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# ASTREINTES: THE OVERVIEW OF CHANGES DEVELOPED PRIOR TO THE 2015 CIVIL PROCEDURE CODE REFORM

*ASTREINTES: O PANORAMA DE ALTERAÇÕES DESENVOLVIDAS ANTERIORES À REFORMA DO CÓDIGO DE PROCESSO CIVIL DE 2015*

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***ABSTRACT***

*The theme of this article is: Astreintes, the panorama of changes developed prior to the reform of the civil procedure code of 2015. The following problem was investigated: Due to the change of the CIvil code from 1973 to 2015 and expressly its interpretations, as it has been originating the proper fixation of astreintes? The following hypothesis was considered: What has been the criterion adopted by the legislator for the establishment of Astreintes. The general objective is to discuss the real change brought about by the new code in the face of the uneasiness linked to the Astreintes. The specific objectives are: To understand the characteristics; the legal nature; The historic; the origins and the fundamental role of astreintes in the civil enforcement process over time. This work is important for the society and the operator of the Law, because it addresses the reflexes resulting from an institute that is little talked about academically today and is legally relevant. This is a qualitative theoretical research lasting five months. As a result of the research carried out, it is concluded that there is, therefore, no definition in the arbitration of the astreintes, because an inadequate fixation can easily hurt the principles of proportionality and reasonableness, it is not a question of funds that originally integrate the party's credit, but legal instrument of coercion used to support executive jurisdictional provision.*

***KEYWORDS:*** *Astreintes. Obligation. Traffic ticket. Process. Execution.*

***RESUMO***

*O tema deste artigo é: Astreintes, o panorama de alterações desenvolvidas anteriores à reforma do código de processo civil de 2015. Investigou-se o seguinte problema: Decorrente da mudança do código CIvil de 1973 para 2015 e expressamente suas interpretações, como vem se originando a fixação adequada das astreintes? Cogitou-se a seguinte hipótese: Qual vem sendo o critério adotado*

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*pelo legislador para a fixação das Astreintes. O objetivo geral é discutir a real mudança que trouxe o novo código frente ao descostume atrelado às Astreintes. Os objetivos específicos são: Compreender as características; a natureza jurídica; o histórico; as origens e o papel fundamental das astreintes no processo de execução cível ao longo do tempo. Este trabalho é importante para a sociedade e o operador do Direito, pois aborda os reflexos decorrentes de um instituto hoje pouco falado academicamente sendo juridicamente relevante. Trata-se de uma pesquisa qualitativa teórica com duração de cinco meses. Em decorrência da pesquisa realizada, conclui-se que não há, portanto, definição no arbitramento das astreintes, pois uma fixação inadequada pode ferir facilmente os princípios da proporcionalidade e razoabilidade, não se tratando de verba que integra originariamente o crédito da parte, mas sim de instrumento legal de coerção utilizado para apoiar a prestação jurisdicional executiva.*

***PALAVRAS-CHAVE:*** *Astreintes. Obrigação. Multa. Processo. Execução.*

## INTRODUCTION

The so-called Astreintes are an important mechanism whose objective is to enable the fulfillment of obligations arising from do's and don'ts. It must be asked that the purpose of this obligation is to compel the defendant to comply with the obligation, as a result of bearing greater losses than he would have to comply with it. Circumstantially, the Judiciary has repeatedly taken controversial decisions on the subject. There are several decisions that reduce the value of astreintes after a long period of noncompliance on the grounds that maintaining the value would result in the plaintiff's illicit enrichment. On the other hand, other decisions understand that there is no need to talk about limiting the fine to the amount of the main obligation, since such a reduction could allow the defendant to freely abstain from fulfilling the obligation and only after the passage of time and the movement of the judicial machine, pay, at most, the equivalent of the principal.

There are scholars who divide the jurisdictional activity into two: cognitive, or knowledge, and enforceable, or execution. In the first, intellectual activity prevails, that is, the judge's analysis of the facts and the rule to be applied. In the second, material activity prevails, the search for a practical, concrete result (WAMBIER; ALMEIDA; TALAMINI, 2008, p.44).

Following the interpretation of Humberto Theodoro (2009, p.109), an interesting distinction between the execution and the knowledge process. In execution, the State acts as a substitute for the creditor, demanding the satisfaction of the provision, that is, execution is only possible when the debtor does not voluntarily fulfill the obligation. In the acknowledgment process, the judge examines

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the dispute with a view to applying the law to the specific case. In forced execution, on the contrary, it is not sought to apply the rules to the concrete case, but to put into practice the rule already applied in order to modify the factual reality. That is, in the cognition process, there is a search for the rights of the litigants and a decision on the merits, while in the execution one already starts from the certainty, in theory, of the creditor's right attested by the enforceable title, without a decision on the merits.

This article proposes to answer the following problem: As a result of the change of codes and expressly their interpretations, and clairvoyant that new dogmatics will be shaped for the party with the greatest influence, be it the creditor or the debtor, has been originating from this new conjuncture of influences a proper fixation of the astreintes ? The debtor party irrefutably bear the losses and the creditor the illicit enrichment or vice versa, the issue arises from the lack or even excess of the so-called Judicialization of the specific policy for the application, within the astreintes institute . In this sense, the more progress there is in improving such processes and in the legal instruments to guarantee compliance with obligations, the more effective the Judiciary will be and the better will be the fulfillment of social demand.

It follows from such logic that the execution process is not dialectical, since there is no objectivity on the rights involved due to the existence of the title that derives in theory, a liquid and certain right of the creditor. In forced execution, the State interferes with the debtor's assets to satisfy the creditor's right. There are two ways to achieve this purpose: specific performance and performance of a subsidiary obligation. In the first one, the payment due is effectively sought, whereas in the second one, through expropriation of the defaulting debtor's assets, a value equivalent to the original obligation is sought. In both modalities, the executive process aims at carrying out the sanction (THEODORO JÚNIOR, 2009, p.110).

The hypothesis raised in the face of the problem in question was critically analytical of how the adaptation of the Astreintes institute has been due to the new code of Civil Procedure (BRASIL, 2015) against the old and already revoked code of process (BRASIL, 1973) . The sanction, at the patrimonial level, which is of interest to forced execution, translates into practical measures that the legal system itself outlines so that the State can invade the sphere of the individual's autonomy and effectively enforce the rule of law. Because it has this coercive character, forced execution only occurs upon non-compliance with the obligation, that is, payment prevents the execution from being proposed and prevents execution if it has already been proposed (GONÇALVES, 2019, p.188).

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A subtle terminological distinction must be made between the process of execution and forced execution. The first would be the set of coordinated judicial acts with the objective of compulsorily satisfying the creditor's right at the expense of the debtor's assets. It is an ongoing legal relationship governed by public law. Forced execution, on the other hand, would be the content of the execution process, the material realization of the rule through a court action (BRASIL, 2018a, STJ).

The general objective of this article is to discuss the real change that brought the new code in face of the unfamiliarity linked to Astreintes . The execution of extrajudicial title underwent changes with Law No. 11,382/2006. The main one was the extinction of the rigid separation between the knowledge and execution process. Before, as already mentioned, in the case of a court decision it was still necessary to file an enforcement action, as compliance could not be carried out within the scope of the same process as a continuation of the knowledge phase, another change was in relation to incidental actions for liquidation of sentence that were also extinguished, becoming incidents of the process against which there is an appeal and no further appeal (NERY J; NERY, 2016, p.1454; ALVIM; GRANADO; FERREIRA, 2019, p.2055).

Currently, extrajudicial enforceable titles are enforced through an autonomous enforcement process, while, as a rule, judicial bonds will be enforced upon compliance with a judgment. This rule applies to convictions handed down in civil proceedings. The convictions in a criminal sentence with reflexes in the civil sphere, the arbitration sentence, the foreign sentence approved by the Superior Court of Justice and the conviction against the public treasury, despite the fact that they constitute a judicial enforcement order, still require the initiation of a new process to its execution (WAMBIER; ALMEIDA; TALAMINI, 2008, p.61; BRASIL, 2016, STJ).

The effectiveness of an executive title is given to certain documents by the legislator, that is, to be considered an extrajudicial executive title, an express legal provision is required. With it, it is possible to enter directly with the execution process, not being necessary the knowledge process, because, in theory, there is no controversy about the right, since it is expressed in the title. Enforceable title is each of the legal acts that the law recognizes as necessary and sufficient to legitimize the execution of the execution, without any new or previous inquiry about the existence of the credit, or other terms, without any new or previous cognition as to the legitimacy of the sanction. whose determination is conveyed in the title (THEODORO JÚNIOR, 2009, p.116).

The Specific Objectives of this work are to understand the characteristics; the legal nature; the respective temporal events; The historic; the origins and key role of

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astreintes in the civil enforcement process over time. This work is important for the operator and future operator of the Law, and for all the public that arouses interest, as it addresses the consequences arising from an institute that is currently little discussed academically and legally relevant and used. With the advent of the reform of the code of civil procedure and the restructuring of the articles, such a significant advent capable of compelling the defendant to fulfill the obligation, in practice is taken to complete disdain.

In addition to being little debated, the proposed theme has significant scientific and social relevance, because with the little feasibility proposed by the Astreintes Institute , the judiciary currently did not hold back in making controversial decisions on the subject, from large contractors and international representatives who, in refusing to pay, are exempt from the obligation, after a long period of non-compliance on the grounds that maintaining the value would result in the plaintiff's unlawful enrichment, cases ranging from debts arising from labor charges or related to the defense and protection of the Consumer, in disparity of labor powers, employer and consumer, conglomerates respectively. It is hoped to give the reader a good view of Astreintes , their relevance to the effectiveness of judicial decisions and the prospects for improvement with procedural reform.

For the elaboration of this article, the type of research used was the descriptive bibliography, having as a research method the treatment of qualitative data of a secondary nature, using as a research instrument books, doctrine and jurisprudence, articles and theses defended from the keywords: Astreintes ; Obligation; Traffic ticket; Process; Execution. Being made the analysis regarding the Obligatory Rights; The understanding defended and adopted by the courts; The point of view of those who defend what results from this obligation and those who suffer from the bad formulation of fines against them; in line with the code reform. This literature review research is expected to take five months. In the first and second months, a survey of the theoretical framework was carried out; in the third and fourth month, the literature review; in the fifth month, the elaboration of the pre -textual and post-textual elements that make up the entire work.

As Gonçalves (2019a) adds, the literature review consists of the perspective of bringing public bibliographic data as an instrument of reflection to a subject that is intended to debate or dialogue. A qualitative research treats the information collected with an analysis of all the nuances allowed in it (GONÇALVES, 2019b).

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**ASTREINTES: THE OVERVIEW OF CHANGES DEVELOPED PRIOR TO THE REFORM OF THE CIVIL PROCEDURE CODE OF 2015.**

The astreintes emerged in the early 19th century by praetorian initiative. Initially, the doctrine considered the institute *contra legem* , however, after several questions and periods of setback, with the help of jurisprudence, there was a consolidation of the instrument as a coercive measure and independent of compensation for damages. Thus, French law recognized in 1972, through Law n° 72-626, the astreintes under the title: On Astreintes in civil matters, expressly providing for its application as a fine by the French courts. Later, in 1991, the French enforcement process was reformulated and the legislator dedicated an exclusive session to astreintes (AMARAL, 2010, p.5; DINAMARCO, 2003a, p.38).

The resistance found by the institute in French law is related to the defense of freedom and autonomy of the will, very much in vogue at the time. This freedom was apparently contrary to the imposition of an attitude on the defendant. Therefore, the old Napoleonic Code expressly prohibited the fine and provided only for the settlement of obligations in terms of losses, damages and interest. Over time, the judges themselves felt the need to apply the fine, even if it was against the law, giving rise to the astreintes . Even so, for more than a century, they were considered as a simple advance of compensation for damages (MARINONI; ARENHART, 2008, p.72; DINAMARCO, 2001, p.24; DINAMARCO, 2003b, p.33).

The position of the doctrine contrary to this view and the repeated decisions of lower court judges were decisive in the change in the understanding of the Court of Cassation in France. Thus, in 1959, the First Civil Chamber of this Court determined that the astreintes had an impositional nature, seeking to compel the debtor to perform and not indemnify nature, not to be confused, therefore, with losses and damages. In 1972, the advance was even greater, Law 72,626 expressly provided for the application of the measure, that is, now the fine would have legal support. In 1991, with the reform of the enforcement process in France, a specific section was edited for astreintes in Law 91,650 (AMARAL, 2010, p.8; CAPPELLETTI; GARTH, 1988, p.32).

Even before the CPC reform, such a forecast already existed. In fact, its insertion in the Brazilian legal system occurred with the CPC of 1939. However, with the new wording, there was mention of the possibility of imposing the fine in anticipation of guardianship and its application to the obligations to deliver things. Before Law No. 10,444/02, the Brazilian State had difficulties in satisfying creditors with obligations to do and not to do, precisely because of the lack of means to coerce the debtor to perform the obligation without converting it into damages. Although

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article 287 of the CPC provides that the author must request the imposition of astreintes , from Law No. both in the anticipation of guardianship and in the final sentence (PACHECO, 1999, p.260; DINAMARCO, 2001, p.24; DINAMARCO, 2003b, p.38).

It should be noted that article 461-A, introduced in the CPC by the reform introduced by Law No. 10,444 of 5/10/2002, applies the same provision to obligations to deliver certain or uncertain things. With this change, precedent 500 of the Federal Supreme Court, (BRASIL, 1968) which provided for the non-application of punitive action in obligations to give, was superseded. The initial term for application of the fine is default, that is, it can be imposed from the moment the debtor does not fulfill the obligation within the deadline, or when he is summoned to fulfill it and does not do so promptly. This period is defined by the judge when forwarding the compliance order to the defendant. The initial term of the daily procedural fine will be fixed by the judge, if not already provided for in the title. A reasonable period must be established before the start of its incidence, taking into account the specific circumstances: not so distant as to render the protection in favor of the creditor innocuous, nor so close that it becomes impossible for the debtor, even if he wants to satisfy the obligation without incurring a fine. (WAMBIER; ALMEIDA; TALAMINI, 2008, p.335).

It is noteworthy that if the decision imposing the fine does not include the period within which it will begin to apply, the decision will be invalid, applying precedent 410 of the STJ (BRASIL, 2007; BRASIL, 2009). The fine is foreseen in the sentence itself and the judgment of an appeal in relation to it is pending, with suspensive effects, the fine does not apply until the appeal is decided. In the case of a fine imposed in anticipation of guardianship, the effects are immediate (TALAMINI, 2003, p.253; DINAMARCO, 2017, p.103).

The opposite of opinions referenced by the scholars is that the fine can only be charged after the final decision has become final, provided that the anticipation of guardianship in which the fine was applied is confirmed. This current argues that the intended coercion with the application of the fine is in the threat of payment and not in the immediate collection. Didier disagrees with this argument, since there is no suspensive effect to the decision, preventing the provisional execution is not justified. This position seems to be the most correct and is vehemently the most used by legislators (TALAMINI, 2003, p.254; DINAMARCO, 2003b, p.41; DIDIER JR, 2010, p.456).

The fine will apply until the obligation is fulfilled, or while there is a possibility of fulfillment. If compliance is no longer possible, or the option to convert into damages is made, the fine will no longer apply. In these cases, the credit arising from the

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period in which the fine was imposed remains, and its deduction from the indemnity for damages is not applicable (DINAMARCO, 2013, p.91).

The impossibility of specific protection can be verified ex officio by the judge. A specific request by the plaintiff is only necessary in the event that there is still the possibility of specific protection and he, even so, chooses to convert it into damages, ceasing the incidence of the fine. Astreintes also cease to apply when surrogate means are applied to achieve an equivalent practical result (TALAMINI, 2003, p.256).

The major doctrinal discussion is about the final term of astreintes in case the default goes on for a long period. It is questioned whether it would be possible for the fine to be levied indefinitely. One current states that it is not possible. For these authors, the judge must verify, after some time, that the fine has not reached its coercive purpose and stop its incidence. From there, the obligation could be converted into damages, for example. The author points out as a solution the verification, by the judge, of the possibility of obtaining an equivalent practical result. If there is such a possibility, surrogate means must be used to achieve it, ceasing the incidence of the fine. If this possibility does not exist, there is no need to contain a glimpse through the legitimacy for the cessation of the incidence of the fine based only on the defendant's insistence on failing to comply with the order, and the fine must be maintained and the other measures applied (WAMBIER; ALMEIDA; TALAMINI , 2008, p.336; ALVIM; GRANADO; FERREIRA, 2019, p.2657).

The astreintes fell as a kind or means of coercing the defendant in order to compel him to comply with a court order. They are used within the scope of specific protection. It is a coercion of an economic nature that aims to influence the mood of the debtor. The longer he delays the performance of the obligation, the greater the fine to be paid (ALVIM; GRANADO; FERREIRA, 2019, p.2005).

In the words of Plácido e Silva (2016, p.153), This term has a French core, lacks interpretation for the correlate and indicates, in the civil procedural technique, the pecuniary penalty within the execution. It is the injunction measure of unfavorable constriction against the debtor to do or not to do, whose daily value is rooted through a judge in the executed sentence, which will last as long as the default persists.

The astreintes are the daily fine used as a coercive means for the execution of the executive order. It would be a kind of indirect execution, designed to psychologically pressure the debtor to satisfy the obligation. It is included in the Code of Civil Procedure (BRASIL, 2015), with legal provision in article 814:

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> Art. 814. In the execution of an obligation to do or not to do based on an extrajudicial title, when dispatching the initial, the judge will set a fine for the period of delay in fulfilling the obligation and the date from which it will be due. Single paragraph. If the amount of the fine is provided for in the title and is excessive, the judge may reduce it.

Although the recipient of the fine is, in general, the debtor of the obligation, he understands that there is a possibility of its application to the claimant, as in the case of counterclaims, for example, formulated in a counterclaim or in claims of a dual nature. He also points out the possibility of imposing the fine on a third party outside the dispute. This would be the case, for example, of a mandatory sentence aimed at a legal entity, with provision for a fine in case of non-compliance to be imposed on the individual responsible for ensuring compliance with the order (DIDIER JR, 2010, p.468; DINAMARCO, 2017, p.114).

It should be noted that the fine is also applicable in cases of fungible duty , since , even if it is the use of subrogatory means is likely , nothing prevents the execution from being sought by the defendant himself. This is also because compliance by different people often becomes more onerous and complex. There is no value limitation, and may even exceed the total of the obligation, and they are provisional, since they cease with the performance of the obligation. This value can be changed by the judge in the execution, either for more or for less (TALAMINI, 2003, p.245; OLIVEIRA, 2001. p.327).

Initially, the astreintes were applied in the condemnation of the execution process. However, more recently, the conviction has been waived, and the judge can apply them in the anticipation of guardianship. Its application cannot be retroactive, given its purpose of coercion, that is, it will start counting from the non-compliance with the court order and will no longer apply from the fulfillment, from the impossibility of the demanded fulfillment or not of the defendant's fault, from the choice by the plaintiff for compensation for damages, the exclusive adoption of acts of subrogation or the loss of the coercive capacity of the astreintes resulting from the defendant's insolvency, for example. The dismissal of the action also determines the extinction of the fine. The origin, in turn, does not reinstate those established in anticipation of relief revoked by a later decision (TESHEINER; AMARAL, 2010, p.12).

Notwithstanding Article 814 of the CPC only refers to a daily fine, usually, astreintes are fixed for a period of time, whose compensation is given by a daily or monthly fine, for example, and even an hourly fine. However, the dominant understanding is that there is no fence for setting a fixed value. This option comes from the protected object, when it comes to rights whose violation is instantaneously consummated, the most correct is the fixed fine, whereas when it comes to continued

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illicit, the periodic fine is more appropriate (ALVIM; GRANADO; FERREIRA, 2019). , p.2005; BRASIL, 2018b, STJ).

The unit value of the periodic fine may , however , different as long as it is too small or too much for the purpose coveted . It is also required that time be given skillful for the defendant carry out the task _ antecedent of the incidence of astreintes . Partial performance authorizes the reduction of the fine, provided that the obligation be divisible ( TESHEINER; AMARAL, 2010, p.13 ).

Understanding the legal nature of astreintes is very relevant to understanding their function and effects in the Brazilian legal system. First, it should be noted that its legal provision, as demonstrated, is found in the Code of Civil Procedure, hence its procedural nature is already demonstrated. Regarding its specific legal nature, there is a lot of doctrinal divergence. For a long time it was understood that it was a matter of compensation, confusing a fine with reimbursement. In 1959, the French Court of Cassation clarified the issue, determining that astreintes constituted a measure completely different from damages, not having a compensatory nature. The controversy was definitively resolved, in that country, with Law 72,226/72, which expressly provided for the application of the measure and its appropriateness. Following the same path, in Brazil, §2 of article 461 of the old civil procedure code (BRASIL, 1973), made it clear that the fine is independent of compensation for damages, that is, there is no need to speak of an indemnity nature. (MARINONI; ARENHART, 2008, p.74; GONÇALVES, 2019c, p.188).

One of the most defended positions today is that the astreintes would be a coercive measure in order to protect the authority of judicial decisions and the very dignity of the Judiciary. In fact, the coercive purpose of the fine is to convince the debtor to comply with the obligation and this imposition is carried out by the State. Despite this, in both French and Brazilian law, the beneficiary of the fine is almost exclusively the plaintiff . German law, on the other hand, follows a different line, providing for the fine to be directed to the State, since such a measure serves to defend the authority of the State-Judge, there are authors who criticize this theory, asking what applies only to some types of obligation, that is, if their nature were really that of an instrument of defense of the state authority, the correct thing would be that they were applied to any and all judicial decisions, since in all of them there is a need to protect the dignity of the Judiciary, since when there is noncompliance, there is offense to it and the fine is not capable of preventing this from happening (AMARAL, 2010, p.57; MARINONI; ARENHART, 2008, p.74).

The fine has a coercive and accessory nature, not having an indemnity or punitive nature. It exists simply to coerce, to convince the debtor to fulfill the

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obligation. He agrees with Guilherme Rizzo Amaral that astreintes should not be confused with a punitive fine for *contempt of court ;* attack on the dignity of justice. The current that understands that the nature of the fine is a procedural instrument aimed at inducing the defendant to comply with the warrant, without compensation or even compensatory nature. The daily fine is a typical mechanism for preserving the judge's authority, constituting a public procedural measure. (DIDIER JR; BRAGA; OLIVEIRA; CUNHA, 2020, p.445; TALAMINI, 2003, p.239; WAMBIER; ALMEIDA; TALAMINI, 2008, p.336).

According to the understanding of the Superior Court of Justice, 4th class (BRASIL, 2013) in decision, the astreintes would have a hybrid nature, with characteristics of procedural and substantive law. The specific nature would be a coercive measure used to compel the defendant to comply with the obligation. However, there is no consensus even within the scope of the STJ, 3rd class (BRAZIL, 2012a), since, in another decision, the court expressed its opinion on the purely procedural nature of the institute; Possibility of cumulating astreintes with contractual charges due to the different nature of the two institutes. Procedural nature of astreintes and substantive law of contractual charges. Therefore, it appears that the divergences around the legal nature of astreintes have not yet been resolved even by jurisprudence. Despite the different understandings, the positions prevail in the sense of their hybrid character, being the procedural and material character (AMARAL, 2010, p.28; CARVALHO, 2004, p.216).

Regarding the amount of the fine, §4 of art. 461 of the former CPC (1973) refers to compliance with the sufficiency and compatibility of the fine with the obligation. Compatibility is related to the hypotheses that the fine is applicable, while sufficiency is more directly related to the value attributed to it (BRASIL, 2014, STJ).

Astreintes are not limited to the value of the obligation, nor to the damages derived from its default, as they do not have an indemnity nature, for this there is a penalty clause and losses and damages, different institutes of astreintes . In this sense, the understanding is that the amount resulting from or deriving from the fine will tend to be fixed so that it fulfills its function as a pressure mechanism on the debtor's will. Therefore, it is not necessarily limited to the value of the obligation being performed. There must be an amount capable of shaking the debtor in his decision to continue disregarding the executive order; (WAMBIER; TALAMINI, 2018, p.337).

In establishing the amount to be paid, the judge must seek to assign a value that can concretely influence the defendant's behavior, taking into account his economic situation, his ability to resist, the advantages for him arising from the default, and other values not assets that may be involved. Therefore, as the judge

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must necessarily observe the parameters of sufficiency and compatibility, in addition to the circumstances of the specific case, Talamini understands that there is no discretion in the allocation of this quantum. Even so, this value can be reviewed by a higher court based on disobedience to the aforementioned criteria and the principle of least sacrifice (TALAMINI, 2003, p.248; GONÇALVES. 2019, p.188).

In the case of an increase in the amount of the fine, the new amount will apply from the date of communication to the defendant, which will contain a reiteration of the compliance order. Talamini (2003, p.254) clarifies that it would not make sense for the increase to take effect in the event of new facts, as its objective is to psychologically pressure the defendant, which will not occur until he is aware of the increase. It is important to point out that there may be changes even to the fine provided for in an extrajudicial executive title. Luiz Rodrigues Wambier and Eduardo Talamini (2018, p.218) talk about this possibility in cases where the judge considers the stipulated fine to be excessive.

The Superior Court of Justice understands the review of the fine as a new probative analysis, providing legal certainty to the decision that arbitrated it. That is, the value of astreintes must respect the principles of proportionality and reasonableness, but applied to the specific case, based on the evidence and allegations brought to the case. This means that, within the scope of the STJ, there will only be changes in values if the stipulated amount is clearly derisory or exaggerated. However, if there is a change in the factual situation, the values of the astreintes can be modified even after the final decision, without any harm to the res judicata. In this sense, the STJ (BRASIL, 2012b) has already expressed its opinion in its Jurisprudence Report No. 481 (DIDIER JR; BRAGA; OLIVEIRA; CUNHA, 2020, p.445; THEODORO JÚNIOR, 2017, p.127).

The execution of the credit derived from the fine is carried out in the same process in which the order to fulfill the obligation was given. However, the procedure adopted will be the execution for a certain amount of a judicial title. The tax calculation on the exact amount to be received does not depend on liquidation, as it is a mere arithmetic calculation, in the event of a decision on appeal or an action of challenge defining that the plaintiff was not entitled to specific protection, the resulting credit of the fine will be void. That way, if the author has already received it, he will have to return it. It is also possible to partially enforce the fine, that is, it is not necessary to wait for the term of its incidence to receive part of the credit, its enforceability is sufficient. If the incidence continues, the author may carry out successive executions. There is already a manifestation on the subject by the STJ; impossibility of enforcing the fine based on an interlocutory decision. (DIDIER JR,

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2010, p.453; TALAMINI, 2003, p.263; ALVIM; GRANADO; FERREIRA, 2019, p.2454; GONÇALVES, 2019c. p.282; BRASIL, 2013, STJ).

The use of the fine as a coercive measure is widely adopted by the Brazilian judiciary. However, Didier (2010, p.459) makes some reservations regarding the dissemination of this practice in small-value obligations or in the face of defendants who do not have the financial conditions to support the application of the fine. For the plaintiff, when the obligation is of small value, the fine can become the main objective of the plaintiff, who starts to want the defendant not to fulfill the obligation in order to obtain a greater gain, which may result in an unjust enrichment of the plaintiff. .

If the defendant does not have the financial means to bear the fine, its application as a coercive measure is in itself innocuous. In relation to this topic, an important issue was raised in the III Civil Law Journey of the Federal Justice Council (BRASIL, 2004): the principle of objective good faith of the creditor to avoid the aggravation of the damage itself. According to this principle, the plaintiff has a duty to mitigate his/her losses, that is, to take steps to avoid further aggravating his/her losses. As a result of this principle, the position of the author who omits himself, failing to perform procedural acts to protect his rights, with the objective of delaying the fulfillment of the obligation, obtaining a greater gain with the astreintes . Failure to comply with this principle constitutes an illicit act that violates the general clause for the protection of objective good faith (DIDIER JR, 2010, p.462; DIDIER JR; BRAGA; OLIVEIRA; CUNHA, 2020, p.461).

Another criticism that is founded by scholars and that is made against astreintes is in relation to their exclusive destination to the author of the action. It is believed that this definition was influenced by French law, first raised by Guilherme Rizzo Amaral (2010, p.41). The fact is that many scholars consider the public character of the fine to be inconsistent with its allocation to the author and not to the State, as in German law, for example.

Talamini (2003, p.264), however, sees two major advantages in allocating the fine to the author. The first would be the increase in psychological pressure on the defendant with the prospect that the credit resulting from the fine will be quickly and rigorously executed, since this will be the responsibility of the author and not the State. The second advantage would be that the credit of the fine could be used in an eventual composition with the opponent, the author could, for example, give up part of the fine in exchange for fulfilling the obligation.

On the other hand, Talamini (2003, p.265) points out criticisms made by French doctrine to the same provision belonging to that legal system. There, it is alleged that the judges, already knowing that the cumulation of the fine with the

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losses and damages will result in a very high amount, capable of generating an excessive gain for the plaintiff, end up establishing the fine at a very small amount, losing , with this, the instrument's ability to intimidate, which points in this direction Humberto Theodoro Jr (2017, p.829).

Here in Brazil, however, this practice is not yet observed by magistrates. Having made these considerations, Talamini (2003, p.267) analyzes the perspective of the plaintiff's unjust enrichment in two situations: in infungible obligations and in fungible ones. In the former, the author rules out any possibility of unjust enrichment, since the damage caused by failure to comply with the original duty to do or not do is pecuniarily inestimable, and there is no parameter to speak of unjustified gain.

In the case of fungible obligations, when there is full or precise monetary equivalence, or when the state arising from the transgression is subject to full and economically assessable restitution, unjust enrichment may be verified. Even so, this situation occurred as a result of the defendant's free and spontaneous conduct, and linking the amount of the fine to the economic dimension of the obligation would remove much of its effectiveness as a subpoena instrument. For the above reasons, the aforementioned author defends the constitutionality of the astreintes , making only a suggestion that the amount of the fine that exceeds the obligation should be allocated to the State and not to the author.

## FINAL CONSIDERATIONS .

the *astreintes* are provided for in several laws of the Brazilian legal system, such as the Civil Procedure Code, the Consolidation of Labor Laws, the Public Civil Action Law, the Consumer Defense Code and others. The main purposes are to guarantee the effectiveness of specific jurisdictional protection and protect the dignity of the Judiciary. They replace the *manu militari activity* of the State, which would be inoperative and, perhaps, could become violent, because, in the final analysis, it would fall directly on the person of the debtor, possibly undermining his freedom.

It has to be said that the astreintes could be conceptualized as a fine imposed by the Judiciary, in the face of non-compliance with an obligation to do or not to do, whether fungible or non-fungible. Such a fine may even be imposed ex officio by the magistrate. They emerged as a way of trying to guarantee the specific protection of the State. Demand from people who seek assistance from the Judiciary to claim mandatory rights. The legislator's intention is for this right to be implemented as closely as possible to the initial agreement.

The purpose of this article is to provide a basis for the general panorama and how the changes in the codes expressly modified their interpretations in this way,

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how has the adequate fixation resulting from the astreintes ? It happens that, previously, the judicial protection could not compel the debtor to comply with the agreement, thus, the obligation was converted into damages and the end of the demand was almost always resolved with a payment in cash. However, this is not the outcome desired by the legislator. As a way of trying to change this situation, the astreintes , of French origin, were included in Brazilian Law. Such an instrument, currently, is nothing more than a daily fine for the period of non-compliance with the obligation. Astreintes constitute a technique of coercive and accessory protection, which aims to pressure the defendant to comply with a court order, pressure exerted by means of a threat to his assets, embodied in a periodic fine to be levied in case of non-compliance.

Coercion, as well as the enforceability of a fine, presupposes that it is possible to fulfill the task in its original form. Once the *in natura* payment is not possible , even due to the debtor's fault, the condition of the coercive fine will no longer be admissible. Its end does not stem from punishment, but basically from acquiring the specific quota. If the fulfillment of the obligation is impracticable, the creditor has to settle for the economic equivalent in losses and damages. However, if this infeasibility was incidental to the requirement of the daily fine, the validity of the measure will prevail until the event that made the original quota impossible.

The competence to set the astreintes rests with the judge responsible for the process, he may set them ex officio or at the request of the parties. This determination can be made in any instance, as long as there is a risk of default on the obligation. It should be noted that the astreintes do not apply in the case of a judicial decision that determines a specific procedure for its compliance and in the case in which direct execution by the Judiciary itself is possible. It is important to emphasize that the astreintes have no relation with moral damages, being completely autonomous institutes between them.

Discussing the transformation demanded by the new code of civil procedure of 2015, the fine, an essential characteristic of injunctive relief, aims to pressure the defendant to comply with the judge's order, aiming at preventing the illicit by preventing its practice, its repetition or its continuation. This fine may be provided for in the conviction itself or may be arbitrated during the execution of the sentence. In the case of an extrajudicial enforcement order, the fine will be fixed by the judge when issuing the initial execution, at which time he will also define the date from which it will be due.

There is, therefore, no means of definition in the arbitration of astreintes , since it is not a sum that originally integrates the party's credit, but a legal instrument of

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coercion used to support the executive jurisdictional provision. It is for this reason that there is no res judicata in the decision that defines the amount of the fine and its periodicity.

The change demanded by the 2015 code brought innovations on the subject. The main practical innovation refers to the allocation of the fine, which will be due to the plaintiff up to the limit of the equivalent of the main obligation, with the surplus destined to the State. It is noted, therefore, that the proper setting of astreintes is extremely relevant, since an inadequate setting can easily violate the principles of proportionality and reasonableness, as for the fact that the beneficiary of the claim is the author, a multitude of criticisms are arranged in the middle juridical, the nature of the fine being coercive and not indemnifying.

The solution presented at the time by the Project of the new Civil Procedure Code was to allocate the amount that exceeds the amount of the obligation to the State. In this way, the dispute is resolved, avoiding, at the same time, the author's illicit enrichment and the lack of effectiveness of the coercive power of the fine, which often becomes more advantageous than the performance of the obligation. It should be noted that in cases of inestimable quantum, it will be up to the judge to set a maximum value for astreintes destined for the creditor, with the value that exceeds this limit destined for the State. The Project also brought the possibility of provisional execution of the fine, through the judicial deposit of the amounts, an amount that will only be raised after the decision-making phase of the process, or through the provision of a bond, protecting the legal security of both procedural poles .

Such points are relevant, since the legal proceedings aimed at the fulfillment of obligations are a representative part of the total Brazilian legal demand. In this sense, the more progress there is in improving such processes and in the legal instruments to guarantee compliance with obligations, the more effective the Judiciary will be and the better the service of the requesting social demand will be.

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