BETWEEN SILENCE AND LIE: LIMITS OF SELF-DEFENSE IN FRONT OF THE RIGHT NOT TO SELF-INCRIMINATE

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Abstract: To remain silent is a fundamental right and, as a logical consortary, so too is not to be obliged to declare your guilt even if you have to testify against yourself. It will be verified, therefore, if the interrogated person has a subjective public right to lie or if, by falsifying the information provided, he would be extrapolating his constitutional right of self-defense. For this, the dialectical approach methodology and bibliographic and jurisprudential analysis will be used as a research technique. The problem faced is eminently correlated in the expression, externalization, of language. It is inferred that a person does not have the right to lie before the judicial or police authority, as she will be subject to sanctions typified as crimes (false identity, slanderous denunciation or false self-accusation, *verbi gratia*).

Keywords: Fundamental right; To lie; Language; Crimes; False identity.

1 Introduction

The Federative Republic of Brazil confers on the criminal accused some fundamental rights, among which is the right to a fair hearing, of remaining silent, and not being found guilty before the criminal sentence is res judicata. The doubt and proposal of analysis of this research relate frontally to the alleged and controversial right that the interrogated, in the exercise of the right to a fair hearing, has to lie in court without this causing procedural damage.

In this context, it is inquired: to what extent can the lie narrated by the accused, in his/her interrogation, develop negative procedural and/or material consequences to him/her?

Specialized doctrine and domestic jurisprudence have already addressed (and still analyze) the subject. Authors such as Cesare Beccaria, Nicola Framarino dei Malatesta, Eugênio Pacelli, and André Luiz Nicolitt (among others) discuss this due to its relevance.

One could state that there would be no consequence to the interrogated in the present problem, given that it is in the sphere of his/her right to a fair hearing; or that, having subsumption of the fact to the norm, it would incur delinquent conduct; or, moreover, that the magistrate, having proven the untruth of the allegations, could fix the initial sentence of the accused above the minimum established by the legislation.

The research proposes to analyze the limits of the exercise of the right of the accused to defend him/herself broadly. To this end, it will be necessary to confront the right to remain silent with the alleged right to lie; verify doctrinal and jurisprudential convergences and

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divergences regarding the material and/or procedural consequences of the lie; and, ultimately, identify possible judicial solutions to the case of lying reports given by the interrogated.

2 Right to remain silent: corollary of the constitutional guarantee of the right to a fair hearing

The silence of the accused, although not having negative relevance to a possible criminal conviction in the domestic legal system, may not necessarily reflect his/her interest in omitting a truth that is unfavorable to him/her (MALATESTA, 1927, p. 268). It is possible that the conduct of the innocent accused to remain silent is due to what Malatesta (1927, p.269 and 270, our translation) denominates the "trepidation of his/her [referring to the accused] spirit" manifested because of feeling "weak in the face of a formidable accusation" in front of which he/she sees his/her defense useless, becoming mute "due to surprise" or "anger" since he/she begins to see "an unknown danger in his/her word"; or, still, keep silent by nobility, so as not to expose others, by "despising his/her salvation, to avoid condemnation," or the reproach, of someone for whom he/she has some feeling of consideration.

The right of the accused to remain silent during his/her interrogation, and from this silence not to inherit damage to his/her technical defense, is one of the ways to exercise the right to a fair hearing. Bahia (2017, p.194) explains that the right to silence is harmonious with the right to a fair hearing.

2.1 Brief comments on the right to a fair hearing

The right to a fair hearing is a constitutional guarantee provided for in Article 5, LV, of the Brazilian Constitution of 1988 (CR/1988). CR/1988 was edited and enacted after a historical period of restrictions and various disrespect to the minimum rights of the people of Brazil. Among so many restrictions, authoritarian and diametrically adverse to democracy, we cite, *verbi gratia* the absence of freedom of the press, or of artistic manifestations, or even political participation through political parties.

True, multiparty system existed, but in an illegal way. Its legalization and the consequent recognition of some existing illegal political parties occurred even in the pre-democratic period, during the government of President of Brazil José Sarney (LENZA, 2009, p.77 and 78).

The military dictatorship of Brazil, through the Complementary Act (AC) n° 38 of December 13th, 1968, closed the National Congress, removing from the national feeling any trace that once symbolized the representativeness of the Brazilian people in their politics and government.

The Institutional Act (AI), nº 5, which also dates from December 13th, 1968 – revoked, almost ten years later, Constitutional Amendment (EC) n° 11 of October 17th, 1978, which

lacked political legitimacy and legal status. It can be said that this legitimacy was imposed on them by the military, army, wildness. The President (Executive Branch) overlapped the Legislative Branch (of the Federal Government, States, and Municipalities). It limited a number of rights and fundamental guarantees, and granted other despotic powers to the head of the Executive Branch, such as of forfeiture of property, suspend mandates of elected officials, suspend civil and political rights, not grant *habeas corpus* (*HC*) to certain types of crimes, etc. (LENZA, 2009, p. 73).

These limitations, especially in the interests of public freedoms – among which is the right to move freely, the guarantee of due legal process, and *HC*, the instability of elective mandates, and the suspension of guarantees of members of the judiciary – nothing more natural than to grow a feeling of social and legal insecurity in the population in general. This would later begin with the edition of a Constitution that, perhaps in excess, limited and marked the punitive power of the State in such a way that the accused would be guaranteed the exercise of a right to a fair hearing and that his/her innocence would be presumed for his/her benefit.

The limitation of the punitive power of the State, as provided for in the constitutional text, invades the administrative sphere. In Administrative Law, specifically, the guarantee of the right to a fair hearing is directed to the self-enforcement inherent in the state administrative function. Thus, according to the words of Carvalho Filho (2017, p.111, our translation), such a constitutional guarantee restricts, and does not suppress, the "self-enforcement of the acts of the Administration [...], establishes some limits to the principle of enforceability, preventing an exclusive action of the administrator".

Thus, the right to a fair hearing translates into technical defense (assistance from a lawyer or public defender) and self-defense. For its time, this institute is divided into the rights of audience and of presence or participation (LENZA, 2009, p.714).

Notwithstanding the extensions regarding the technical defense being an element for the realization of the fair hearing, the Federal Supreme Court (STF) published a precedent statement with binding character in the opposite sense, according to which "the lack of technical defense by a lawyer in the administrative disciplinary process does not offend the Constitution" (Binding Precedent n° 5, our translation).

On March 21st, 2011, a procedure was initiated, with several modifications to cancel Binding Precedent (SV) n° 5, promoted by the Brazilian Bar Association. This is the Proposal for Binding Precedent (PSV) n° 58. This PSV, was rejected by the STF in a tight vote from its ministers Ricardo Lexandowski, Gilmar Mendes, Rosa Weber, Luís Roberto Barroso, Dias Toffoli, and Teori Zavascki, maintaining SV n° 5 in full force. The defeated ministers were Marco Aurélio, Carmen Lúcia, Luiz Fux, Edson Fachin, and Dean Celso de Mello (Informative n° 849 of the STF).

2.2 Provisions on the right to remain silent

The right to silence, a corollary to the exercise of the right to a fair hearing of the accused, must be interpreted in the light of the Constitution, that is, the accused cannot weigh procedural and/or material losses on account of clinging to such a right. However, it must be added cautiously that, alongside the right to remain silent, the right to be informed about the existence and possibility of its use must be respected.

Following this reasoning, Bahia (2017, p.194, our translation) informs that “the prisoner has the fundamental right to be informed that of such a right [to remain silent] and the absence of the notice may cause nullity”.

"The right to remain silent", in the lesson of Sarlet, Marinoni, and Mitidiero (2017, p. 905, our translation), reflects “the constitutional prominence of the right of freedom of the accused in the face of the punitive claim of the State” (original highlight), being certain that non-compliance will be answered with the *HC* (SARLET; MARINONI; MITIDIERO, 2017, p.945, our translation).

Malatesta reflects that the imputation of the sentence to an author of a certain offense necessarily goes through the verification of a truth without which it is impossible for the judge to apply the legal punishment, even if in his/her conscience he/she is convinced, by other means than by probative investigation, of criminal authorship and materiality. In this sense, the offender expects the following actions to prevent the judge from reaching the "truth": "either he says the opposite of the truth, or he tramples the truth; lie or silence, falsehood, or reticence” (MALATESTA, 1927, p.268, our translation).

However, the truth in the process will never be absolute since the fact to which it supposedly corresponds has already exhausted itself in time and is unrepeatable. Thus, a legally enforceable conclusion can be reached by probative verification.

Ferrajoli (2002, P.38) analyzes the truth under two approaches: the material truth, which is a legal truth sought in the model of a substantialist criminal law; and the procedural truth, which is a legal truth sought in the model of a formalist criminal law.

In turn, procedural truth can be factual - when one watches for a "*historical* truth, concerning propositions that speak of past facts" (original highlight), inaccessible "to experience" – or legal - reflecting, in the meantime, a "classificatory truth when referring to the classification or qualification of historical facts proven according to the categories provided by the legal lexicon and elaborated through the interpretation of legal language” (FERRAJOLI, 2002, p. 43, our translation).

The formal (or procedural) truth, as the jurist explains, finds its limits in procedural law and, in general, in the guarantees of defense, allowing to infer that it is opposed to the inquisitive model and favorable to the accusatory model. In this scenario, it is a "truth [that] does not intend to be the truth" – because the last corresponds to an authoritarianism

characteristic of the inquisitive model, which is not limited to be reached and does not recognize/know guarentees to the defense -; "it is not obtained through inquisitive questioning" and because of this, it is "more controlled concerning the acquisition method"; and "is conditioned to respect the procedures and guarantees of defense", which makes it “further reduced regarding the informative content" with respect to the material or substantial truth (GUARANTEES, 2002, p. 38, our translation).

Therefore, since it is impossible to verify an absolute truth – and, on the contrary, be faced with “an epistemological naivety, which the enlightenment juridical doctrines of judgment, as a mechanical application of Law, share with the vulgar gnoseological realism” (FERRAJOLI, 2002, p. 42, our translation) – the truth must be seen as an approximate ideal to be desired and which, for the absence of certainty, is also absent definitiveness.

Although the "suspicion of the lie" leads us to "suspect criminality", due to the "unlikeliness" and "improbability of what is said" (MALATESTA, 1927, p. 268). In a legal framework that adopted the accusatory system, as is the specific case of Brazil, this discussion would result or run into the barrier of the right to a fair hearing and the right not to self-incriminate.

Having the right to silence reflected directly in the right to be kept at liberty, both under constitutional protection, the obligation to coercively conduct a person to clarify points of divergence that will serve to incriminate him/her in current or imminent criminal persecution is empty. Likewise, it is not necessary to speak of prison for the interrogation to be carried out, given that, according to former STF minister Eros Grau, in the trial of *HC* 95009 (BRASIL, 2016, p. 294, our translation), "the Constitution guarantees anyone the right to remain silent”; this “makes the response to the investigative inquiry a capacity” and no one can be arrested “to exercise a capacity”.

Thus, the constitutional right to silence is evident in terms contrary to the one aired by Malatesta (1927, p. 269), for whom “the accused who keeps silent” makes infer his/her “interest in concealing the truth” and that “the truth is contrary to him/her”.

One faces the “*certainty* of the lie" when the narrative of the accused is contradictory and does not show credibility. However, being only unlikely that there is any truth in the narrative, one will be faced with a “*suspicion* of lies” (highlights, periods, originals). In this case, the simple suspicion is not supported as "evidence of criminality“, given that” the suspicion of a lie would be no more than the evidence of an evidence" (MALATESTA, 1927, p. 268, our translation).

The doubt raised by Malatesta is explained by semiotics. The evidence manifests itself as a visible element of a still imperceptible, naturally hidden circumstance or situation. Thus, the evidence – which, in Malatesta, can be a form of verifying the truth – does not, of course, protect the importance of the objectified truth (of which it is an evidence). However, according

to the semioticist Umberto Eco (2005, p. 57, our translation), the evidence will be true, i.e., it can be "considered a sign" that leads to the desired goal, if it meets three conditions:

> [i] when it cannot be explained in a more economical form (of a simple and objective question), its answer does not corroborate with the truth sought; [ii] when it indicates a single cause (or a limited amount of possible causes) and does not indicate an indeterminate number of different causes; and [iii] when it fits with another clue.

The right to self-defense, which translates into participation and presence in the process, although it is petrified as a fundamental right, is listed as freely available to the accused (SARLET; MARINONI; MITIDIERO, 2017, p. 902).

The right to silence may be invoked not only in the criminal proceeding or investigation but also in other investigations, such as those initiated by the Parliamentary (Joint) Commission of Inquiry (CPI/CPMI). This is what is inferred from the text of the Constitution of Brazil, in its article 5, LV.

In this regard and in this same sense, the STF Minister Marco Aurélio, rapporteur on *HC* 99289, understands that there are no public bodies or agents to whom the right to silence does not apply. "The invocation of the prerogative against self-incrimination" is "entirely opposable to any authority or agent of the State" and, therefore, " does not legitimize, by effect of its eminently constitutional nature, the adoption of measures that affect or restrict the legal sphere" of the person investigated or prosecuted, "nor justify, for the same reason, the decree of his/her precautionary arrest" (BRASIL, 2016, p. 294, our translation).

In September 20th, 2005, STF Minister Gilmar Mendes made a monocratic decision conferring to the patient at the time - STF, *HC* n° 86724 (BRASIL, 2005) - safe conduct so that, during his interrogation at the Correios CPMI, he could remain silent.

Mendes, who was the rapporteur of that *HC*, explained that

> the call of someone to testify before this or that CPI, does not detract the convoked, in any form, from the basic principles of the Constitution of Brazil regarding fundamental rights, especially those exhaustively, imperatively, and fundamentally enshrined by article 5 of our Major Law. [...] The right to silence, which ensures the non-production of evidence against oneself, constitutes a cornerstone of the system of protection of individual rights and materializes one of the expressions of the principle of the dignity of the human person. (BRASIL, 2005, p. 1 and 4, our translation)

Furthermore, the magistrate assured the patient the "discharge from answering questions likely to cause embarrassment to his defense", as well as "the full observance of his constitutional rights, especially the preservation of his *status libertatis*, regardless of the possible silence to some inquiry" (BRASIL, 2005, p.1 and 2, our translation).

3 The limits of self-defense in judicial interrogation

According to the STF Minister Celso de Mello, in *HC* 94016, the interrogation of the accused is an "act of defense of the defendant" (BRASIL, 2016, p. 294) - which must be considered “not a necessity of the prosecution but a right of the defense” (FERRAJOLI, 2002, p. 447, our translation) – and will be taken at the instruction hearing, opportunity in which the magistrate will inquire about the accused and the facts. Every problem structurally revolves around the language, that is, the narrative that the accused provides on the accusatory accounts.

3.1 Polysemic language and interpretation of the interrogation

Considering that the interrogated conveys his/her view that will be captured by the interpreter/judge during the report, narration, a relationship of communicability and prior agreement between the interlocutors about the language exteriorized by speech is even more certain. For this reason, Warat (2002, p. 21 and 22, our translation) teaches that “language is what allows us to understand speech” since it is presented “as a method of approaching linguistic facts”, and, in turn, “the sign facts obtaines its meaning through its inscription in the language”.

The addressee of the interrogation is the magistrate, who will use it to directing him/herself to the decision closest to the law. Thus, a correct interpretation will be more likely than the report given by the interrogated, especially when polysemic expressions and/or lexemes are identifiable in the interrogation, when the interpreter uses the “isolation of the relevant semantic isotopy” technique (ECO, 2005, p. 73): within polysemy, an interpretation that best adapts to the context is adopted.

3.2 Silence and lies: beacons to the right to a fair hearing of the interrogated

The right to remain silent is provided for in the text of article 5, LXIII, of the Brazilian Constitution and in the current wording of article 186 of the Code of Criminal Procedure (CPP). The Code also clarifies that the accused is not required to answer the questions addressed to him/her and that such silence will not be interpreted to his/her disadvantage (article 186, sole paragraph).

According to Ferrajoli (2002), the interrogation allows the accused a double defense: (I) to contest the narrative of the accusatory piece and (ii) to present the accounts of his/her justification (FERRAJOLI, 2002, p. 486).

By not answering the questions (remaining silent), the interrogated person will be in full enjoyment of his/her right not to be forced to declare guilt even if he/she has to testify against him/herself, as well as if his/her omission is not interpreted unfavorably, as if it were a confession, for example.

Nicolitt recalls that, although the right to silence was constitutionally enshrined in 1988,

only 15 years after the enactment of the Constitution was the aforementioned right of the interrogated provided for in the infra-constitutional legislation. This dilemma only ended with the new wording of article 186 of the CPP given by Law nº 10,792/2003. While this law does not address most of the judiciary superimposed the understanding of the law (article 186 of the CPP) to the Constitution, understanding the silence of the interrogated to the detriment of his/her defense. With a certain compliance to the opinions in this sense, Nicolitt affirms "that the exercise of a constitutional right could not be interpreted to the detriment of the defense" (NICOLITT, 2016, p. 689, our translation).

Although some members of the judiciary applied the old positive understanding to article 186 of the CPP, part of the doctrine advocated (unless better judgment) for the constitutional non-reception of the legal device. There are even those who claim that said legal device would have been "repealed" by the constitutional order inaugurated in 1988: "such a provision had been repealed by article 5, LXIII, of the Constitution, which ensures the accused the right to silence, fundamental basis of what was agreed to be called 'constitutional silence'" (MARCÃO, 2016, p. 370, our translation).

The right not to respond to questions whose answers may be incriminating to the accused orients Marcão (2016, p. 355, our translation) that there is in the criminal procedure, unlike in the civil procedure:

> Contrary to what occurs in Civil Procedural Law (CPC/2015, article 385, paragraph 1, in criminal proceedings, the absence of an answer by the accused regarding the questions of merit presented by the judge, in no case will matter in confession, nor can it, in any form, be interpreted to the detriment of the defense. Currently, there is no "confession penalty" in Brazilian Criminal Procedural Law in cases of absentia, escape, or silence during interrogation.

Thus, according to the previous wording of article 186 of the Code of Criminal Procedure – "Before beginning the hearing, the judge shall observe for the defendant that, even if it is required to answer the questions asked, its silence may be construed to the prejudice of the defense" – even if the accused remains silent because in the exercise of a fundamental right established in the constitution, it "could be construed to the prejudice of the defense, the reference to which, evidently, has not been approved by the Federal Constitution, which implies the privilege of non-self-incrimination, a corollary of the right to remain silent" (AVENA, 2017, p. 100, our translation).

Another device criticized by the doctrine is article 198 of the CPP: "The silence of the accused shall not constitute a confession but may constitute an element for the formation of the judge's convincing".

It should be noted that the final part of the aforementioned legal text directly harms the fundamental right to remain silent, given that silence, according to the current legal-

constitutional system, can never be grounds for any prejudice to the defense of the accused.

Thus, Marcão (2016, p. 371, our translation) states that the final part of article 198 of the CPP "was not accepted by the current Federal Constitution" since "article 5, LXIII, ensures the right to silence with impunity, and therefore, any conclusion unfavorable to the accused cannot be validly extracted from it".

Pacelli (2017), along with the massive majority of the criminal procedural doctrine, sponsors the understanding according to which the accused does not have the right to lie, even during interrogation. However, the lie may possibly be considered as excluding anti-juridicity or culpability.

It is important to highlight, in this space, that a model, namely a guarantor of criminal law, in which there is subordination to "procedural guarantees", recognizes the right to deny or lie to the accused (FERRAJOLI, 2002, p.188), and denying a statement that knows to be true is, in itself, a lie.

The right to remain silent, according to Pacelli and Fischer (2016, p. 431), bifurcates into two strands identifiable as measures of moral and legal protection of the interrogated:

> tutelage, not only the moral conscience of the one who, by the fact of running the risk of condemnation, finds him/herself compelled to *lie* in his/her favor, but also protects the accused against judgments of convictions backed up in subjective perceptions unworthy of acceptable degrees of certainty. [original highlight]

Part of the doctrine understands that the right to silence differs from the right not self-incriminate. In this context, the right to silence, or to remain silent, would be a guarantee against a possible cognition or legal inference of silence or the purposeful absence of answers by the interrogated. On the other hand, according to this doctrine, the right not to self-incrimination would be "the right to intimacy, to privacy, to physical and mental safety, to honor, to image (article 5, X and XII, CF), which cannot be tangential by the Public Power, except in the limits authorized in the constitutional text" (PACELLI; FISCHER, 2016, p. 433, our translation). Thus, according to Pacelli and Fischer (2016), there is no right of refusal to any and all evidentiary acts.

Diametrically opposed to the immediately preceding illustrated understanding, Avena (2017, p. 100) recalls that the accused "cannot be constrained to the production of evidence against him/herself", which, added to the right to remain silent without prejudice to his/her defense, "strikes any other evidentiary means". This includes the right not to be obliged to participate in, contributing to the implosion itself, "re-enactment of the crime (simulated reproduction of the criminal practice)".

This guarantee of not being compelled, under penalty of prejudice to his/her defense, to produce evidence against the person him/herself brings, in the diction of Ferrajoli (2002, p. 486,

our translation), a series of rights, considered corollaries, among which are listed the rights to remain silent and to lie, as well as

> the prohibition "spiritual torture", denominated by Pagano, which is the oath of the accused; the "right to remain silent", in the words of Filangieri, as well as the ability of the accused to answer falsely; the prohibition not only of violently extracting a confession but also obtain it through psychic manipulation using drugs or practices hypnotic, with the respect due to the accused person and the sanctity of his/her conscience; the consequent denial of the definitive role of confession, for the objection of any legal evidence and the unavailable character associated to criminal situations; the right of the accused to assistance and, in the same manner, the presence of his/her counsel in the interrogation to prevent abuse and/or still in violation of the procedural guarantees.

Thus, because it is a fundamental right to be invoked at any time, the accused cannot be restrained from his/her bodily freedom when showing disinterest in collaborating with the investigations.

However, his/her preventive arrest may be decreed, according to the Code of Criminal Procedure, in the event that, unlike non-collaboration with the State during the investigation or process supported in the exercise of constitutional law *nemo tenetur se detegere*, the person will perform conducts that can disturb the proceeding: "The preventive detention may be decreed as a guarantee of Public Order, of economic order, for the convenience of criminal investigation or to ensure the application of Criminal Law" (article 312).

For Nicolitt (2016, p. 690, our translation), "the accused can even lie in his/her defense without generating any consequence, in view of the principle of the right to a fair hearing, which does not accomodate limitation". However, despite, at first glance, the exercise of his/her alleged right to lie seeming an absolute thoughtlessness to the interrogated, Nicolitt brings that false self-incrimination, established in article 341 of the CP, is an offense from which not even the interrogated is immune, corroborating with the thesis that there is no absolute right (not even the right to a fair hearing).

The appointed professor and magistrate, contrary to the majority doctrine of Criminal Procedure – which is in the sense that the interrogated can only be silent about the narrative regarding the facts -, teaches that the right to silence covers the two moments of the interrogation: personal qualification and the narrative of the facts. Nicolitt (2016, p. 690 and 691, our translation) well illustrates this statement with the following transcript:

> In the interrogation itself, the accused can exercise the right to silence widely, whether when asked about residence, livelihoods, profession, etc. (individualization interrogation), or on the fact itself (merit interrogation).

Embracing the same thesis aired by Professor Nicolitt, according to which the untrue narrative constitutes a right of the interrogated, Marcão (2016, p. 356, our translation) justifies that "no one can be compelled to testify against him/herself because no one is obliged to

incriminate him/herself (*nemo tenetur prodere seipsum, quia nemo tenetur detegere turpitudinem suam*), "therefore the accused" may lie, be silent, or tell the truth".

Távora and Alencar (2016) are affiliated to two doctrinal currents: one more expansive and the other more restrictive. In this sense, the professors subdivide the guarantee *nemo tenetur se detegere*, that is, that the accused is not obliged to produce evidence to the detriment of his/her technical defense, in: "silence or remain silent", "not be compelled to confess the commission of the criminal offense", "inexigibility to tell the truth", "not adopt active conduct that may cause incrimination", and "not produce incriminating invasive evidence or that impose penetration into his/her organism" (TÁVORA; ALENCAR, 2016, p. 77, our translation).

On the other hand, unlike what André L. Nicolitt proposes, the right to remain silent under analysis, in the lesson of Távora and Alencar (2016, p. 77), does not cover the first phase of the interrogation since "the accused, conducted, defendant, declarant, and witnesses have the duty to inform their name, address, and other qualification data, not being applicable regarding the right to silence".

With deference to the understanding that the right to remain silent would only cover the second phase of the interrogation, Minister Gilmar Mendes, in the *HC* n° 86724 – in which the injunction was granted and issued the safe conduct for the patient to use this fundamental right without prejudice to his/her defense before the Correios CPMI -, decided that the interrogated must necessarily provide the information that does not imply his/her own decline:

> In the case of the case file, it appears unequivocal, at least in court, that the failure to recognize the right not to answer the questions, whose answers may incriminate him/her, will cause serious and irreversible damages to the fundamental right of the patient. **The obligation to provide information persists concerning facts that do not imply self-incrimination** [highlighted] (BRASIL, 2005, p. 5, our translation)

Marcão (2016, p. 356, our translation) is adept at this same line traced in the *HC* n° 86724, guided by the doctrine that the fundamental right to remain silent finds its limit in the first phase of the interrogation, in which the magistrate seeks to qualify the interrogated: "The guarantee of silence", states the professor, "is not unlimited and does not reach the qualification interrogation".

However, it cannot be forgotten that article 68 (head provision and sole paragraph) of the Law of Criminal Offenses (LCP) still applies, which provides for the penalty of fine for those who are silent and fine plus simple imprisonment for the one who lies. In this context, it should be inferred that, although it is a rule incompatible with the current constitutional order - therefore, ineffective –, the conduct punishable as a criminal offense would relate to the first phase of the interrogation, the one that addresses the qualification of the accused.

Marcão (2016, p. 371) explains that the right to silence is limited. Thus, "it does not reach the qualification interrogation", under penalty of the conduct remaining configured in

article 68 of the LCP - occurring the "refusal of data on one's own identity or qualification" – or in article 307 of the CP – in a more serious way, when the accused provides "false data about his/her identity".

The right not to produce evidence against oneself, although it is quite widespread in forensic practice, is not absolute. In this sense, the higher courts, by their repeated jurisprudence and repeatedly analyzing the "possibility of the conducted by the police authority presenting false documents to circumvent their identification [...], have rejected the application of the principle of *nemo tenetur se detegere*, concluding by the criminalization of the conduct" (original highlight) (TÁVORA; FISCHER, 2016, p. 77 and 78, our translation).

The STJ jurisprudence has stated in several judgments that the right of self-defense absolves any lie told by the accused. However, one should pay attention to the fact that the STJ does not have the same understanding when the (still) investigated, gives a false identity to the Police Authority (Statement n° 522).

In the same sense, the STF, in the judgment of the Extraordinary Appeal (RE) n° 640139, also understands that the attribution of false identity in police investigation characterizes a criminalized, anti-legal, and culpable fact: “The constitutional principle of self-defense (article 5, LXIII, CR/1988) does not reach the one that attributes false identity before police authority with the intent to hide bad antecedents” (BRASIL, 2016, p. 293).

The accused “to whom the right of silence is recognized”, is, in the diction of Malatesta (1927, p. 459, our translation), an "incoherent witness", given that “not only can he/she not be constrained to *confess*, as he/she cannot be required to *witness* in any way” (original highlights); and it is incoercible because it is not subject to oath, for otherwise it would be a “compulsion upon his/her spirit, and all compulsion, internal or external, forcing the defendant to confess, is always illegitimate, and must be rejected”.

In the chapter entitled “Oaths”, Beccaria (2008, p. 36) not only admits the possibility of the accused lying but also believes it is impossible to demand from him/her a conduct contrary to his/her survival instincts: “As if man could swear in good faith that he/she will compete for his/her own destruction!”

4 Conclusion

Although part of the doctrine adheres to the thesis that the interrogated has a right to tell a lie, it seems correct that one can also infer that the accused does not assist the subjective public right to lie in court, because he/she is subject to the sanctions criminalized by reason of crimes against the administration of justice (defamatory complaint or false self-acusation, *verbi gratia*).

However, despite the absence of such a right, due to a conduct not criminalized, a simple lie shall not be considered a crime, sometimes because there is no criminalization of

perjury in the domestic legal-criminal system, sometimes when the untruth is not subsumed to the positive criminal norms; as well as the lie narrated by the interrogated cannot be a basis for a possible fixation of the sentence beyond the legal minimum.

However, one must pay attention to the fact that, in a model of guaranteeing criminal law, in which the search for the truth (procedural) is limited and can be marked by a series of guarantees (already seen above), it is not reasonable to admit that the accused contributes to his/her own ruin, either through a narrative or through commission conducts imposed by the State.

Given this, a consciously false narrative by the interrogated, as well as his/her silence when asked about something that he/she knows, in favor of his/her fair hearing, the possibility of refuting the accusatory narrative, is (and must be) tolerable in a State governed by the rule of law that adopts the accusatory and guarantor model of material law and criminal procedure.

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