CHANGES IN THE SCOPE OF PROTECTION OF *NEMO TENETUR SE DETEGERE* PRINCIPLE DUE TO THE MODIFICATIONS INTRODUCED BY LAW 12.654/12 IN CRIMINAL INVESTIGATIONS: THE (IN) CONSTITUTIONALITY OF COERCIVE COLLECTION OF GENETIC MATERIAL TO DETERMINE THE GENETIC PROFILE

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1 INTRODUCTION

This article deals with some changes brought by Law 12.654 of May, 2012, responsible for creating a genetic database for usage in the Criminal Justice System and introducing ways to obtain genetic material from both definitive convicted or investigated by a crime, and the consequences of such standards in shaping the *nemo tenetur se detegere* principle.

The conformation that the right against self-incrimination reached in Brazil led much of the doctrine and jurisprudence to state that is legally impossible to force the suspect in an investigation to give genetic material for comparative analysis directly from his or her body. However, the rules formatting such right took as basis the absence of strict law (principle of legality) that could adequately restrict this right, among other legal elements. Still, the simple legal provision of coercive measures against the investigated will may not be in accordance with the constitutional and conventional standards prevailing in the Brazilian legal system.

Thus, there is utmost importance in studying the new legislation so that it can determined whether such coercive measures have support in the Constitution and in international treaties that Brazil joined.

2 CHANGES BROUGHT BY LAW 12.654 FROM 2012 TO THE CRIMINAL INVESTIGATION

The Brazilian legal system has undergone changes through Law 12.654/12 regarding the collection and treatment for the genetic data in criminal matters and regulations on ways of collection and storage of material in order to determine the genetic profile of investigation and the subsequent use of such identifying information. The Act appointed cases in which the collection of material will occur independently of the will of the suspect submitted to the measure, in addition to providing the initial setting up of the database to store such information, so that the processed information can be used to clear up crimes that have biological traces.

Law 12.654 added a paragraph in the fifth article of the Criminal Identification Act (Law 12.037/09), analyzed in this paper, and other legal provisions[2] in the Law of Penal Execution. As the database is not directly related with the obtainment of material to identify the genetic profile of the subject during a criminal investigation, this subject will not be addressed in this paper.

The new paragraph of Article 5 of the Criminal Identification Act deserves special attention because it provides the possibility to carry out the collection of genetic material for the

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[2] The articles 7-A and 7-B of Law 12.037 deal with the creation of a genetic database, data entry form on the bank and its nature, responsibility for misuse. The Article 9-A and its paragraphs introduced an obligation to identify the genetic profile of all convicted of a crime with nature of serious violence against the person or convicted of heinous crime in order to feed genetic database.

determination of the investigated DNA profile, by pointing "to obtain biological material" as one of the measures to be taken during a criminal identification. The combination of the *caput* and the paragraph points that whenever the criminal identification is essential to police investigations, the Police, the Prosecution or the Defense may request to the Judge the collection of biological material for the determination of genetic profile, as well as photographic and fingerprints identification, even if it is presented an identification document.

Clearly, the law indicates that the "genetic print" of a suspect may be taken as evidence within the criminal identification procedure when such measure is essential to police investigations, which may be ordered *ex officio* by the Court or by representation of the Police Authority or request of the Prosecution or the Defense. Therefore, the legal requirements to this measure are the demonstration of its essentiality to the elucidation of the fact and a Court Order.

The essentiality of the measure is the proof of its indispensability to check a fact, so that, if such evidence is not obtained, it will be impractical to determine the authorship of the crime investigated (LOPES JÚNIOR, 2013, p. 634), at least aprioristically. It can be distinguished within this matter the existence of any evidence that point, as a minimum ballast evidence, the possibility of authorship, in order to avoid an unjustified "witch hunt". The utility of the evidence used for the elucidation of the fact in question is based on the demonstration of the impossibility or extreme difficulty of verifying the issue that will be remedied by determining the DNA profile.

The legal provision of representation by Police Authority or request by the Prosecution or Defense denotes the need for a Court Order to demonstrate the essentiality of the measure in an adversarial procedure, which shows the attention of the Legislator regarding the Reserve of Jurisdiction relating to Fundamental Rights restrictions (SILVA, 2013, p. 51). In addition, taking the matter to Court allows the discussion of its essentiality, honoring the Right of Contradictory in the formation of evidence. It is worth noting that the *ex officio* decreeing of the measure does not appear to be consistent with the current constitutional system and much less with the rule itself that established the procedure, because he who can determine the extent indispensability is one that is investigating the facts, whether the police authority or the prosecutor.

In the matter of Criminal Identification and the presentation of Civil Identification Documents, the listed documents in Article 2, such as ID card or Passport do not bring any identification on the genetic profile, which in itself already endorse the necessity of criminal identification, due to failure of the documents to fully identify the accused (item II of Article 3).

Given the characterization of the measure, it must be taken into consideration that the coercive conduction of investigated can be used for the collection of genetic material, which serves as a means of putting into practice the court order, pursuant to Article 260 of the Penal Procedure Code. If the subject refuses to hand over the material, the collection will be carried out "by force", pointing to Law 12.654 that obtaining the material should be done in "proper and painless" way.

3 **LEGITIMATE RESTRICTION TO THE RIGHT OF NOT PRODUCE EVIDENCE AGAINST HIMSELF?**

The criminal identification is an institute based in item LVIII of Article 5 of the Federal Constitution, as the need to identify citizens before public agencies related to the criminal prosecution was already apparent to the Originals Constituent. Due to specifically address the Legal

Reserve, the law must strictly stick to the details of this restriction to Fundamental Rights by creating obligations for individuals that will be subject to such restriction.

Although the scope of the *nemo tenetur se detegere* principle varies according to the doctrine that is adopted, it is certain that the issue of physical intervention in Brazilian law hampered by the absence of law that dealt with the subject. Now that the Law 12.654 addressed the issue in the context of criminal prosecution, arises the need to consider whether the right against self-incrimination can be legitimately restricted by the devices brought by this law.

The right not to give evidence against himself, as a distinguished institute the right to silence, is originated in Anglo-Saxon law (SILVA, 2013, p. 101) and gained prominence in Brazil with the use of technological methods in legal proceedings, especially when dealing with the usage of DNA testing in civil lawsuits of paternity investigation. In the criminal context, there is the debate about the legality of forcing the investigation to submit to DNA testing or other measure that can clarify any questions in criminal proceedings, generally related to the determination of authorship.

In what is considered the leading case of physical interventions in Brazilian law, the Supreme Court analyzed the *Habeas Corpus* 71373-4/RS the possibility of forcing a man to undergo DNA testing to determine or to expel his paternity. The Brazilian Supreme Court ruled that because the offense to a number of constitutional principles, it would not be possible, at least at that time, the coercive collection of genetic material for comparative examination.

Justice Marco Aurelio, who opened the divergence to grant the writ clarified stated that, at the time, it did not exist a law that would force a father to submit to examination and, that even if there were, that coercive collection of material would be unconstitutional based on a private interest (determination of paternity) and would not have the power to ward off the inviolability of the body. It became clear in the discussion that if there was any law in strict sense to oblige the person to undergo such an examination and this obligation was grounded in the public interest, possibly, those Justices would consider such an obligation (and such a law) constitutional (SILVA, 2013, p. 39).

However, due to legislative inertia in adapting the criminal procedure to new technologies and the repetition of the precedent discussed without further analysis, it was created in Brazil a "right not to give evidence against himself in a Brazilian way." (SILVA, 2013, p. 106). What it was a privilege due to legal vacuum became an autonomous right, which also underwrote questionable decisions from a technical point of view, which declared unconstitutional a few procedures in which the accused was required to do (active participation) or tolerate did (passive participation) something.

When analyzing legal systems that have criminal proceedings considered more democratic, effective and guarantor of rights that the Brazilian (taking Germany, Spain and Italy as example), the right to not self-incrimination has a scope of protection directed to the prohibitions of forced confession and to extract any prejudice to the refusal of the defendant to assume responsibility for a criminal fact. This privilege does not cover the issue of evidences that requires the subject of an investigation to take or tolerate action, according with the European Court of Human rights (SILVA, 2013, p. 119). Some legal systems prohibit the requirement of active participation (to force the subject to act), keeping only the passive participation (tolerate that the state collect evidence) and others that allow both forms of participation are required of the investigation.

Legal systems around the world tend to give preference to collecting materials by non-invasive means, in detriment of invasive ones. Article 9-A of the Law of Penal Execution, following

this tendency, states that the identification of the genetic profile of those submitted to collection should be done through proper and painless technique, which infers the preferred non-invasive methods when skilled.

The Supreme Court did not address the institutes introduced by Law 12.654 until the time this paper was written, making it possible only to consider individual opinions of Brazilian Justices and the jurisprudence of the Constitutional Courts of countries with legal tradition similar to Brazil, and the opinion of scholars. The composition of the Supreme Court in 1994 ended up ruling that in the case of application of coercive obtaining genetic material in the core of paternity investigation, that there was no law in the strict sense to force anyone to submit to DNA testing. However, some of the votes on the *habeas corpus* in question showed that, if it were a public interest versus private interest conflict (as in criminal prosecution), would possibly be considered constitutional, allowing the fundamental right to physical integrity be restricted constitutionally.

The doctrine (and even some jurisprudence) tried to stick exclusively to the summary of the Judgement of 1994 and ended up creating a real right not to produce evidence against himself "in a Brazilian way" who behaved like an insurmountable right for many years. However, there is no absolute Fundamental Right, at least to many reputed scholars.

In this sense, Lopes Júnior (2013, p. 632) believes that the Law 12.654 fulfilled the formal requirement to make Fundamental Rights restriction similar to European legislation. The author punctuates, addressing the issue, that the investigated is required to submit to body intervention to obtain genetic material, either voluntarily or coercively, point the "end of the Brazilian tradition to respect the right of negative self-defense" (LOPES JÚNIOR, 2013, p. 633). Avena (2013, p. 180) places that obtaining material necessarily will be taken in a non-invasive way and puts that the right to not give evidence against himself enshrines the suspect to act in a certain way, being that the subject may be required to tolerate collect the material, but cannot be forced to do something.

4 ARGUMENTS ABOUT THE (IN) CONSTITUTIONALITY OF LAW 12.654

The Brazilian Penal Procedure Code dates of 1941 and, as such, brought techniques of investigation of its time, as the fingerprinting and writing identification. Over the years, the Legislators tried to follow scientific advances, however, due to questions (some external and others own the law) that do not deserve further analysis in this article, some technologies were left behind or were not adequately introduced.

Genetic identification stands out as a method that can aid in criminal matters, the Court determine the authorship of a given crime by comparing evidence found in the *corpus delicti*, however, as evidence that depends on information which are obtained invasively, they are subject to the control of constitutionality and legality by the judicial authority. The legislative vacuum on the matter was supplied, the criminal justice context, by Law 12,654, which regulates the matter, leaving the analysis of conventional and constitutional compatibility of the devices.

Clearly, this issue is not yet exhausted in the academic environment and will possibly be pacified only after the Supreme Court Justices have the last word on the subject, however, the usefulness of such evidence for the elucidation of complex criminal cases is something to take into

consideration. It is also right to point out that the use of DNA testing as a tool in criminal proceedings is a trend that democratic systems that seek efficiency in their procedures.

On the other hand, it is imperative that the determination of the genetic profile of an investigated person follow the conventional, constitutional and legal norms, taking into account that the investigation is not merely object of proof, but subject of law. The judicial review of this evidence and its determination based on the indispensability and obtaining and analyzing the material as less invasive expert technique serve as a guarantee of the investigation that the due process of law and contradictory in the production of evidence should be respected, in addition to Dignity Human person.

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