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MEMORY AND CLANDESTINE RECORDINGS AS A MEAN OF PRODUCTION OF EVIDENCE IN CASES OF CORRUPTION IN BRAZIL

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ABSTRACT

In this work, we present the results of an analysis of the functioning of clandestine recordings as a means of evidence production, in Brazil, in criminal investigations and criminal proceedings of the cases "Fernando Collor" and "DelcídioAmaral". The question that we try to answer concerns the effects of meaning of illicit, legal effect and safety of these instruments of evidence production. The corpus was constituted of the judgments of the two cases. In the analysis, we mobilized theoretical assumptions of Discourse Analysis, in particular, the concepts of discursive memory and places of discursive memory.

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INTRODUCTION

The act of listening, which has long been used as a means of discovering family secrets, to observe intimate conversations, such as the old habit or the practice of listening behind doors, has had its techniques perfected, has been updated, and has been also employed for purposes of criminal investigation and criminal procedural instruction. The Brazilian Federal Constitution of 1988 itself in the subsection XII, of its art. 5, brings, as an exception to the rule of inviolability of the secrecy of correspondence and telegraphic communications, data and telephonic communications, the possibility of interception, in the latter case (of telephonic communications), for purposes of criminal investigation and criminal procedural, provided that it is legally authorized, and in the cases and in the form established by law. In order to standardize this exception, it was enacted the Law No. 9.296 / 1996, which regulates the final part of the subsection XII of the article 5, of the Federal Constitution. According to article 1 of the aforementioned law: "the interception of telephonic communications, of any nature, for evidence in criminal investigation and criminal procedural instruction, shall observe the provisions of this law and shall depend on the order from the judge with jurisdictional power over of the main lawsuit, under a court of law."

However, the article 2, in a *contrariosensu* interpretation,lists the cumulative requirements authorizing the interception of telephonic communications for the purposes of criminal investigation and criminal procedural instruction: (i) when there is reasonable evidence of authorship or participation in criminal offense; (ii) when evidencecannot be collected by other available means; and (iii) when the investigated fact constitutes a criminal offense punishable, at most, with a penalty of detention. Provided, of course, that the interception is carried out by a court order, according to the final part of the subsection XII, of article 5, of the Federal Constitution of 1988, and article 1 of law 9.296 / 1996.In relation to the third

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requirement set forth in article 2of law 9.296 / 1996, the ordinary legislatormeant that, in order toadmit the interception, the fact investigated should constitute a criminal offense punishable, at least, not at most, with a detention penalty, since, also in criminal offenses punishable by imprisonment, interception is permitted for purposes of criminal investigation or criminal procedural instruction. According to its preamble, the law 9.296 / 1996 deals only with the hypothesis of the suitability of telephonic interception, but the specialized legal literature and the jurisprudence of the country courts admit other forms of wiretapping as a means of evidence collecting be in the investigative phase or in the criminal procedures.

The specialized Brazilian legal literature uses generic term "*escuta*"- listening - to refer to both telephonic interception and clandestine recordings, and usually presents specific classifications and definitions for each of these terms. According to Gomes and Maciel (2014, p. 24-25), the telephonic interception consists in the capture of telephonic communication carried out by a third party without the knowledge of the interlocutors; while telephonic conversation recording is the interception of telephonic communication made by a third party with the knowledge of one of the participants. These two situations are currently regulated by law, in the case, by Law 9,296 / 1996.

Clandestine recording, in turn, can be telephonic or environmental. In both situations, an interlocutor records communication without the knowledge of the other. There are also mentions about environmental interception and environmental listening. In the first hypothesis, a third party captures a communication in the environment in which it takes place without the participants knowing it. In the environmental listening, the communication is captured by a third party also in the environment in which it happens, but with the knowledge of one of the interlocutors.

It happens that, in the legal arena, these resources cannot always be used as licit means of evidence, precisely because they invade the private sphere and private life of people, which are fundamental rights, as granted on subsection XI of article 5, of the Federal Constitution of 1988 which guarantees the inviolability of privacy, privacy, honor and the image of persons, or the first part of subsection XII, also of article 5, which guarantees the inviolability of the secrecy of correspondence and telegraphic, data and telephonic communications.

On the other hand, the advancement of technology also creates the conditions for it to be used for criminal practice, according to Gomes and Maciel (2014, p.13) so that the state eventually feel the need to resort to technological means to investigate and elucidate criminal facts, and among these means, telephonic interception is certainly one of the longest and the most frequent used, to the extent that, legally provided as an exception, it now becomes the rule.

With this, a whole memory was formed about this fairly new instrument of production of truth, be it with regard to its emergence, the limits of its outline, the legal requirements for its application and the hypotheses of its adequacy and legitimate uses; or in the cases where it was applied as the main instrument of production of criminal procedural truth. Telephonic interceptions and conversations recordings, which had long been used for criminal investigation and criminal procedural instruction, were widely used in the various phases of Operation Carwash of the Federal Police, such as the one that led to the detention of Delcídio Amaral, then Senator of the Republic, decreed in a court decision whose main basis was a clandestine recording by an interlocutor of Delcidio, in which it was configured the practice of the crime of attempted obstruction of justice. In the research that resulted in his work, we analyzed the functioning of clandestine recordings and telephonic interceptions as means of probative production in cases of political corruption taken place in Brazil, since the promulgation of the Federal Constitution of 1988.

The question that we try to answer concerns the effects of meaning of lawfulness, legal effect and safety around the use of the institute of wiretapping for purposes of criminal investigation and criminal procedural instruction. In this article, however, we operate a clipping of memory, and we present results of analysis of the functioning of clandestine recordings used as means of evidence production in criminal investigations and criminal procedural instructions of two cases of corruption: case "Fernando Collor" and case "Delcídio Amaral". The *corpus* was constituted, specifically, of the judgments of these cases. In the analysis, we mobilized theoretical assumptions of Discourse Analysis, especially the notions of effects of meaning, discursive memory and places of discursive memory.

MATERIAL AND METHODS

The *corpus* of the research consisted of excerpts from jurisprudential decisions rendered by the Supreme Court and related to cases of political corruption of great repercussion in the country, in which the use of wiretapping (legal interception or clandestine telephonic recording, clandestine recordings or environmental interception and environmental hearing) as a means of evidence production.

For the analysis of the selected materialities, we have used some operational concepts developed in the context of Discourse Analysis - DA which are related to the study of memory, such as the notion of discursive memory, taken up by Pêcheux ([1983a] 1999) in his studies, and the notion of place of discursive memory, coined by Fonseca-Silva (2007).

The discursive memory, according to Pêcheux ([1983a] 2008; 1983b]1999), is all that, having been said about a certain object, allows us to know and understand it, that is, what, reestablishing the implicit that are necessary to its reading, offers itself as the legibility / intelligibility condition of a text that appears as an event to be read, those implicit that occur "in the form of remissions, retakes and paraphrase effects" (Pêcheux[1983a] 1999, p. 51), and which produce an effect of regulation. We consider the judgments that we analyze as places of discursive memory, following Fonseca-Silva (2007), for whom these places would function through the production of effects of meaning and effect of memory in a given actuallity, and in this sense, as places of interpretation: "circulation, repetition, return, oblivion, conflict/controversy, transformation, permanence and updating of meanings" (Fonseca-Silva, 2007, p.25).

The symbolic materialities of meaning analyzed here, as well as the advertisements analyzed by Fonseca-Silva (2007), also function as places of discursive memory, insofar as they repeat, maintain, update or transform meanings.

RESULTS AND DISCUSSION

In 1992, the then President of the Republic Fernando Collor de Mello was involved in a corruption and influence peddling scandal. In the criminal case that he filed with the Supreme Court (criminal action nº 307), among the evidence that was presented against the former President, there were clandestine recordings of telephonic calls, which had as interlocutors, on the one hand, Paulo César Farias and the former Minister Bernardo Cabral and, on the other, Sebastião Curió, who made the recordings, without the knowledge of the others involved in the conversations. The dialogues incriminated Fernando Collor, as well as the businessman Paulo César Farias, who had been head of his campaign.

According to the procedural files, Sebastião Curió himself would have handed over to the Federal Police the recordings made on his initiative. Some excerts of conversations were verbatim transcribed into the criminal complaint, with the intention of using them as evidence against both Paulo César Farias and Fernando Collor de Mello, as described by the rapporteur, Minister IlmarGalvão, in his vote. The defense of Paulo César Farias requested the recognition of the inadmissibility of the clandestine recording of telephonic communication, due to illegality of the means of production of the evidence. The rapporteur of the case, Minister Ilmar Galvão - from interpretative acts that consisted in quoting jurisprudential precedents applicable to the juridical matter under discussion -, understood that the evidence obtained by clandestine recording of telephonic communication was unlawful, because it hurt the confidentiality of the telephonic communications, and due to the absence of judicial authorization for the recordings to be performed, as required by the Federal Constitution.

The rapporteur argued that the secrecy of telephonic communications was expressly protected in the Federal Constitution of 1988, but it contained an exception, in terms of its article 5, subsection XII, final part. However, he also stated that there was at the time no law to regulate the aforementioned constitutional provision, and therefore the Brazilian Telecommunications Code was not valid, which made it impossible to use the evidence obtained with the clandestine telephonic recordings made by Sebastião Curió.

After mentioning the specialized legal literature, the rapporteur minister also mentioned in his vote the existence of previous decisions of the Federal Supreme Court (STF), like the Extraordinary Appeal nº 85.439, which deals with the subject, although in the civil area: "In the context of legal case, the criterion of clandestinity, assuming the lack of consent and assent, was essential for rapporteurin the RE 45439, Minister Xavier de Albuquerque (RTJ 84/609), to consider arecord made by the husband of a telephonic conversation held by his wife with a third party, inadmissible as evidence" (STF/GALVÃO, 1994, 2174).

Finally, the Ministerrapporteur also highlighted a decision of the Supreme Court, handed down in criminal proceedings - the first on the matter - Habeas Corpus nº 63.834. In the words of Minister IlmarGalvão: These precedents in the civil area (referring, *inter alia*, to RE 85.439) were projected in the criminal field, when the court, in the judgment of RHC 63834, the rapporteur for the decision Minister CélioBorja (RTJ 122/47), reaffirmed the unlawfulness of the evidence consisting of clandestine magnetic recording, involving facts related to fraud committed against the assets of the extinct National Institute of Health Insurance and of Social Security - INAMPS. The habeas corpus was granted to dismiss the unlawful evidence and, in the absence of other elements, to close the investigation, and it was pointed out, as an autonomous ground, that the existence of such a recording still violated the *audialterampartem* principle, restricting the defense of the party against which was produced" (STF/GALVÃO, 1995, p.277).

In this regard, the rapporteur minister also argued that there was no reason not to follow these precedents of the court also in the case of the criminal action that was under trial, understanding, as already said, that the evidence obtained by clandestine telephonic recording was unlawful for harming the secrecy of telephonic communications, and due to the absence of judicial authorization for the recordings, which authorization, even if it had been requested, could not be granted, precisely because of the lack of a law regulating the matter.

The quoted precedents of the jurisprudence of the Supreme Court by the minister functioned as places of discursive memory, insofar as the mnemonic knowledge were retaken to confirm the understanding that was being defended by the rapporteur - in this case, the understanding of the inadmissibility of the evidence, due to its illegality - had to be (re) interpreted and, in a way, (re) meant, so that the meanings present in them conformed to the situation of the records.

This functioning of previous jurisprudential decisions, as places of discursive memory, and the effects that are produced by the interpretative act, which consists in displacements in the mnemonic content in those previous summons, updates the discursive memory to confirms the understanding or thesis defended by the legal interpreter, as discussed by Gonçalves (2012).

Another case of great repercussion took place in the course of the investigations of "Operation Carwash": the then Senator Delcídio Amaral was arrested, after being caught in an attempt to obstruct justice, in the recording of a dialogue with Bernardo Cerveró, son of Nestor Cerveró, former President of Petrobrás, who was in prison and was about to make a plea bargain. During the conversation, Delcídio Amaral offered an escape plan for Cerveró, and also a monthly allowance for the time he spent outside the country. The son of Nestor Cerveró decided to make the recording of the meeting and handed it to the public prosecutor's office, who performed the audio transcription.

The case refers to a clandestine recording of environmental conversation, which, like the clandestine recording of telephonic conversation, type of wiretapping that was considered as illicit evidence in the "Collor" Case, is also carried out by one of the participants, without the knowledge of the other(s). However, since the "Magri" case, which preceded the "Collor" case, involving RogérioMagri, then minister of labor and social security of the Collor Government, charged of passive corruption for offering, in a clandestine recording of an environmental conversation, bribes to his adviser and reporting the obtaining of pecuniary advantages in public affairs, this type of record had already been used as ameans of producing evidence and accepted by the Supreme

Court. Also in the decision of the Supreme Court to arrest the former Senator Delcídio do Amaral, pronounced in the records of precautionary action. nº 4039 by the then rapporteur of the Operation Carwash at the Supreme, Minister TeoriZavascki, the thesis was sustained that the evidence produced by recording clandestine environmental conversation would be lawful, considering that, in this case, the initiative to record the conversation came from one of the interlocutors. In the aforementioned decision, the rapporteur of the case also pointed out that the question regarding the legality of this type of recording had already been overcome by the court, referring to extraordinary appeal nº 583937 / RJ: "However, the recording of a conversation by one of the interlocutors without the knowledge of the others is considered licit, for the purposes of the aforementioned constitutional interdiction, "when there is no legal cause of secrecy or reservation of the conversation" (HC 91613, rapporteur: Min. GILMAR MENDES, Second Class, adjudicated on 05/15/2012, ELECTRONIC JUDGMENT DJe-182 DIVULG 14-09-2012 PUBLIC 17-09-2012 RTJ VOL-00224-01 PP- 00392). The subject, in fact, is overrun with general repercussions (RE 583937 00- RG, Rapporteur {a): Min. CEZAR PELUSO, judged on 11/19/2009, GENERAL REPERCUSSION - MERIT DJE-237 DIVULG 17-12-2009 PUBLISH 18- 12-2009 EMENT VOL-02387-10 PP-01741 RTJ VOL-00220-PP-00589 RJSP v. 58, n. 393, 2010, p. 181-194)" (STF/ ZAVASCKI, 2015, p.190). In the act of interpretation carried out by the rapporteur of the case, the trial of RE 583937 / RJ was retaken to maintain a mnemonic knowledge that corroborates the thesis defended by the minister that the evidence produced by clandestine recording is lawful, as far as there is not any legal provision that requires that the confidentiality of the conversation should be kept, in that case, in order to validate the decision rendered by the judge, in the records of the precautionary action4039. It is worth mentioning that, from the extraordinary appeal n. 583937 / RJ, admitted and judged with acknowledgment of general repercussion, was formed a "rule" applicable to all similar cases, in which the legality of the evidence produced by means of clandestine environmental conversation recording were debated, which it considered as lawful.

Conclusion

We observed that, unlike telephonic interceptions, wiretapping and recording, which currently have regulations in the law 9.296 / 1996, and are therefore no longer considered as illegal, as happened in the "Collor" Case, clandestine recordings of environmental conversation, while means of production of procedural truth, although admitted as lawful by Brazilian jurisprudence, an understanding followed in the "DelcídioAmaral" case, are not well delineated, precisely because of the absence of a law that regulates them.

We do not overlookthat the tapping, even the clandestine recordings of telephonic and / or environmental conversations, are important means of obtaining evidence. However, in addition to the need to safeguard, minimally, constitutional guarantees such as the inviolability of privacy, private life, professional secrecy honor and image of persons, and, it is alsoindispensable the provision of judicial order. Besides, in the case of interceptions and wiretapping the evidence produced by these means shall still be considered together with the entire set of evidences, in order achievea fair decision.

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