapist had entered a supermarket and he was armed. The police went into the supermarket and found a man of the same description who after seeing the police ran to the back of the establishment. After catching up with him he was told to put his hands on his head after which he was searched. The police noticed that his holster was empty and asked him where the alleged weapon was. The man replied "the gun is there," pointing to some empty cartons of milk. After picking up one of the cartons, the police found the loaded firearm and handcuffed him. Only then they read him his rights. (Miranda Warning) He had already been handcuffed and had answered about the gun and where he had got it.

The Court of New York excluded the statement "the gun is there" and did not admit that the gun had been seized due to the lack of reading of the Miranda Warning, a decision confirmed by the New York Court, by majority vote. Disagreeing, judge Watchler understood that there was a public safety exception to the Miranda Warning. A guarantee that was not made to allow a defendant in criminal proceedings prevent police from protecting the population against imminent and serious risk of physical injury. The Supreme Court confirmed this understanding, under the argument that the Fifth Amendment of the Constitution does not prohibit people from admitting they have committed a crime, but they can be coerced into admitting one. In the case, the accused had not been coerced into speaking because of the approach adopted by the police. Police may decide not to give the Miranda warning if there is a reasonable concern for public safety which was in certain in this case because the gun had not been found by the police. Thus, the answers were necessary so that the concealment of the weapon in a public place would not become a risk to public safety. This valued judgment will be made by the police who should decide whether the given situation allows postponing the Miranda Warning considering an objective and reasonable concern for their own safety or the safety of others. Jurisprudence points in the same direction where the existence of firearms or bombs endangers police or the general public with imminent and grave harm. In such cases, the questioning by the police without the Miranda Warning should be concerned with the need to get answers from the accused in order to eliminate possible hazard, i.e. one can only question the accused without giving the warning mentioned if it is necessary to solve a grave and imminent problem of public safety. However, the answers give by the accused cannot, in any situation, be obtained with use of violence or coercion, even if there is a need to do so. In any case, the statements must be voluntary so as not to infringe the due process of law, which will not be allowed in court (BENOIT, 2011).

3-TRANSCONSTITUTIONALISM

Since the end of last the century doctrine has been concerned with new challenges arising from a constitutional right that ignores geographic boundaries and beyond the borders of states, has been of interest to other state and non-state legal orders. For Neves, it is a new phenomenon, namely, the recognition that there is a plurality of legal systems intertwined in global society and independent from forms of political mediation such as international treaties and state legislation. The author

observes that the situation becomes relevant when one considers that the *transition bridges* between legal systems are largely developed directly from their respective centers, in other words, judges and courts (2009, p. 116-117).

At this point, the world society is a multi-center, so that in the perspective of those who are at the center of a given system (judges and courts), the center of another legal system is peripheral and vice versa. It does not impede relations of mutual observation, so forms of learning and exchange of experience are established, a true and effective dialogue between jurisdictions. Neves explains:

> In this sense, "conversation" or "dialogue" between courts is mentioned which can be developed at various levels. For example, between the Court of Justice of the European Communities (supranational) and the courts of the Member States, between the European Court of Human Rights (international) and national courts or between national courts etc. This "conversation" (which is, strictly speaking, cross communications traversing boundaries between legal systems) should not lead to an idea of permanent cooperation between various legal systems. All "conversation" between courts carries the potential for dispute on the threshold. (2009, p. 117, our translation).

Other forms of intertwining legal systems of the world society occur when there is a reinterpretation of the system to which is tied a given judge or court. Incorporating a normative sense extracted from another system, or the exchange and lifelong learning in the informal relationship which established between legislative assemblies, governments and administrations from different countries. However, the most relative transverse characteristic between legal systems is what permeates between judges and courts.

> This is a "constitutional conversation," which is incompatible with a "constitutional diktat" from one order in relation to another. In other words, we cannot talk of a hierarchical structure among orders: the reciprocal incorporation of content implies a reinterpretation of meaning in the light of the receiving order (NEVES, p. 118, our translation).

It should be noted that this conversation (trans) constitutional, allowing a dialogue between judges and courts of various legal systems, has consequences on a practical level: for example, it authorizes the Brazilian magistrate to enforce a

United States Supreme Court precedent to decide, in Brazil, a concrete case under its jurisdiction.

> The term “transconstitutionalism” emerges, on one side, as a "crossed constitutional fertilization". The constitutional courts "are cited not as precedent to each other, but as persuasive authorities" In terms of transverse rationality, the courts avail of a constructive learning from other courts and are linked to these decisions. (NEVES, p. 119, our translation).

This opening of one legal system to another means to admit that the world society and its various decision-making centers are also open to mutual learning and decision making concerning cases and common problems:

> What characterizes “transconstitutionalism” between legal systems is therefore being a constitutionalism relative to (solving) legal and constitutional problems facing various orders. When issues of fundamental rights or human rights are subject to specific legal treatment, permeating various legal systems, the constitutional "conversation" is essential. (NEVES, p. 129, our translation).

CONCLUSION AND RECOMMENDATIONS

In Brazil, a transconstitutional reinterpretation of art. 5, LXIII of the Federal Constitution is to be proposed - *the prisoner shall be informed of his rights, including the right to remain silent, and will be assured assistance from family and a lawyer* - incorporating the American experience in police practice and criminal procedure, in particular, resulting from the leading case Miranda v. Arizona 384:

a) to form your *opinio delicti*, the prosecutor should only make use of police questioning if the offender has been previously told that he could remain silent, a warning that must be clear and objective;

b) a police officer (civil, military, federal or municipal guard) as soon as an arrest is made, should notify the prisoner that he can remain silent and will be assisted by a lawyer (which obviously includes a public defender); this warning should not be postponed only at the beginning of interrogations conducted by the police authority;

c) if the prisoner mentions that he wishes to remain silent, any inquiry or police interrogation should be terminated or should not even begin; also to prevent intimidation and embarrassment, the authority should not proceed asking or registering that the accused has said he wanted to remain silent if this has already been stated;

d) if the defendant requests an attorney, the hearing should not continue until the attorney is present; in the case of the defendant not being able to afford an attorney, the police should call a public defender, without whom the hearing should also not proceed;

e) at any time during the investigation or proceedings, the defendant can make use of the right to remain silent;

f) The defendant should not be questioned alone, or for several hours (a lengthy interrogation); the defendant is put in an awkward situation in both cases and it discredits the aforementioned constitutional guarantee;

g) the refusal of technical assistance from a lawyer is exceptional and should be accepted only if it is clear that it was freely chosen by the defendant; if in doubt, it is understood that assistance from a lawyer was not refused;

h) police questioning without clearly communicating the right to remain silent and without the effective assistance of a lawyer (or public defender, if that be the case) should be disregarded or removed from the file by the judge, including elements of conviction and evidence derived thereof.

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