Atypical executive measures and the prohibition of surprise decisions in the Brazilian Code of Civil Procedure

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Abstract: This article studies the connection between the prohibition of surprise decisions and the atypical executive measures in Brazilian civil procedure, so as to identify if a decision establishing one of these measures, if not given the opportunity for previous manifestation to the parties, will be a surprise decision. Firstly, an analysis of the prohibition of surprise decisions and its perception in Brazil is made. Then, the system of atypical measures is identified, principally when it comes to its prerequisites. Finally, the interaction of both principles is made. It is a qualitative research with exploratory objectives, using as a procedural basis the specialized bibliography, legislation, and jurisprudence, in an inductive method. It was observed that, in theory, a decision that establishes an atypical measure and meets all of its requirements should not be considered a surprise decision, but there is jurisprudential dissent and further research can be made.

Keywords: prohibition of surprise decisions; atypical measures; Brazilian civil procedure.

Medidas atípicas de execução e a vedação a decisões surpresa no Código de Processo Civil brasileiro

Resumo: Este artigo estuda a conexão entre a proibição das decisões surpresa e as medidas executivas atípicas no processo civil brasileiro, a fim de identificar se a decisão que institui uma dessas medidas será uma decisão surpresa, se não for dada oportunidade de manifestação prévia às partes. Primeiramente, é feita uma análise da proibição de decisões surpresa e sua percepção no Brasil. Em seguida, identifica-se o sistema de medidas atípicas, principalmente no que diz respeito aos seus pré-requisitos. Por fim, é feita a interação de ambos os princípios. Trata-se de pesquisa qualitativa com objetivos exploratórios, tendo como base procedimental a bibliografia, a legislação e a jurisprudência especializadas, de forma indutiva. Observou-se que, em tese, uma decisão que estabelece uma medida atípica e atende a

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todos os seus requisitos não deve ser considerada uma decisão surpresa, mas há dissenso jurisprudencial e novas pesquisas podem ser feitas.

Palavras-chave: proibição de decisões surpresa; medidas atípicas; processo civil brasileiro.

1 Introduction

This paper seeks to analyze the interaction between two principles of the Brazilian Civil Procedure Code (CPC) (BRASIL, [2021b]): the prohibition of surprise decisions, in art. 10, and the atypical executive measures from art. 139, IV, in the interest of identifying if there is the possibility of a decision which establishes an atypical measure may be nullified for being a surprise decision.

This is a necessary research because atypical measures are one of the attempts by the new legislation to bring efficiency to the executive process, and normally requires a certain level of surprise, which might be hindered by the limitation posed by the prohibition of surprise decisions.

To reach this general objective, a few specific objectives were drawn. First, an analysis of the principle of the prohibition of surprise decisions will be made, so as to understand its insertion in the Brazilian legal system, its main characteristics and its requisites and exceptions. Then, the system of atypical measures will be studied, with a focus of magistrates' power to instate such measures, with or without the previous consent of litigants.

Finally, a connection between both principles will be made, trying to identify how much of a threat the prohibition of surprise decisions is to the use of atypical measures. Based on that, two initial hypotheses can be made: either the decision of using an atypical measure is exempt of the previous manifestation of parties, thus not being considered a surprise decision, or it is not, and can be nullified for that.

This is a qualitative research, with an exploratory objective, and will be based on the analysis of the triad bibliography, legislation, and jurisprudence, in an inductive method.

2 The prohibition of surprise decisions principle in Brazil

The analysis of the principle of prohibition of surprise decisions in Brazil depends on the study of the constitutional procedure law system currently

established in the Brazilian legal ordinance. This is mainly because, as Sá (2018, p. 63) indicates, the Brazilian CPC was made as a means to enable the Constitutional State that is currently sought after in times of neopositivism, and not to be singular, unrelated to the other legislations.

The surprise decision prohibition principle is a direct consequence of the principle of contradiction, not too dissimilar to the adversary procedure in common law. In Brazil, said principle is called *Princípio do Contraditório*, and it is established both as a fundamental right of litigants in art. 5th, LV, of the Brazilian Constitution (BRASIL, [2022a]), and as a fundamental norm of Brazilian civil procedure in art. 9th of CPC (BRASIL, [2021b]). In fact, as Marinoni, Arenhart and Mitidiero (2017b, p. 507) point out, this principle is the basis of a Constitutional State, the minimum prerequisite for a just ruling and an organized Justice administration.

Many important procedure law researchers, such as Bueno (2018a, p. 131), Marinoni, Arenhart and Mitidiero (2017a, p. 170) and Didier Junior (2018, p. 105), reinforce the fundamental aspect of the contradictory principle in judicial actions, administrative courts, and business processes.

Bueno (2018a, p. 111) identifies as the objective of this article the enabling of litigants to actually influence and participate in the process of decision-making, so as to guarantee that due process, another fundamental right, is effectively achieved. This opportunity of participation normally occurs before the judicial decision is made. However, sometimes it is postponed, which is referred to as deferred contradictory (ZUFELATO, 2017; MARINONI; ARENHART; MITIDIERO, 2017a, p. 171).

Gonçalves (2017, p. 59-60) points out that only in urgent cases it is possible for judges to delay the contrary manifestation, either because there is not enough time to allow the other side to participate, or because there is a risk on giving knowledge of the action to the other litigant at that time. Thus, as Alves and Medeiros Neto (2020, p. 41) identify, "this postponing (and not suppression) becomes a necessity to make the process effective, and to safeguard the petitioner's constitutional guarantee of access to justice".

Alves and Medeiros Neto (2020, p. 42) remember that this "is why this principle is often named as the 'right to be heard' or, in Latin, either *Audi Alteram Partem* or *Audiatur et Altera Pars*".

It is important to note that this preoccupation is not a result of the contradictory principle alone, but a result of a systematic recognition, in procedure principles, of this necessity. The constitutional principle of ample defense, the idea that defendants must have conditions to respond to accusations and to question decisions (BUENO, 2018b, p. 53), is also a representation of that.

Sá (2018, p. 57) points out that both contradictory and ample defense principles are corollaries of the postulate of isonomy, inalienability of jurisdiction, parity of arms and access to justice, all constitutional procedure principles in Brazil. All of these principles, as stated by Marinoni, Arenhart and Mitidiero (2017b, p. 506), aim to prevent that, in the proceedings of an action, litigants have an asymmetry of opportunities, caused by their socioeconomic, financial, professional, informational, or even technical statuses.

All these principles, as mentioned before, are both in the current Brazilian Constitution and the CPC, in the interest of guaranteeing due process, also a part of Brazil's Constitution (MARINONI; ARENHART; MITIDIERO, 2017b, p. 506).

Other principles, such as the objective good faith principle (art. 5th of CPC) and the cooperation principle (art. 6th of CPC), also effectively communicate with the mission of

providing fair trials in Brazil, principally when it comes to the effective participation of litigants.

The prohibition of surprise decisions is both a consequence of all the previously mentioned principles, and also another reflex of the new constitutional procedure system in CPC. Some authors, such as Marinoni, Arenhart and Mitidiero (2017a, p. 171) and Souza (2017), identify this principle as the contradictory principle applied to magistrates.

This principle is currently established in art. 10 of CPC. However, even before the entering into effect of this law, the prohibition of surprise decision was already discussed its existence as a consequence of the contradictory principle.

Also, as identified by Alves and Medeiros Neto (2020, p. 49), this principle can be found in many other legal systems, such as in Italy, as the prohibition of *decisioni di terza via* from the art. 101 of the *Codice di Procedura Civile*, in Germany, as the *Verbot von Überraschungsentscheidungen* from the art. 139, item 2, of the *Zivilprozessordnung*, amongst others.

The principle of the prohibition of surprise decisions means that, when making decisions, judges must use criteria that have been effectively and previously discussed by the litigants during the proceedings of the lawsuit, allowing them to influence said decision (BUENO, 2018b, p. 112).

Surprise decisions, as stated by Souza (2014, p. 136), are those whose grounds or fundaments have not been previously mentioned in the lawsuit, or which have not been discussed by litigants, resulting in a decision which has been founded on innovative information known only by the magistrate.

The grounds on which decisions might be made can be of three different kinds: factual, normative/legal, or juridical. The factual or factual material fundament represents what happened in real life that caused the parties to start litigation. The normative or legal fundament refers to the legislation which can, was or will be used to ground the litigants' claims and the decisions. The juridical fundament means the arguments evoked by the litigant to support their claim or defense, an analysis of what happened and how the law should be used in this specific case.

Even if all three fundaments could be, at least theoretically, used as the paradigm established by art. 10 of CPC, it has been systematically reinforced that this provision refers to the juridical fundament, meaning that judges only must call litigants to manifest themselves, thus ruling out the possibility of a surprise decision, if they see a different connection between facts and legislation than the ones presented by litigants.

The factual fundament, supported by the principle of demand, might be stretched by the fact that judges have what is called the probative instruction of office, which means the *causa petendi* defined by litigants is not changed, but the facts brought out went further than previously raised. It is important to note, however, that the facts, once included in the proceedings, have to be presented to litigants, because they almost certainly will influence the juridical fundament.

When it comes to the legal fundament, there is a rift in juridical research. If applied to the rule of art. 10, this would mean that, once litigants raise their claims and defenses based on a specific law, for example, the decision cannot be founded on different legislation. Mollica (2017) suggests that this might be the rule amongst specialized authors.

It is important to note, on the other hand, that there has been dissent on occasion in regard to this point. The Brazilian National School of Training and Improvement of Magistrates (ENFAM) has established, in Enunciations

n. 1 and 6, that it believes that the fundament mentioned in art. 10 is the factual basis of the request, and that, even if not supported by the legal grounds brought by parties, may be considered correct if supported by the evidence, if said evidence was accordingly contradicted (ESCOLA NACIONAL DE FORMAÇÃO E APERFEIÇOAMENTO DE MAGISTRADOS, [2015]). Also, Brazil's Superior Court (STJ) has repeatedly decided that the fundament of art. 10 of CPC is the juridical, not the legal.

Brazilian tradition has established such principles as *Iura Novit Curia*, "the court knows the law", and *Narra* (or *Da*) *mihi factum dabo tibi jus*, "narrate (or give) me the facts and I will give you the law", which mean, as states Gajardoni, Dellore, Roque and Oliveira Junior (2014, p. 65), that judges will decide according to the best legal framework possible, regardless of the position of litigants, or the lack thereof. Recently, this has been relativized, which is used to criticize ENFAM's position on the issue (SÁ, 2018, p. 59).

The ending of art. 10 of CPC introduces an innovation that is the prohibition of surprise decision even if this decision can or must be made *ex officio* (BRASIL, [2021b]). Decisions *ex officio* are those which the law require magistrates to make regardless of being asked to by litigants. They are normally such important subjects that it is imperative that they are decided, even if there was no provocation for doing so.

Analyzing this new addition, Zufelato (2017) indicates that the new system requires judges to aptly identify the necessity of an *ex officio* decision, but then provide opportunity for litigants to present their manifestations about the subject, before actually making the decision.

This is the framework of the principle of the prohibition of surprise decisions in Brazil. It is worth noting that the name of this principle, however much recognized nowadays, was not mentioned in the CPC, which decided to explain the prohibition without naming it.

The clear objective of this article of the CPC is to give litigants an opportunity to participate in the process of decision-making actively and effectively, which will probably result in better decisions. These decisions, which will affect them, should not have an element of surprise, or the good faith principle would also be disrespected (BUENO, 2018b, p. 112).

If a decision made is found to be a surprise decision, it will be considered null and void of effects, being considered *error in procedendo* (ZUFELATO, 2017). Alves and Medeiros Neto (2020, p. 48) conclude "that the prohibition on the surprise decision limits judicial action, promoting a resurgence of the jurisdictional power in the conduct of the action and re-establishing the parties at the center of the judicial provision".

Another result of this principle is that decisions will more rarely be generic, as the prohibition on surprise decisions forces judges to address all claims that have been made by litigants. This will also limit the possibility of standardized decisions, as they are not particular to the case, which means they will probably not provide a dialog between what was brought forward by parties and the fundaments elected by the judge, representing the inexistence of proper consideration by the judge of the specific demand proposed (MARINONI; ARENHART; MITIDIERO, 2016, p. 455).

The prohibition of surprise decisions must be considered, even as a means to enable the new Brazilian tradition of a constitutional and democratic process. This is the reason why many other CPC articles reinforce the same prohibition.

Flach (2016) mentions art. 493, which requires judges to give litigants the opportunity to manifest themselves if new constitutive,

amending, or extinguishing facts that can be applied to the cause and might influence the judgment are found. Similarly, art. 933 of CPC says that, in case of "a supervening fact on the appealed decision or the existence of an appreciable question of office not yet examined that should be considered in the judgment of the appeal, the parties must be summoned to comment within five days" (BRASIL, [2021b] apud ALVES; MEDEIROS NETO, 2020, p. 48).

This importance is such that this principle, despite being established in the Brazilian CPC, has been applied to other kinds of procedure, such as Labor Procedure, as mentioned by Alves (2020, p. 151-152).

This principle, despite having been steadily brought into Brazil's procedure tradition before CPC, has now been effectively inserted in Brazilian legislation, and constitute an important movement in the direction of a participative jurisdiction and a democratic process.

Once recognized the prohibition of surprise decisions, it is necessary to address the atypical executive measures, so as to identify the possible connection, or rather, conflict, between those innovations.

3 Atypical executive measures in CPC

The executive part of a process, in the Brazilian legal system, is the moment in which either a judicial decision is brought into effect (thus, for instance, indemnifying the offended) or a document that can be reinforced by the Judiciary Branch (such as a cheque or a promissory note).

Recently, there has been a tradition of naming the first type of execution *cumprimento de sentença*, or sentence fulfillment, as, at least normally, the decision that is brought into effect is a sentence. Despite the name, any judicial executive title can be used for a sentence fulfillment.

On the other hand, the term execution process (in Portuguese, *processo de execução*) has been used to address other judicial reinforcements (BUENO, 2018b, p. 612). However, it is important to point out that there has been some criticism over the use of the expression execution process, as many authors believe that there is only one process, in which there is a specific part that seeks the satisfaction of what is in a document with legal validity.

Nevertheless, the idea is the same, the execution is the stage of the process in which a judge tries to deliver the desired legal asset either embodied in a judicial decision or in an extrajudicial valid title. As Dinamarco (2008) states, in this specific part of a process, judges must deliver to the plaintiff that which they should have if the interference of the Judiciary Branch had not been necessary.

It is correct to say, then, that the execution is the consubstantiation of the access to justice, which is established in art. 5th, XXXV, of the Brazilian Constitution. As Cappelletti and Garth (1988) made it clear, this principle can not be limited only to the ability to start an action but must include the effective provision of legal protection and a response to the demand.

Not only that, in fact. It is also necessary to deliver said legal protection and response in a reasonable amount of time, as per art. 5th, LXXVIII, of the Brazilian Constitution. This principle is normally called reasonable duration of process (CÂMARA, 2010).

Despite being grounded on constitutional bases, the execution in Brazil has been consistently criticized over its inefficiency, either because the desired result is not reached or because this phase drags on for years (CASTRO, 2019). According to Medeiros Neto (2018), it has in fact been a stimulus to those who study juridical science in Brazil.

The current CPC in Brazil came into the legal system in 2015, and it tries to change this tradition of inefficiency and lentor. It establishes many different instruments to make it possible for judges to deliver the judicialized asset safely and effectively to the creditor. One of these instruments is the atypical executive measures.

In the previous tradition of Brazilian law, in accordance with the revoked Code of Civil Procedure of 1973 (CPC/1973), the system employed the principle of the typicity of execution (SÁ, 2018, p. 932-933), based on its strong positivism spirit, limiting executive measures to those foreseen by procedural legislation. There were, as mentioned by Bueno (2018b, p. 207), some cases of atypicity, but they were mostly out of the main CPC, in sparse laws or laws which are not inherently procedural, such as art. 84 of the Brazilian Code of Consumer Protection (CDC) (BRASIL, [2021a]) and were limited to cases in which money was not the focus.

This has been found to be extremely limiting to the efficiency of execution, as the Legislative Branch could never foresee every single complication which could occur in actions, and because the repetitive use of the same measures meant defendants who were not interested in honoring their obligations had an easier time dodging the regular instruments used.

The current CPC, however, despite still valuing the idea of typical measures for execution, in the interest of ensuring legal certainty, recognized the possibility of atypical executive measures, directing its system to a concentration of power in execution of magistrates, to whom a general power of effectiveness is given, which was also called principle of atypicity (DIDIER JUNIOR; CUNHA; BRAGA; OLIVEIRA, 2017, p. 100).

This means that lists of executive instruments, such as the ones found in arts. 536, 1st paragraph, and 538, 3rd paragraph, of CPC, are examples only, not *numerus clausus* (GONÇALVES, 2017, p. 244).

The confirmation of this new perception on executive measures comes in art. 139 of CPC. This article, which enlists the powers, the obligations, and the responsibilities of judges, established, in its item IV, that magistrate can "determine all inductive, coercive, mandatory or subrogatory measures necessary to ensure compliance with a court order, including in actions that have as their object the payment of money" (BRASIL, [2021b], our translation).[1]

There has been criticism based on the lack of technicality of the legal text, as some authors

[1] In the original language: "Art. 139 […] IV – determinar todas as medidas indutivas, coercitivas, mandamentais ou sub-rogatórias necessárias para assegurar o cumprimento de ordem judicial, inclusive nas ações que tenham por objeto prestação pecuniária".

consider inductive, coercive, and mandatory to be the same thing: indirect means of execution, while subrogatory measures would be the direct atypical means (DIDIER JUNIOR; CUNHA; BRAGA; OLIVEIRA, 2017, p. 101). However, a distinction could still be made between the others.

An inductive measure involves offering the executed an advantage, a prize, for the compliance with the obligation which must be fulfilled. Meireles (2015) mentions, as examples, the reduction by half of attorney's fees if the debtor of an extrajudicial executive title makes payment within 3 (three) days (art. 827, 1st paragraph, of CPC) and the exemption from procedural costs.

Alves and Mollica (2021, p. 118) alert that this atypical measure cannot affect rights of third parties, nor can it go against the law if it establishes something specific. As an example of a viable atypical inductive measures, the authors mention the possibility of extending the deadline for an action to be performed by the debtor.

Coercive measures are sanctions or punishments to direct the executed to fulfill their obligation. According to Alves and Mollica (2021, p. 118), these sanctions can be of different kinds, some of which are and some of which are not accepted legally. They can be economic, such as fines; moral, such as warnings; legal, such as loss of capacity; social, such as banishment; or even physical, such as whipping (MEIRELES, 2015).

Alves and Mollica (2021, p. 118) point out that most atypical measures extensively used in Brazil nowadays, such as the apprehension of driver's licenses or passport, or the forbidding of participating in tests to become public servants are coercive.

Mandatory measure is the expedition of an order by the magistrate that must be fulfilled by the recipient, "under theoretical penalty of incurring the crime of disobedience in case of non-compliance" (ALVES; MOLLICA, 2021, p. 118, our translation).

The last kind of atypical measure is the subrogatory, in which the obligation is performed by a third party, not the plaintiff or the defendant, under the expenses of the one who should have complied.

At the end of art. 139, IV, (BRASIL, [2021b]) there is the confirmation that these atypical measures can be applied to cases in which the discussion only involves money, which, as mentioned before, was not the case before the new legislation.

It is important to specify, however, that the art. 139, IV, is not the only part of the CPC in which atypical measures are recognized to be possible in the Brazilian legal system.

The first such case is in regard to provisional decisions. According to art. 297, judges can, in the interest of making sure a provisional decision is effective, determine measures, not mattering if they are typical or not (BRASIL, [2021b]; MARINONI; ARENHART; MITIDIERO, 2017a, p. 391-392).

Another instance of the prevalence of the possibility of atypical measures is in art. 380, single paragraph, (BRASIL, [2021b]) which establishes that, if a third party fails to comply with the obligations to inform facts and circumstances of which is aware, or to exhibit something or document in is possession of, the judge may impose a fine and any other inductive, coercive, mandatory or subrogatory measures.

Art. 400, single paragraph, also recognizes the possibility of atypical measures as a means to guarantee the exhibition of documents, which, before the innovation by the law in 2015, was considered illegal by Brazil's STJ, at least on the matter of fines (MARINONI; ARENHART; MITIDIERO, 2017a, p. 516). This possibility is also applied to the exhibition of documents by

third parties, in accordance with art. 403, single paragraph, and to the order of deliverance of documents, data or information, as instituted by art. 773 of CPC (BRASIL, [2021b]; MARINONI; ARENHART; MITIDIERO, 2017a, p. 859).

One of the most important articles, though, is the art. 536, 1st paragraph. It is constantly connected to the art. 139, IV, as the basis of atypical measures in Brazilian procedural law. This article, in words of Alves and Mollica (2021, p. 120, our translation)

> allows the judge to use measures such as fines, search and seizure, removal of people and things, carrying out or undoing works and preventing harmful activity to satisfy the fulfillment of an obligation of doing or not doing, even using police force for such execution. However, even more important is the fact that, in addition to these undeniably typical measures, the aforementioned paragraph begins with the provision that these determinations can be used among other measures, thus recognizing the possibility of using atypical measures.[2]

All these articles converge in the notion that, if necessary, it is possible for judges to use atypical measures to promote the compliance with a judicializable matter. Despite having been normally connected to the execution, where most of the times the necessity of judicial reinforcement arises, it is important to note, however, that atypical measures can be used in any procedural phase (SÁ, 2018, p. 1.047).

There is a debate if atypical measures can be used in both executions based on judicial decisions and executions of extrajudicial executive titles. Didier Junior, Cunha, Braga and Oliveira (2017, p. 105) defend that in both cases the use atypical measures is possible, while Marinoni, Arenhart and Mitidiero (2016, p. 783) defend that only in executions based on judicial decisions should atypical measures be used.

There is also the matter of the possibility of using the atypical measures before the use of typical measures, that is, if the use of atypical measures is subsidiary or not. In that regard, researchers diverge.

Assis (2018, p. 130-131, our translation), who believes in the unconstitutionality of the atypical measures, understands that there is nothing on art. 139, IV, that indicates subsidiarity. He concludes that, it is "a limitation as manifestly arbitrary as the measures listed".

[2] In the original language: "permite que o juiz se utilize de medidas como multa, busca e apreensão, remoção de pessoas e coisas, fazimento ou desfazimento de obras e o impedimento de atividade nociva para satisfazer o cumprimento de obrigação de fazer ou não fazer, utilizando, inclusive, de força policial para tal efetivação. Entretanto, ainda mais importante é o fato de que, além dessas medidas inegavelmente típicas, o parágrafo mencionado inicia com a disposição de que essas determinações podem ser utilizadas dentre outras medidas, reconhecendo, assim, a possibilidade de utilização de medidas atípicas".

Marinoni, Arenhart and Mitidiero (2016, p. 783) state that CPC established the rule of atypicity of executive measures, making it so that judges decide what measures they believe adequate, not mattering if they are typical or not.

Some authors, such as Gonçalves (2017, p. 244) and Didier Junior, Cunha, Braga and Oliveira (2017, p. 105-106), believe that if the interest in the execution is that of doing, not doing, or giving something, which is not money, the executive measures can be either typical or not since the beginning, thus utilizing the idea of atypical measures as a rule. On the other hand, these authors defend that, if the execution is based on paying, then the rule is that of typical measures, establishing a subsidiarity.

Another debate that commonly arises is the acceptance of the atypical measures by the Superior Courts in Brazil. To a lesser degree, this discussion also involves the constitutionality of art. 139, IV.

The manifestation of these higher courts is essential in delimiting the possible use of atypical measures. There has been, as stated by Medeiros Neto (2019), almost constant debates over the subject, and the decisions of the Judiciary Branch, in connection to the specialized doctrine, will be fundamental to the correct understanding of this new instrument.

The discussion is, in fact, so ample that it has necessitated researchers to study the matter focusing on specific spheres of jurisdiction. Alves and Mollica (2021, p. 111), for instance, researched the topic on the Superior Courts of Brazil, while Medeiros Neto and Reinas (2018) studied it in São Paulo's Court.

Nevertheless, one instance in specific should be noted, which is the understanding of atypical measures in the Brazilian Supreme Court (STF).

Considering its strictly constitutional competence, not many cases questioning this subject have been brought to the Supreme Court's attention. However, a few have and are worth mentioning.

Most of these few lawsuits which reach Brazil's STF are *habeas corpus* destined to suspend decisions which apprehended, as an atypical measure destined to pressure respondents into compliance, driver's licenses, or passports, on the basis that the apprehension is an unconstitutional limitation to the "come and go" right.

However, one specific action, the Direct Unconstitutionality Action n. 5941, adjudicated in May of 2018 (BRASIL, [2022b]), seeks to have the nullification of virtually all articles related to atypical measures in CPC if they are seizure and retention of Driver's License, suspension of the right to drive, seizure of passport and prohibition to participate in public servant's tests or public biddings. The bases were human dignity, the principle of legality, liberty of locomotion, due process, legal access to public services and the right/obligation for the State to release public biddings for selecting its contracts.

There was a preliminary injunction to suspend the effects of those articles, but it was denied. Brazil's House of Representatives, Senate and Attorney General sent their manifestations in the defense of the legislation as is, while the Public Prosecutor's Office has agreed with the limitation sought after by the action.

The action was placed on the judgment agenda for November 11, 2021. It is necessary to point out, however, that this is the third inclusion of the case on the agenda, having been removed in the two previous instances.

The future of the atypical measures in Brazil is still uncertain. But it is possible to see that they have been consistently used in these few years of existence. Now, it is necessary to understand the connection between them and the prohibition of surprise decisions.

4 The prohibition of surprise atypical measures

As established before, the discussion that centers this paper is the necessity or not of the atypical measures inserted in art. 139, IV, amongst others, of CPC to be submitted to the principle of surprise decisions foreseen in art. 10.

The first point that must be registered, of course, is that this debate is not centered on the possibility of an atypical measure being or not subjected to contradictory, for a decision to be constitutional it must be subject to contradictory.

As previously mentioned, the cases in which a decision is made before parties manifest themselves must always be subjected to a future manifestation. This is called deferred contradictory.

The debate is, then, if the judge must, before deciding on the use an atypical measure, give the opportunity for the parties to manifest themselves (thus using the deferred contradictory), and, more importantly, if the decision made without this previous opportunity could be nullified or not by a Court on the basis of it being a surprise decision.

This question can be divided into two separate points of view. The first one is the plaintiff's right to agree or not to the means used by the judge to somehow direct the defendant into the compliance of what is being sought after in the lawsuit. Obviously, this discussion is only meaningful if author of the action has not asked for the use of an atypical measure, as the act of asking for one is in itself the manifestation which averts the allegation of a surprise decision.

In other words, for the use of an atypical decision without the request of plaintiffs not to be a surprise decision, it is necessary to identify if judges can or not decide on atypical measures *ex officio*. This analysis has been made before, and the apparent conclusion is that judges can do that, based on judges' autonomy which comes from the *imperium* power, according to Marinoni, Arenhart and Mitidiero (2017a, p. 284) or the creative power of the jurisdictional activity, in accordance with Didier Junior, Cunha, Braga and Oliveira (2017, p. 102).

To Sá (2018), this means that atypical measures do not follow a list, they are not bound by the request of the parties; can be changed according to the specific circumstances; can be granted *ex officio*, and, if not complied with; can generate the sanctions imposed by the coercive measure, penalty of malpractice litigation or accountability for the crime of disobedience (SILVA, 2017).

In this line of thought, the use of an atypical measure which was not requested by the plaintiff is not considered a surprise decision. However, it is important to point out that, in accordance with the principle, an

opportunity of manifestation must be provided after the imposition of the measure, so as to honor the deferred contradictory rule.

The analysis of the possibility of an atypical measure constituting a surprise decision for the executed (as in, the defendant) is a bit more complicated.

As mentioned by Silva (2017), the change of civil procedure code also brought a raise in judges' powers in directing the execution, go as far as giving them ample liberty to decide on coercive measures to be used in the interest of compliance. However, even with the majoring of powers, judges still have to follow the obligation of justifying their decision on legal and juridical grounds.

Didier Junior, Cunha, Braga and Oliveira (2017, p. 111) point out that the decision made by the magistrate must respect principles such as the proportionality, reasonability, the prohibition of excess, efficiency, and the lesser cost of execution. Similarly, Sá (2018, p. 1.048) identifies three requisites for such decision: adequation, efficiency and lesser cost. Medeiros Neto (2019), along with efficiency, proportionality, and reasonability, includes the principle of cooperation, without prejudice to other constitutional principles and guarantees.

This means that the decision of using an atypical measure must be proportional, in the sense that Ávila (2006, p. 121) brings forward, which means it must be adequate, where the means promotes the end; necessary, with the measure being the least burdensome possible; and strictly proportional, insofar as the disadvantages of the means are the desired advantages of the end.

The result of this discussion is that, when applying an atypical measure, the principles of Brazilian civil procedure, most of which are represented by the twelve first articles of CPC, named the "fundamental norms of civil procedure", must be given conformation. The principle of the prohibition of surprise decisions is included there, thus being a logical, if only theorical, conclusion that atypical measures decisions must not be a surprise to the defendant at least.

Castro (2017, our translation) specifically states that the decision of establishing an atypical measure must be made "without prejudice to the prohibition of surprise decisions", which points out to the same conclusion.

On the other hand, it is necessary to remember that, at times, the system of civil procedure has specifically stated that judges can defer requests *inaudita altera parte*, which means without giving the opportunity for the defendant to manifest themselves. This is foreseen in art. 300, 2nd paragraph (BRASIL, [2021b]).

This will happen when the efficiency, which is also one of the requisites of atypical measures, requires judges to perform without the knowledge

of the debtor. This is especially necessary when there is the possibility of the executed to somehow invalidate or jeopardize the executive measure.

Once again, it does not mean that the executed will not be able to manifest themselves, but rather, in accordance with the deferred contradictory, they will present their point of view when timely advised. Not only that, but the law also establishes, in the 3rd paragraph of art. 300 (BRASIL, [2021b]), that if there is the possibility of the measure not being reversible, it will not be conceded.

The use of atypical measures, then, as identified before, should follow specific choice criteria, which, for Didier Junior, Cunha, Braga and Oliveira (2017, p. 113-115), are adequacy, which is the rule that the measure is the means to the effective attainment of the desired end; necessity, which translates into the impossibility of the atypical measure to extend beyond the objective sought; and conciliation of the opposing interests of the parties in the process, a corollary of proportionality in the strict sense. Castro (2019) follows the same guidelines for such decisions. Neither of them mentions the necessity of a previous manifestation of the parties.

However, Didier Junior, Cunha, Braga and Oliveira (2017, p. 140-141), who go further on the requisites to include the duly substantiation, the possibility of *ex officio* measures, and the ineffective measure change, specifically identify the necessity of the contradictory, even if deferred. This means that these authors precisely defend that the contradictory of atypical decisions can come after the decision is established, thus making it so that the decision cannot be nullified on the basis of being a surprise decision.

The necessity of contradictory is obvious. Even if they are a debtor, the defendant is a holder of fundamental rights, so much so that the use of any measures, atypical or not, must comply with the respect of the person, their dignity, and their liberty. This is why Medeiros Neto (2018) states that the measure must have a direct or indirect connection to the interest of compliance.

Doctrinally, there has been consensus in Brazil that, while it is moved in the interest of the creditor, the execution must be the least burdensome to the debtor and must be processed using the patrimony of this debtor, and not the debtor as a person, principally if the obligation in discussion in the action is strictly pecuniary, as Coêlho, Medeiros Neto, Yarshell and Puoli (2016, p. 28) point out. This is supported by the art. 789 of CPC (BRASIL, [2021b]).

This is why Alves and Mollica (2021, p. 125) identify atypical measures should only be used by magistrates in cases where the parties are not complying with the decision issued by their own option, and not in cases where compliance is impossible. Gonçalves (2017, p. 245) reinforces that

opinion saying that atypical measures should be used because other means prove not to be effective, because the debtor maliciously conceals the assets or causes embarrassments and difficulties to their constriction, and not because they simply do not have assets. That is, typical measures are especially valuable against the so called "professional debtors", people who hide their patrimony in the interest of not honoring their debts, not against the poor or the bankrupt.

Neves (2017) alerts, however, that the fact that most atypical measures involve the suppression of rights of the debtor, it does not mean that the execution is being processed towards the person of the debtor and not their patrimony, but only that they are being used to pressure debtors into compliance.

As Alves and Mollica (2021, p. 125-126) point out, that would only be the case if, for example, the judge established the atypical measure of the suspension of the right to drive and concluded that the obligation of paying the debt of the defendant is now honored. In this case, the person of the debtor would have, in fact, been liable for the debt, not their patrimony.

Nevertheless, the point is that atypical measures are most of the times used against people who go out of their way not to pay their debts or honor their obligations. It would not be farfetched to believe that those people could make use of subterfuges to hinder the efficiency of the atypical measure, which is precisely the case in which the deferred contradictory is necessary.

The conclusion that must be made, considering the theme of this paper, is that the contradictory is an essential part of the atypical measures, but, if there is any indication that the previous chance to manifest will affect the efficiency of the measure, it is advisable to defer it to a future moment, and the decision cannot be nullified on the basis of it being a surprise one.

For instance, considering one of the most typical atypical measures, if the best instrument for the compliance in a case is the apprehension of the passport of the debtor, the measure itself will have no effect if the litigant goes abroad during the period they have to present their considerations on this measure.

Even if this theorical conclusion is possible to be made in accordance with specialized doctrine, it is important to note that there could be decisions, especially in Courts, which see the matter from a different angle.

In this research, it was possible to conclude that this conflict has apparently not been brought to Courts' attention in a substantial number of times. However, it was subjected to jurisdiction enough that there is at least one ruling that contradicts the theory developed in this paper.

The State Court of Paraná has recently, in April of 2021, decided that, for the use of the atypical measure of the apprehension of Driver's License, it was "imperative the observance of the previous contradictory and the prohibition of surprise decisions" (PARANÁ, 2021, our translation), which made the decision of the judge of using it, at that time, null.

It is clear that both understandings are possible, even if, theoretically, there seems to be more support for the understanding that the decision of using an atypical measure will not be a surprise decision if the other requisites are foreseen.

5 Conclusion

The basis of the discussion at hand is if the decision made by a judge of using an atypical executive measure, in the interest of directing the defendant towards the compliance of the obligation, can or not configure the surprise decision that is prohibited by art. 10 of CPC.

Firstly, an analysis of the prohibition of surprise decisions was made. It is a principle and a fundamental norm of Brazilian civil procedure, established by art. 10 of CPC, and it seeks to stop judges from making decisions without giving parties an opportunity to manifest themselves. It was possible to observe that the prohibition of surprise decisions helps to make the decision-making process fair and just, but at times the manifestation of the litigants can be made at a following moment, which is called deferred contradictory.

Then, the system of atypical measures was studied. It was a paradigm shift, which changed the previous single focus on typical measures to a system of freer means of execution. This new principle is established in art. 139, IV, of CPC, but it permeates the whole law. There is some resistance to its use and its constitutionality has been questioned.

Finally, on the core discussion of this paper, a connection between both institutes was made, at least preliminarily. It was found that, despite there being a little evidence indicating that the prohibition of surprise decisions is applied to atypical measures, the larger theorical research made it so that the conclusion is that it does not, and the use of deferred contradictory is possible, and at times necessary, for atypical measures.

However, it was also possible to observe that there has been ruling in favor of nullifying decisions which established atypical measures for the lack of previous manifestation, effectively using the idea of the prohibition of surprise decisions on atypical measures.

Thus, further research should be made, principally in the interest of understanding the perception of Courts on the topic, so as to establish a stronger conviction on the connection between both institutes.

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