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# EXECUTIVE TECHNIQUE IN THE CIVIL PROCESS CODE AND ITS LIMITS

## A TÉCNICA EXECUTIVA NO CÓDIGO DE PROCESSO CIVIL E SEUS LIMITES

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## ABSTRACT

This article deals with the execution of Brazilian civil procedural law and its evolution. With the Civil Procedure Code of 2015, there have been changes and innovations in numerous articles, such as article 139, item IV, which generated understanding of part of the doctrine of the atypicality of executive means in execution for certain amount, with the application of measures atypical to those debtors, such as the retention of the passport or the national driver's license. It is around this theme that the present work will be developed. The methodology used was a qualitative research, with a review of the literature on the topic, within classic and modern doctrines, as well as legal articles and current jurisprudence. In the first stage, we observe the general aspects of the execution process. The second stage deals with the application of executive means, from the original Civil Procedure Code of 1973, the reforms of 1994 and 2002 and the new code of 2015, with an analysis of Article 139, item IV, and their possible effects. In the third step, we intend a constitutional analysis of the effects of the application of article 139, section IV of said Code. In the end, the possibility of applying the measures will be demonstrated, according to requirements that must be observed by the judge.


**KEYWORDS:** Civil proceedings. Execution of paying a certain amount. Atypical executive means. Constitutional Law.


## RESUMO

*O presente artigo trata sobre a execução do direito processual civil brasileiro e a sua evolução, sendo que, com o Código de Processo Civil de 2015, houve modificação e inovação em inúmeros dispositivos, como o artigo 139, inciso IV, que gerou entendimento de parte da doutrina da atipicidade dos meios executivos em execução por quantia certa, com aplicação de medidas atípicas aos executados, como a retenção do passaporte ou da carteira nacional de habilitação. É entorno desta temática que o presente trabalho será desenvolvido. A metodologia utilizada foi de pesquisa qualitativa, com revisão da literatura acerca do tema, dentro doutrinadores clássicos e modernos, bem como de artigos jurídicos e jurisprudência atual. Na primeira etapa, realiza-se observação acerca dos aspectos gerais do processo de execução. A segunda etapa aborda a aplicação dos meios executivos, desde a versão original do Código de processo Civil de 1973, as reformas de 1994 e 2002 e o novo código de 2015, com análise do artigo 139, inciso IV, e seus possíveis efeitos. Na terceira etapa, pretende-se uma análise constitucional dos efeitos da aplicação do artigo 139,*


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*inciso IV do referido Código. Ao fim, será demontrada a possibilidade de aplicação das medidas, de acordo com requisitos que devem ser observados pelo juiz.*

**PALAVRAS-CHAVE:** *Processo civil. Execução de pagar quantia certa. Meios executivos atípicos. Direito Constitucional.*

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# 1 INTRODUCTION

This article will deal with atypical executive means in the execution for a certain amount, provided for in article 139, item IV of Law nº 13.105/2015 (BRASIL, 2015), also called the Civil Procedure Code (CPC).

Execution for a certain amount occurs in the face of a pecuniary obligation or an obligation 'to do', 'not to do' or 'to give something', converted into a pecuniary obligation. It happens that, over the years, under the Civil Procedure Code of 1973 and its reforms, the procedural practice demonstrated that the typicality of the executive means was insufficient for the debtors to be solvent, with a mutation regarding this regime in the different species of execution.

The procedural practice, also, revealed that innumerable enforcement proceedings for a certain amount are suspended due to the absence of debtors' assets to be submitted to the pledge and expropriation institutes, however, the creditor notes that, in certain scenarios, that debtor, in fact, has financial conditions to bear the debt. However, as a precaution, he tried to untie any assets from his real estate, so that they would not be expropriated, thus concealing the patrimonial reality.

In this way, the Code of Civil Procedure, promulgated in 2015, brought an innovative institute, which, as it's a general clause, has been widely discussed by the doctrine and already by the jurisprudence. It was established in the chapter dealing with the Powers of the Judge, article 139, item IV, of the Civil Procedure Code, which the judge will be responsible for: "determining all inductive, coercive, mandatory or subrogatory measures necessary to ensure compliance with a judicial order, including in actions whose object is a pecuniary installment".

In the meantime, for much of the doctrine, it was established the principle of atypicality of executive means to executions for a certain amount. Thus, lawyers initiated requests for the application of that article in enforcement proceedings (execution processes), with the retention of the debtor's passport and the suspension of his National Driver's License. The work will be limited to these two hypotheses, although it recognizes other measures such as: impediment to participation in bidding and public tenders.[2]

As will be shown throughout this work, the measure brought uproar to the doctrine, given that most scholars defend the atypicality as a way of guaranteeing execution, which, today, in a high number of cases remains frustrated. In contrast, other scholars argue that the article under discussion was poorly written and that its great breadth could generate unconstitutional decisions.

2 Doctrine and jurisprudence are scarce when it comes to the topic, it's recommended: NOBREGA, Guilherme Pupe da. Reflections on the atypical nature of executive techniques and article 139, IV, of the CPC 2015. Available at: https://www.migalhas.com.br/coluna/processo-e-procedimento/243746/reflexoes-sobre-a-atipicidade-das-tecnicas-executivas-e-o--artigo-139-iv-do-cpc-de-2015. Accessed on: Feb. 20, 2020.

The magnitude of the topic under discussion is evident, as the measures required by lawyers and granted in some decisions have gained considerable notoriety, in view of the paradigmatic change performed. In this sense, the present research is necessary in order to examine the possible application of the institute under analysis and its consequences, object of a close study by the doctrine.

It is a qualitative research, carried out by reviewing the literature with analysis of scientific articles, books and jurisprudence on the subject, with the aim of making an objective and adequate analysis of the research.

Far from the intention of exhausting the topic, the present research will be carried out around the institute foreseen in article 139, item IV of the Civil Procedure Code, its scope, applicability and limits in view of the Constitution of the Federative Republic of Brazil – (*Constituição da República Federativa do Brasil*) (BRASIL, 1988).

## 2 GENERAL ASPECTS OF EXECUTION IN THE CIVIL PROCEDURE CODE

In this study, which is based on execution for a certain amount, it is important to define and understand what the ‘execution process’ means, it is a genus, of which there are species in the Civil Procedure Code and extravagant legislation.

Classical doctrine divides the modalities of process into: cognitive tutelage, that in which the right is recognized or it's correct about the right, and executive tutelage, that in which a right already settled is satisfied. As explained by Elpídio Donizetti Nunes (2017, p. 1209), the process will proceed through the knowledge process (cognition) procedure when one of the parties seeks to know the law, otherwise, the procedure will be for execution, when one of the parties already has the right established and seeks to satisfy it, with the fulfillment of the agreed obligation. The renowned author further determines that the acts of the execution process differ from the acts of the knowledge process, given that, as already mentioned, the creditor's objective is only the satisfaction of his credit. In this regard, the objective is to compel the debtor to pay off his debt or fulfill the obligation previously agreed, which may be an obligation to do, not do or deliver something.

It is worth mentioning what the doctrine understands about execution: Fredie Didier clarifies this concept, explaining that in the execution there is satisfaction of an obligation already due, and there is a division between voluntary execution - called compliance by a large part of the doctrine - and execution itself, in which the debtor is not solvent with the debt presented (DIDIER et. al, 2017, v. 3, p. 45).

Therefore, it must be evidenced that the execution, process of satisfaction of a right, is a genus that includes other species. So that the Civil Procedure Code establishes in its article 771 that the provisions referring to execution based on an extrajudicial title apply to other execution procedures, as appropriate.

With the perspective presented, it was observed that the execution is a genus, with species that have their particularities of application, as will be observed in the execution for a certain amount.

## 2.1 EXECUTION FOR THE RIGHT AMOUNT

Execution for a certain amount is due to the obligation to give money, a fungible thing, that is, one that can be replaced by another of the same kind, quantity and quality, according to article 85 of Law nº 10.406/2002 (BRASIL, 2002), also known as Civil Code (*Código Civil Brasileiro*).

According to the study already mentioned, the creditor's objective in this procedure is the satisfaction of his credit, because, when he becomes part of an obligation, the duty is attracted by the debtor and it can be said, the risk, of responding with his assets (THEODORO JR., 2017, v. 3, p. 424).

Execution for a certain amount, a type of execution, as dealt with in the Civil Procedure Code, is one in which expropriation of the executed goods occurs, according to article 824: "Execution for a certain amount is carried out by expropriating the property of the executed, except for special executions". It is worth mentioning that the execution for a certain amount, as a rule, results in the execution of extrajudicial executive titles, those described in article 784 of the Civil Procedure Code. However, it can also be based on a judicial title, however, due to the didactic that accompanies the Civil Procedure Code since its version of the year 1973, it is called 'Compliance with Judgment' (*cumprimento de sentença*), with regulation in articles 520 to 527 of that Code. However, as mentioned, article 771 establishes that the provisions of the Execution Book (*Livro de Execução*) apply in the subsidiarily to the 'Compliance with Judgment' (*cumprimento de sentença*).

The execution process will be carried out through the expropriatory means provided for in the Code of Civil Procedure and, when these are not sufficient or there are no apparent assets, following the doctrine defends, it may be possible to use atypical means of execution, the theme of this study. Article 825 of the civil procedural law establishes that expropriation consists of: "adjudication, alienation or appropriation of 'fruits' (goods or utilities from other pre-existing) and income from a company or other property".[3]

Thus, it is observed that, in the execution procedure for a certain amount, the primary objective of the creditor is the expropriation of the debtor's assets to satisfy his credit.

It should be noted that the execution procedure for a certain amount is not the central object of this study, however, for a better understanding of the institutes treated, it is essential to understand in general terms the steps of the execution process for a certain amount:

> The execution for right amount against the so-called debtor is to expropriate as many assets as necessary for the satisfaction of the creditor (NCPC, art. 789). The sanction to be performed in casu is the coercive payment of the debt documented in the extrajudicial executive title. It is a direct execution, in which the judicial entity acts by subrogation, making the payment that

3 A expropriação pode ocorrer por adjudicação, o bem incorpora-se ao patrimônio do credor (artigos 876 e seguintes do CPC) ou por alienação em que o bem é alienado por leilão ou hasta pública (artigos 879 e seguintes do CPC).

> should have been made by the debtor, using assets compulsorily extracted from his assets. After the creditor's provocation (initial petition) and the debtor's summons (summons to pay), the acts that integrate the procedure in question "consist, especially, in the seizure of the debtor's assets (attachment), its transformation into money through expropriation (sale) and delivery of the product to the creditor (payment)" (THEODORO JR., 2017, v. 3, p. 428).

In this way, the main acts that aim at the execution for a certain amount are the attachment of the debtor's assets, with the possible adjudication or sale by public auction or auction/sale and, finally, the payment of the debt that is due.

## 3 THE EVOLUTION OF THE CIVIL PROCEDURE CODE OF 1973 TO THE CIVIL PROCEDURE CODE OF 2015

The Civil Procedure Code regarding the execution institute, has undergone an evolution, which can be noted from the first version of the Civil Procedure Code of 1973 (BRAZIL, 1973), as well as its major reforms: the Law nº 8.952/1994 (BRASIL, 1994) and Law nº 10.444/2002 (BRASIL, 2002).

In this sense, Alcântara and Rodrigues, supported by the thoughts of Marinoni and Arenhart, explain that the original technique of the Civil Procedure Code of 1973 did not have the function of allowing specific protection of rights, there was only the possibility of seeking redress protection for In this sense, Alcântara and Rodrigues, supported by the thoughts of Marinoni and Arenhart, explain that the original technique of the Civil Procedure Code of 1973 did not have the function of allowing specific protection of rights, there was only the possibility of seeking redress protection for noncompliance with a contractual obligation (MARINONI; ARENHART apud ALCÂNTARA; RODRIGUES, 2017, p. 224).

In fact, legal practice has led the legislator to know that reforms were necessary, as the envisaged executive remedies were insufficient for the demands of a certain amount, inhibitory and removal of illicit. The Civil Procedure Code of 1973, in it original wording, dealt with the execution in article 461: "The sentence must be certain, even when deciding on a conditional legal relationship".

In this vein, Rafael Lima observed that the Principle of the typicality of the executive means was valid in all execution procedures, be it for a certain amount, or for the obligation to do, not to do and deliver thing. This system implied a stagnant role for the judge, who could apply only the mechanisms dictated by law (LIMA, 2016, p. 266).

In 1994, aware of the general breach of obligations, Bill nº 3.803/1993 (BRASIL, 1993) was prepared, regarding article 461, the dossier emphasizes in the explanatory memorandum that a more effective system is important. In 1994, aware of the general breach of obligations, Bill nº 3.803/1993 (BRASIL, 1993) was prepared, regarding article 461, the dossier emphasizes in the explanatory memorandum that a more effective system is importante for the fulfillment of obligations to do or not to do and in which the judge can determine specific tutelages

that ensure a relationship between the practical result and the payment, and may impose a fine on the defendant (BRASIL, Projeto de Lei n.º 3.803/1993, p.19).

In effect, after the approval of the referred bill, which resulted in the conversion to Law nº 8.952/1994, a new wording for article 461 was described:

> Art. 461. In an action that has as its object the fulfillment of the obligation to do or not do, the judge **will grant specific protection of the obligation or, if the request is successful, he will determine measures to ensure the practical result equivalent to that of the payment.** (Wording given by Law nº 8.952, dated of 12.13.1994)
>
> [...]
>
> § 5**o For the execution of specific tutelage or for obtaining the equivalent practical result, the judge may, by letter or on request, determine the necessary measures, such as search and seizure, removal of people and things, undoing works, impediment of activity harmful, in addition to requesting police force** (Included by Law nº 8.952, dated of 12.13.1994) (BRASIL, 1994, our emphasis).

In summary, what is observed is that when Law 8.952/1994 was enacted, the Principle of atypical executive means for the obligations of doing and not doing was established, which at that time meant a great advance for the execution procedures and for the role of the Judge, who could *ex officio* or at the provocation of the parties, grant the necessary measures to fulfill the obligations 'of do' and 'not do' (ARAUJO, 2017, p.2).

Subsequently, in the year 2000, Bill nº 3.476 of 2000 was presented. It's noted that in its processing dossier, article 461-A was suggested with the same system as article 461, at the suggestion of Teori Zavascki, for the application of the atypicality of executive means in obligations to deliver (BRASIL, Projeto de Lei nº 3.476/2000, p. 55).

In this context, in which the insufficiency of the legislation in force at that time was observed again, the astraint system for compliance and the Principle of atypicality of the executive means were fixed for the obligations to deliver something (it should be noted that there is talk of 'thing' and not money)[4]. Note the new wording:

> Art. 461: [...]
>
> § 5o For the effectiveness of the specific protection or the obtaining of the equivalent practical result, the judge may, on ex officio or on request, determine the necessary measures, such as the imposition of a fine for delay, search and seizure, removal of people and things, undoing works and preventing harmful activity, if necessary with a request for police force (Wording given by Law nº 10.444, of 7.5.2002, our emphasis). [...]
>
> Art. 461-A. In the action that has as object the delivery of a thing, the judge, when granting specific tutelage, will fix the term for the fulfillment of the obligation (Included by Law nº 10.444, of 7.5.2002). [...]
>
> § 3o Applies to the action provided for in this article the provisions of §§ 1º to 6º of art. 461 (Included by Law nº 10.444, of 7.5.2002) (BRASIL, 2002a).

4 Money is good fungible, applying the right amount execution procedure. Theodoro Júnior clarifies that the 'obligation to give' can be divided into: the debtor delivering what is not his; the debtor delivers the installment of things done by himself; or to refund, when the debtor has received for temporary possession and must return (THEODORO JR., 2017, v. 3, p. 430). The Civil Procedure Code establishes different procedures, depending on the type of obligation.

The new wording of article 461, paragraph 5º, mentioned above, establishes the atypicality of the executive means, with an exemplary role. In turn, Article 461-A, § 3º determines that executions for delivery of a thing will be governed by the referred § 5º. What, also, is established for executions of delivery of things, the atypicality of executive means.

Although, what is verified is that the obligations to give / deliver things, which if in the case of money, the Principle of typicality of the executive means, and only the fine of article 475-J of the 1973 Code can occur: "will be increased by a fine in the percentage of ten percent and, at the request of the creditor and subject to the provisions of art. 614, item II, of this Law, a pledge and assessment warrant will be issued" (BRASIL, 1973).

Before entering into the reform of the Civil Procedure Code with the promulgation of the Civil Procedure Code of 2015, it is opportune to examine the reflection brought by Alcântara and Rodrigues, in the sense that the execution in the old Civil Procedure Code had as a characteristic the division into two axioms, first in the type of obligation (to do, not to do, to pay an amount or to deliver something other than money), the second is the way in which the obligation was generated, whether in a court decision or extrajudicial executive title (ALCÂNTARA; RODRIGUES, 2017, p. 225).

In this area, it is understood that this structure generated a system in which the execution procedures for a certain amount were governed by the Principle of the typicality of the executive means, which today is discussed by the doctrine with the new legislation in force.

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## 3.1 THE CIVIL PROCEDURE CODE 2015

As the next point of this research, we will now study the new regime of the Civil Procedure Code with regard to the atypical executive measures provided for in article 139, item IV, in which the doctrinal and jurisprudential doubt, to be demonstrated, hangs over the possible applicability of inductive, coercive, mandatory or subrogatory measures in execution for a certain amount.

In this sense, the object of the study is restricted to the analysis of article 139, item IV of the Civil Procedure Code and its eventual application to execution for a certain amount. This with the purpose of elaborating a more didactic work and defined precisely to the intended problem.

The Civil Procedure Code of 1973 had good procedural technique, however, it underwent several reforms that brought an often complex wording, with procedures that could be improved. In this way, the project for a new code was prepared based on constitutional principles with a new perspective of bringing a dynamic contradictory in which the process belongs to all the procedural subjects involved, with the objective of bringing effective judicial activity to citizens (THEODORO JR., 2017, v. 1, p. 36).

In this segment, it is noted that, as had already happened previously, the execution legislation, even with the reforms carried out, was no longer sufficient to the new impositions of a complex modernity, in which the problems interact with each other.

Execution for a certain amount, in this context, was governed only by the Principle of the typicality of executive means. Thus, in an execution process that did not find assets to be

pledged, that is, the execution was frustrated, the process was suspended under the terms of article 791, item III of the Civil Procedure Code of 1973 (current article 921, item III of the Civil Procedure Code of 2015).

In other words, it is not possible to state firmly that the atypical regime is the current regime, because, today, the doctrinal discussion occurs in face of the applicability or inapplicability of the Principle of atypical executive means in executions for a certain amount.

The uproar occurs in the face of article 139, item IV, contained in Book III - Of the subjects of the process, Title IV - Of the auxiliary of Justice, Chapter I - Of the powers, duties and responsibility of the judge (*Livro III – Dos sujeitos do processo, Título IV – Dos auxiliares da Justiça, Capítulo I – Dos poderes, dos deveres e da responsabilidade do juiz*): [...] IV - determine all inductive, coercive, mandatory or subrogatory measures necessary to ensure compliance with a court order, including in actions that have as their object a cash benefit (BRASIL, 2015).

Initially, what stands out in the final part of the item is highlighted: "including in actions that have as object the pecuniary benefit", it is noted then that a large part of the doctrine understands that all the necessary measures to ensure compliance with a court order apply to executions for a certain amount, as these are actions whose object is the pecuniary benefit.

The understanding is naturally justified, to one, because it is a spontaneous evolution of what had already occurred in 1994 and 2002; to two, as it turns out that in executions of paying a certain amount, the procedural rule was stagnant, not allowing any other technique other than those provided for in the Civil Procedure Code (MARINONI; ARENHART; MITIDIERO, 2017, vol. 2, p. 584).

LIMA (2016, p. 274) clarifies that the procedural practice usually deals with the breach of obligations, and it was evident the use of third parties to hide assets, as well as enforcement/execution mechanisms in favor of insolvency.

It is important to mention that in the execution processes for a certain amount, it is possible to verify the existence of two types of debtor: (i) the debtor in good faith, who does not pay his debt for lack of assets, often because it succumbed to economic circumstances and is in a state of insolvency, and (ii) the debtor in bad faith, the so-called chicanist, evasive, artifice, that is, the debtor who has enough assets to pay off his debt, however manipulates the procedural institutes under his protection and refrains from paying off his debt, taking often a life of luxury that is portrayed in all sectors of society, except in the process (DONIZZETI, 2017, p. 1211).

It is at this juncture that the application of atypical execution measures is discussed, considering the common proverb "won, but did not take", that is, the characteristics of the failed execution are disseminated in society, leading to a generalized understanding of the inefficiency of the activation of the Judiciary.

Furthermore, it should be noted that part of the doctrine provides a relevant explanation, mentioning that it's a violation of isonomy to treat the execution creditor for a certain amount in a different way from the execution creditor to do, not do or deliver. So that the conjunctural legal regime harmed only one type of creditor and benefits the rest, which could also violate the Principle of Isonomy, under the terms of art. 5th, caput of the Brazilian Constitution (GUERRA, 2003, p. 128).

In view of this, Daniel Amorim Assumpção Neves, great mentor of new atypical means of execution, teaches that article 139, IV of the Civil Procedure Code is the ratification of the Principle of atypical executive means in execution for a certain amount, so that any any attempt to limit executions of doing, not doing and delivering things, will be against the law (NEVES, 2017, p. 2).

Following the reasoning mentioned, Elpídio Donizetti brings weight, stating that since the Civil Procedure Code of 1973, the magistrate could already apply the necessary measures to comply with specific tutelage. This is because with the new code, the aforementioned principle started to have a more comprehensive application, which allows the legislator to apply appropriate measures to the specific case, so that the legal guardianships until then breached are effective (NUNES, 2017, p. 422).

In a similar understanding, Fredie Didier explains that article 139, IV of the Code of Civil Procedure defines in a clear option that the execution for a certain amount may have application of the Principle of atypicality of the executive means, going further, affirms that the denial of such understanding can only lead to the understanding that the choice made by the legislator is ignored (DIDIER et al., 2017, v. 3, p. 107).

Not least, note the statement of the National School and Training and Improvement of Magistrates (*Escola Nacional e Formação e Aperfeiçoamento dos Magistrados – ENFAM*):

> Statement nº 48: "The art. 139, IV, of CPC/2015 translates a general power of enforcement, allowing the application of atypical measures to guarantee the fulfillment of any judicial order, including in the scope of compliance with the sentence and in the execution process based on extrajudicial documents" (ENFAM, 2018).

In the opposite sense, it is possible to mention the concept of Araken de Assis, which supports the enshrining of the Principle of the typicality of enforcement means, based on the guarantee of due legal process, provided for in Article 5 of the Constitution of the Federative Republic of Brazil. To this end, he asserted that the idea of atypicality of enforcement means based on Article 536 of the Code of Civil Procedure does not provide consistent support, and the magistrate in enforcement/execution must comply with what the rule determines. Finally, he warned that the 2015 Code of Civil Procedure brought innovations, among which the atypicality of atypical means is not included, and the procedural rule regarding enforcement/executive means should be considered, under penalty of inflicting the principle of due legal process. (ASSIS, 2016, p. 187).

In line with this understanding, Teresa Wambier brings the perspective that caution should be exercised when applying Article 139, item IV of the CPC, given that the application of atypical measures to execution for a certain amount could generate a mismatch in the system. However, atypical measures should only be applied to executions that deal with obligations to do, not do and deliver thing (WAMBIER et al., 2016, p. 483).

As a result, there is a striking doctrinal divergence as to the application of atypical measures in executions for a certain amount. As this study progresses, it will be explained how the application can be made and, especially, its possible limits.

## 3.2 GENERAL CLAUSE AND ITS MEANING

Article 139, item IV of the current procedural rule has its meaning considered controversial by a large part of the doctrine.

At the outset, it should be noted that the referred item describes a general clause, as explained by Didier, the general clause is characterized by bringing a normative text, in which the factual hypothesis is constituted by expressions without a specific meaning, generating undetermined legal effects. (DIDIER et. al, 2017, vol. 3, p. 101).

In the presented prism, what is verified is that the legal effect of a general clause, like article 139, item IV, is undetermined, in the Brazilian procedural reality, will depend on the direction that the judge will apply.

Likewise, it can be said that in the general clauses, the legislator purposefully establishes that the effect of the rules will be determined by its applicator, allowing the adequacy of the effects of the rule to the specific case. (BERNARDES; THOMÉ, 2013, p. 57).

At the moment it proves to be essential to clarify the meaning of the expressions contained in the article, the inductive, coercive, mandatory and subrogatory measures, so that its effects are understood, as general clauses.

Daniel Neves defends when the debtor's desire is replaced by the law's desire, generating satisfaction, there is a subrogatory measure, such as search and seizure. On the other hand, it deals with coercive measures, which would be the psychological coercion of the debtor to fulfill the obligation (NEVES, 2016, p. 231).

In contrast, Donizetti Nunes brings a more in-depth conception, defining coercive measures as those that enforce a judicial order (compliance with a court order), such as the imposition of a daily fine. In another sense, it mentions mandatory measures, which would come from the effects of part of the decision of a constitutive nature. Finally, it deals with subrogatory measures, which attribute to a third party the producing the intended effect (NUNES, 2017, p. 423).

It is worth mentioning Meireles' clarification that coercive measures are intended to coerce the debtor to satisfy an obligation, as an example, mention the astreintes (art. 537 of Civil Procedure Code - CPC). As for inductive measures, the author also demonstrates that they have the objective of embarrassing the debtor to make the payment of his debt, however they are distinguished as to the nature of the sanction, which is no longer negative and becomes positive, as a kind of premium sanction in which the debtor is encouraged to comply with the judicial decision. As an example, he mentions the reduction of fees (article 827, § 1º of CPC). An important reflection of the author on this point is that the inductive measures are provided for by law and Article 139, item IV of the CPC, and cannot be interpreted as a possibility for the judge to impose a business disadvantage on the creditor not provided for by law or contract. In the author's understanding, these measures could be used only in cases provided for by law (MEIRELES, 2015, p. 5 – 10).

In a divergent current, Didier understands that the article suffers from a legislative technique ('*atecnia legislativa*'), because mandatory, inductive and coercive measures are

synonymous, they are means of indirect execution of a judicial decision. The subrogatory measures are forms of the direct execution of the decision (DIDIER et al., 2017, v. 3, p. 101).

That said, in the case of synonyms or different concepts, it's evident that item IV, of article 139, can be conceived as a general clause, with undetermined effects, of which it's clearly observed that the limits will be imposed by the jurisprudence.

## 3.3. APPLICATION OF ARTICLE 139, ITEM IV OF THE CIVIL PROCEDURE CODE

Already at this stage of the present study, in which the scope of the supposed application of atypical executive measures has been clarified, for a closer analysis, it will be considered that the Civil Procedure Code adopted the principle of atypicality in execution for a certain amount, for so that the proposals for its application are known.

A big point of the debate is fixed at the moment when the measures would be applied, because even if the perspective was adopted that the atypical means apply to the execution for a certain amount, there is still doubt if the application would be later than the application of the typical means.

At the beginning of the debate, it should be noted that the Forum of Civil Proceduralists drew up a statement, in which it concludes by the subsidiary application of atypical means, as long as the adversary is allowed:

> STATEMENT 12 - (arts. 139, IV, 523, 536 e 771) The application of atypical subrogatory and coercive measures is applicable to any obligation to comply with a sentence or the execution of an extrajudicial enforcement order. These measures, however, will be applied in a subsidiary way to the typified measures, observing the contradictory, even if deferred, and by means of a decision in the light of art. 489, § 1º, I and II. (Group: Execution - Grupo: Execução) (FPPC, 2016).

Thus, assuming that atypical executive measures were applied, the aforementioned statement, as well as other scholars, believes that there would be subsidiary application.

Fredie Didier teaches that the rule is the primary observance of typical executive means, where the 2015 Code of Civil Procedure deals with more than 100 (one hundred) articles detailing the procedure of attachment and expropriation in the execution for a certain amount, with numerous hypotheses of non-attachment and detailed description of the procedure of public auction, auction and adjudication of assets. In his opinion, atypical executive means can only be applied when all the possibilities of attachment and expropriation provided for in the procedural statute have already been exhausted. (DIDIER et. al, 2017, p. 106).

A similar understanding is that defended by Daniel Neves, who states that typical measures, such as seizure and expropriation, should be the magistrate's initial choice, if they are described in law. And only after the demonstration of ineffectiveness, atypical measures are applied (NEVES, 2017, p. 12).

Rafael Lima defends the application in the same way, in which the typical means provided for in the Code of Civil Procedure must first be applied, so that, after the exhaustion of

these measures and the observance of due legal process, the atypical measures are applied (LIMA, 2016, p. 276).

Luciano Araújo, in a singular understanding, defends the summons of the executed to reveal what assets can be seized, in the name of good faith and cooperation and only after the said act and all the possibilities of attachment are exhausted, could it apply to atypical measures of execution (ARAUJO, 2017, p. 8).

One cannot fail to mention part of the minority doctrine, which understands that the application of atypical executive means is a rule, so that the creditor can request them regardless of prior application of typical means. (SILVA apud ARAUJO, 2017, p. 7). In addition to Ricardo Alexandre da Silva, this position is supported by Luiz Guilherme Marinoni, Sérgio Cruz Arenhart and Daniel Mitidiero (2017, volume 2, p. 711).

The majority doctrine is adopted in this work - atypical measures are subsidiary to typical measures. This is due to a procedural issue, as the CPC establishes in several articles a system for execution with typical measures, one must initially perform with these measures, which are already pre-defined, typified and widely applied by the jurisprudence. Subsequently, in case of demonstration of ineffectiveness of the typical measures, of concealment of assets, with guarantee of the adversary, the atypical measures would apply.

Typical measures are intended to find the debtor's assets capable of paying off his debt to the creditor, atypical measures are a form of psychological coercion. Thus, it is consistent that the debtor's assets are sought first so that the expropriation is made and the debt is settled. If this search for the debtor's assets is unsuccessful and there is evidence that the debtor hides assets, atypical measures may be required.

At this point, the judge should exercise extreme caution, as atypical measures are on a fine line in which they can be revoked by the *ad quem* court for violating fundamental rights. So, it is a procedural issue connected directly to fundamental rights.

The suspension of the national driver's license and passport retention have repercussions on freedom of movement, a fundamental right guaranteed by the Brazilian Constitution, therefore, as it's a more serious measure, it must be applied with caution and in a secondary way, as a means of psychological coercion, so that the debtor who hides assets feels compelled to comply with his obligation.

In the case of application of measures, such as the suspension of the national license and passport retention card, the necessary requirements are demonstrated, exhaustion of the typical means of execution, reasoned, contradictory decision, demonstration of concealment of assets, appropriate, proportional and reasonable measure, there is no violation of procedural rules or fundamental rights.

However, assuming that the aforementioned measures were applied without complying with any of the requirements mentioned, excesses could occur on the part of the judges, which should be corrected using the Courts, as an example: Habeas Corpus nº 97.876/SP, decided by the Superior Court of Justice (*Superior Tribunal de Justiça*), which will be mentioned in this study later. In this judgment, there was an understanding that atypical measures can be applied, provided that the typical means of execution are exhausted, with a reasoned decision, respecting the adversary, and there must be evidence that this is an exceptional, necessary, adequate and proportional measure. In the case under discussion, the STJ understood

that the measure was illegal and arbitrary, as it was disproportionate and unreasonable, and the typical means of enforcement/execution had not been exhausted previously. The Court finally understood that the suspension of the national driver's license could not be discussed in habeas corpus, and the decision should be challenged by another means. Regarding the passport, the appeal was partially recognized, and given the order to return the debtor's passport (BRASIL, 2018).[5]

It is relevant the precaution that the doctrine has in the analysis of the application of this article, since it is a general clause, its effects are numerous, because the applied measures will be built by the judges' decisions, therefore, a certain judge may decide not to apply the atypical measures, on the other hand, a different judge may understand that the application would fall only on the retention of the passport, or on the suspension of the national driving license.

In this regard, item IV of article 139 of the procedural statute cannot be interpreted as a "carte blanche" at the discretion of the magistrate (STRECK; NUNES, 2016). However, as atypical measures, the constitutional and legal principles are applied, which can bring applied results.

Daniel Neves believes that such measures can be achieved through passport retention, suspension of the National Driver's License, interdiction of credit cards. Likewise, it states that these are psychological coercion measures, which do not act on the debtor's body, but rather on his willingness to pay the obligation. Furthermore, it highlights that these measures are not new in the legal system, considering that there is legal authorization to carry out the protest of final decision (art. 528, § 1º of the CPC), as well as its inclusion in the database of defaulters (art. 782, § 3º). Finally, he stressed that one should not confuse a measure of psychological coercion with a sanction: the first stems from default and the objective is to satisfy the creditor's credit, and the second stems from material law. Therefore, the legal nature of both is distinct (NEVES, 2017, p. 22).

Accompanying the aforementioned understanding Lima (2016, p. 279), he assimilates that the passport seizure measures and suspension of the National Driver's License can be applied, however, with the proviso that the possible effects of such application are demonstrated, so that the technique is not used as a means of sanction.

With the opposite understanding, Didier teaches that it is not possible to retain a National Driver's License, Passport or Credit Card. His justification is that he does not believe there is a consequential relationship between the measures and the objective pursued in the execution, after all, the mere retention of a document would not oblige the debtor to pay off

5 In the same sense, several decisions can be verified: SUPERIOR COURT OF JUSTICE, 4th Class, Appeal in Special Appeal Nº 1495012 / SP, Rapporteur Minister Marco Buzzi, Judgment date: October 29, 2019, DJE: 11/12/2019; SUPERIOR COURT OF JUSTICE, 4th Class, Special Appeal Nº 1782418 / RJ, Rapporteur Minister Nancy Andrighi, Judgment date: April 23, 2019, DJE 26/04/2019; COURT OF JUSTICE OF THE FEDERAL DISTRICT AND TERRITORIES, 2nd Civil Class, Interlocutory instrument nº 0703360-32.2019.8.07.9000, Rapporteur Judge Cesar Loyola, Judgment date: October 30, 2019, DJE 11/13/2019; COURT OF JUSTICE OF SANTA CATARINA, Third Vice-Presidency, Interlocutory Instrument nº 4032876-67.2018.8.24.0000, Judge Judge Luiz Zanelato, Judgment date: August 29, 2019. With related correspondence of the original sources: SUPERIOR TRIBUNAL DE JUSTIÇA, 4ª Turma, Agravo em Recurso Especial nº 1495012/SP, Relator Ministro Marco Buzzi, Data do julgamento: 29 de outubro de 2019, DJE: 12/11/2019; SUPERIOR TRIBUNAL DE JUSTIÇA, 4ª Turma, Recurso Especial nº 1782418/RJ, Relatora Ministra Nancy Andrighi, Data do julgamento 23 de abril de 2019, DJE 26/04/2019. TRIBUNAL DE JUSTIÇA DO DISTRITO FEDERAL E TERRITÓRIOS, 2ª Turma Cível, Agravo de instrumento nº 0703360-32.2019.8.07.9000, Relator Desembargador Cesar Loyola, Data do julgamento 30 de outubro de 2019, DJE 13/11/2019. TRIBUNAL DE JUSTIÇA DE SANTA CATARINA, Terceira Vice-Presidência, Agravo de Instrumento nº 4032876-67.2018.8.24.0000, Relator Desembargador Luiz Zanelato, Data do julgamento 29 de agosto de 2019).

his debt. Furthermore, he adds that the measures resemble a kind of sanction against the debtor, which may restrict his freedom to come and go. (DIDIER et. al, 2017, p. 115).

In different arguments, without mentioning which atypical executive measures would be applicable, Alcântara and Rodrigues state that Article 139, item IV, of the Civil Procedure Code, cannot be interpreted as a "solipsist judicial activism" that does not respect fundamental rights (ALCÂNTARA; RODRIGUES, 2017, p. 230).

In the evidenced prism, it is certain that it is a controversial matter in the doctrine and in the jurisprudence. Thus, as it's a recent institute, it is natural that understandings that are too opposed emerge, however, with the formation of jurisprudence on the subject, the more pacified will be its interpretation.

Therefore, it is worth noting that the application of atypical executive measures should not be used as a punishment in cases where the debtor violates the dignity of justice, given that article 77, § 2º of the Code of Civil Procedure brings adequate punishment for these cases (LIMA, 2016, p. 275).

The atypical measures to be applied do not mean punishment or even the satisfaction of the obligation, repeat the lesson from Daniel Neves, they are only psychological coercion measures, its function is that the debtor feels coercion to make the payment (NEVES, 2017, p. 8).

For Neves (2017, p. 24), the decision granting the atypical enforcement/execution measures must be justified, pursuant to article 489, paragraph 1 of the Civil Procedure Code, demonstrating that the decision is proportional and appropriate to the case. Likewise, the author mentions that there must be a time limit for the effects of the measures, having a transitory characteristic, and cannot serve only as a way to penalize the debtor without a time limit, according to the Principle of the utility of execution.

According to the said Principle, enforcement should be useful to the creditor, not only serving as an instrument for penalizing the debtor, who could lose an asset that would not be sufficient to pay the debt, that is, even if expropriated, the debtor would still be in debt with respect to the full amount of the debt, the creditor would not take advantage of this expropriating act (THEODORO JR., 2017, v. 3, p. 224).

In addition, the civil process must be guided by the principles of proportionality and suitability, that is, it is necessary to weigh the productive effects in the specific case to generate the least possible losses to the creditor and the debtor.

Furthermore, it appears that several characteristics that can be adopted in the execution of article 139, item IV of the Civil Procedure Code is graduality, with the possibility of using measures in a staggered way, in which each measure will have effects for a certain period, being able to be replaced or established in conjunction with others, so that in the decision itself the debtor is aware that by delaying the satisfaction of the execution, he will have a higher level of restriction (DIDIER et. al, 2017, p. 120).

It is of utmost importance to stress that the debtor, the target of the provisions dealt with in this point, is the one called 'chicanist', the debtor who does not pay, even if he has assets. In this sense, they understand NUNES (2017, p. 1211) and NEVES (2017, p. 13).

Neves (2017, p. 13) discipline that is recurrent in the legal routine the occurrence of debtors with hidden assets, who previously took actions to avoid attachment and expropriation. There is an asset shield, as the author calls it, generating a situation in which the debtor continues his life as if he did not have a debt, leading to the frustration of the executionIn this reasoning, he advances that in the process there must be indications that the debtor does not pay only for the desire to not fulfill the obligation, even having sufficient equity.

Likewise, throughout the procedure, including the application of atypical measures, the principles of contradictory and broad defense must be guaranteed (article 5, item LV of the Constitution of the Republic of 1988). The adversary can also be guaranteed in a deferred mode, however, it must be applied (NEVES, 2017, p. 24) (DIDIER et. al, 2017, p. 117).

Thus, it must be unequivocal the understanding that the possible application of atypical executive means in the execution process for a certain amount must be subsidiary to the typical means (attachment and expropriation), in cases where there are clear signs of concealment of assets and that the debtor demonstrates act in bad faith, showing that the measure will be useful and effective to the procedure. The measures can be applied alone or together, always on a temporary basis, guaranteeing the adversary, broad defense and the guarantee of all fundamental rights, and must be proportionate and appropriate to each specific case.

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## 4 THE EXECUTIVE TECHNIQUES AND THEIR LIMITS ON FUNDAMENTAL RIGHTS

The purpose of this chapter is to compare the atypical executive measures (namely, the retention of the passport and the suspension of the national driving license) to fundamental rights, so that an analysis of the possible effects of its application is made.

The article 1º of the CPC establishes that civil proceedings will be carried out in accordance with the fundamental values and rules of the Constitution (BRASIL, 2015). On this occasion, the phenomenon of the constitutionalization of civil proceedings must be addressed, which gave rise to a new perspective after the Constitution of the Federative Republic of Brazil of 1988, with a new relationship between material and procedural law, which cannot be isolated, however must work together, in view of article 5º, item XXXV of the Constitution, which provides for the protection by law of any injury or threat of injury to law (THEODORO JR., 2017, v. 1, p. 28).

THEODORO JR. (2017, v. 1, p. 28) continues on the theme, emphasizing that there was a transformation of the due legal process, with democratization of the process that takes place with a dynamic adversary, involving the litigating parties, as well as the magistrate, through cooperation and co-participation of all involved.

In the meantime, two modes of application of the atypical executive means of execution will be analyzed, interpreted from article 139, item IV of the civil procedural statute, namely the retention of passports and the suspension of the national driver's license, with its effects in view of the constitutionalization of the civil process.

## 4.1 ANALYSIS OF MEASURES IN FACE OF FUNDAMENTAL RIGHTS

At first, two atypical executive measures indicated by lawyers for application in article 139, item IV of the Civil Procedure Code can be cited: the first is the retention of the Passport; and the second, the suspension of the National Driver's License.

The two measures will be analyzed together, because, despite their differences, they fall under the same criteria of analysis of fundamental rights: the right to move (movement), article 5º, item XV of the Constitution of the Republic.

Regarding the measures, Daniel Neves (2017, p. 15) states that the retention of the passport would be a legitimate measure that would prevent the debtor, who travels only for leisure, from increasing his expenses, also states that the suspension of the National Driver's License it would be a measure that pressures the debtor to fulfill his obligation, being indirect means of psychological coercion to the payment.

Rafael Lima (2016, p. 273) justifies that the techniques for retaining a passport and suspending the CNH may be appropriate when used in a case in which they are shown to be effective and necessary, and it is not possible to apply them in a disorderly manner.

For this analysis, it is initially clarified that the possible question to be asked to these two measures would be regarding the restriction of the right to move, provided for in article 5º, item XV of the Constitution: "locomotion in national territory is free in times of peace, and anyone, under the terms of the law, may enter, remain in or leave it with their goods" (BRASIL, 1988).

The Constitutional provision is a rule of contained efficacy, this type of rule allows the possibility of a law regulating its application, and there may be restrictions with justified reasons (TAVARES, 2012, p. 119).

Freedom of movement has four basic points, the first is the right to enter the national territory, the second is the right to stay in the national territory, the third is the right to move within the national territory, between cities or Federated States, and the fourth point is the right to move beyond the national territory (TAVARES, 2012, p. 652).

Within the national territory, freedom of movement encompasses the right to come and go between Federated States, Municipalities and regions within the Municipalities. It is observed that this freedom of movement is always conditioned to the Brazilian rules and the rules of other countries, demonstrating its regulation by other rules.

In this sense, freedom of movement is a significantly complex fundamental right, as it's a contained efficacy norm, it does not have a practical and direct application, depending on other norms for its effectiveness.

Regarding the right to travel, in an important lesson, Minister Ellen Gracie disciplined that there is no absolute right to freedom to come and go, and there may be a need to weigh up conflicting interests, depending on the case under analysis (BRASIL, 2008).

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Considering that the fundamental right to free movement is not absolute and it is a constitutional norm of contained efficacy, it's verified what the infra-constitutional laws establish about the Passport and the National Driver's License.

Regarding the National Driver's License, the Brazilian Traffic Code (*Código de Trânsito Brasileiro*) establishes in its article 159, § 1º that: "It's mandatory to carry the Driving Permit or the National Driver's License when the driver is driving the vehicle [...]" (BRASIL, 1997).

In this sense, it's observed that freedom of movement, using motor vehicles is regulated by the Brazilian Traffic Code, and to be able to drive a vehicle, it is necessary to have the National Driver's License. However, as already mentioned, this right is not absolute and the Brazilian Traffic Code itself describes cases in which the National Driver's License may be suspended, under the terms of its article 261, for violations of the Code, referring to traffic regulations.

It appears that the right to travel exercised by driving a vehicle is highly regulated and can only be implemented after the course with theoretical classes, practices and exams. Still, even with the document, it will not be perpetual, and must be renewed, respecting the traffic rules, under penalty of its suspension or confiscation, in administrative area.

With regard to the retention of the debtor's passport, Decree nº 5.978/1996, article 2º, provides that: "Passport is the identification document, owned by the Union, required of all those who intend to make an international travel, except in cases provided for in treaties, agreements and other international acts [...]" (BRASIL, 2006).

In this context, it is noteworthy that, in Brazil, the passport is a document owned by the Union. The document referred to is known to be used by people from all over the world for international travel, in a way that is essential for the entry in many countries.

Among the countless conditions for the passport to be granted, there is the aforementioned Decree, article 20, item VII: "not to be sought by the Justice or prevented by Court from obtaining a passport" (BRASIL, 2006).

The retention of the passport in this study, would be done in cases of debtor who has financial conditions to make the payment of his debt and hides his assets so that they are not seized, thus making several international trips for leisure, to visit museums, parks, beaches, for the sole purpose of entertainment. Diverse is the case of the debtor who travels for work and depends on trips to exercise his professional activity, such as airline pilots, ship workers and flight attendants. In these situations the retention of your passport would prevent the exercise of work, which cannot be authorized, and there must be careful analysis by the magistrate who analyzes the specific case (NEVES, 2017, p. 17).

Again in this context, the limitation of the right to move the executed is questioned, which could not pass between countries.

In strong analysis, the right to travel, applying passport seizure, will not be totally restricted, however partially, because within the scope of the Mercosul countries, there is free transit with an identity card. It appears that the San Miguel de Tucumán Agreement, Mercosul / CMC / DEC nº 18/08, in its article 1º, recognizes the validity of the personal identification documents of each State Party and Associate, as a suitable travel document for the transit of nationals and / or regular residents (MERCOSUL, 2008).

That is, a citizen with a passport retained for debt in execution for a certain amount, will still be able to transit through 09 (nine) Mercosul countries, carrying only their Brazilian identity card.

It should be noted that the Constitution often presents concepts and words that can lead to numerous interpretations, which makes the doctrine elaborate numerous articles about the subject and the jurisprudence has decisions with different interpretations.

André Ramos Tavares (2012, p. 659) understands that when the Constitution has indeterminate terms, it is the task of the Judiciary to complement these terms, as long as the limits of constitutional interpretation are observed. In this sense, it is observed that today in Brazil constitutional mutation occurs in several cases. It is noted that the hermeneutics of decisions varies according to the historical moment and its requirements.

It must be evidenced that the retention of the passport should not be ordered by the magistrate when it is proved that the executioner depends on international travel for his work, which would directly affect his livelihood and further aggravate the debtor's financial condition (NEVES, 2017, p. 16).

Likewise, if the executed person depends on the national driver's license to perform his/her job, as a taxi driver, transportation application driver, bus driver, truck driver, among many, the document cannot be suspended, after all, the debtor would not be able to guarantee their livelihood, thus violating the principles of reasonableness and suitability (NEVES, 2017, p. 17).

Gajardoni (2015) understands that the interpretation of article 139, item IV of the Civil Procedure Code must be enhanced, so that the measures employed will have limits on the exhaustion of the typical means provided for in the Code (attachment, expropriation and adjudication), in principle proportionality and in the Constitution of the Federative Republic of Brazil.

Therefore, it appears that the atypical executive measures are too complex to interpret, which generates divergent understandings about the constitutionality or not of the measures.

Thiago Rodovalho (2016) brought an important reflection, presenting the concept that the driving of motor vehicles is a citizen's right, however, it differs from what would be the fundamental right to move/locomotion. His contribution stands out for this work when he mentions that the national driver's license can be suspended administratively, without judicial authority acting in the case. It also adds that millions of citizens do not drive and that there are other restrictions on the right to drive, such as the rotation of vehicles carried out in the city of São Paulo. In summary, he stated that there is no unconstitutionality, as long as the application is made in a subsidiary manner, respecting the provisions of the CPC, after all they are only psychological coercive means for complying with the obligation.

In this understanding, Daniel Neves (2017, p. 14) teaches that the principle of effectiveness of executive protection, too, would be a fundamental right, since the dignity of the human person of the demandant must be respected. In addition, he mentioned that the removal of people and things already restricts the right to come and go, as provided in the Civil Procedure Code of 1973, article 461, § 5º and which are still considered in article 536, § 1º CPC, in this reasoning, concludes that the differentiation of executions of doing, not doing and delivering things, from obligations to deliver a certain amount would be an evident unconstitutionality,

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after all, certain creditors would benefit from more effective measures depending on the type of obligation under discussion.

Marcelo Lima Guerra (2003, p. 128), even before the CPC, mentions that the procedure of executions of doing or not doing could not be different from the others, since the principle of isonomy would be violated (article 5º, item I, CRFB), as a more efficient procedure is being provided for certain types of obligations.

In a different understanding, note that Araken de Assis, quoted by Didier (2017, p. 101) understands that the atypicality of executive measures would be unconstitutional, since article 5, including LIV, of the Brazilian Constitution, guarantees the observance of due process legal for a citizen to be deprived of any good.

Nobrega (2016) interprets that article 139, item IV of the CPC must be declared unconstitutional without reducing the text, so that it does not occur: the seizure of the passport, the suspension of the national driving license and other measures.

Streck and Nunes (2016) understand that the increase in the scope of application of article 139, item IV of the Civil Procedure Code cannot be done in an authoritarian manner, and constitutional limits, such as due constitutional process, must be respected.

Recently, a decision of great importance on the subject was published by the Superior Court of Justice (*Superior Tribunal de Justiça - STJ*):

> SPECIAL RESOURCE. EVICTION AND RENTAL COLLECTION ACTION. FULFILLMENT OF SENTENCE. ATYPICAL EXECUTIVE MEASURES. ART. 139, IV, OF CPC / 15. 'APPLICATION' IN THESIS. OUTLINE OF GUIDELINES TO BE OBSERVED FOR ITS APPLICATION. [...] 4. The systematic interpretation of the legal system reveals, however, that such a legal provision does not authorize the indiscriminate adoption of any executive measure, regardless of beacons or effective means of control. 5. According to the STJ's understanding, the modern rules of procedure, still supported by the search for jurisdictional effectiveness, may under no circumstances be distanced from constitutional dictates, only being possible to implement non-discretionary commands or commands that restrict individual rights of reasonable way. Specific precedent. 6. **The adoption of atypical executive means is appropriate provided that, if there is evidence that the debtor has expropriable assets, such measures are adopted in a subsidiary manner, by means of a decision that contains adequate grounds for the specifics of the concrete hypothesis, with observance of the substantial contradictory and the postulate of proportionality** [...]. (RECURSO ESPECIAL. AÇÃO DE DESPEJO E COBRANÇA DE ALUGUEIS. CUMPRIMENTO DE SENTENÇA. MEDIDAS EXECUTIVAS ATÍPICAS. ART. 139, IV, DO CPC/15. CABIMENTO, EM TESE. DELINEAMENTO DE DIRETRIZES A SEREM OBSERVADAS PARA SUA APLICAÇÃO. [...] 4. A interpretação sistemática do ordenamento jurídico revela, todavia, que tal previsão legal não autoriza a adoção indiscriminada de qualquer medida executiva, independentemente de balizas ou meios de controle efetivos. 5. De acordo com o entendimento do STJ, as modernas regras de processo, ainda respaldadas pela busca da efetividade jurisdicional, em nenhuma circunstância poderão se distanciar dos ditames constitucionais, apenas sendo possível a implementação de comandos não discricionários ou que restrinjam direitos individuais de forma razoável. Precedente específico. 6. **A adoção de meios executivos atípicos é cabível desde que, verificando-se a existência de indícios de que o devedor possua patrimônio expropriável, tais medidas sejam**

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**adotadas de modo subsidiário, por meio de decisão que contenha fundamentação adequada às especificidades da hipótese concreta, com observância do contraditório substancial e do postulado da proporcionalidade** [...]) (BRASIL, 2020, our emphasis).

The Third Panel, in a special appeal (*Recuso Especial*), decided that the CPC allows the use of atypical executive means, as long as the requirements are met: there are indications that the debtor has expropriable assets, the measures are adopted subsidiarily and that the decision is justified in the specific case, with an emphasis on contradictory and proportionality. In addition, the decision clarifies that these are exceptional measures, and must have as requirements the summons of the debtor to pay the debt or the presentation of assets to settle it, after using the typical measures and, if there is no result, the application of the measures atypical. The judgment was unanimous, the Reviewing Ministers accompanied the Reporting Minister. The judgment reiterates the STJ's jurisprudence, which is not yet consolidated (BRASIL, 2020).

Still, it's important to highlight one of the first analyzes of the STJ on the theme:

> ORDINARY RESOURCE IN HABEAS CORPUS. EXECUTION OF EXTRAJUDICIAL TITLE. ATYPICAL COERCITIVE MEASURES. CPC / 2015. CONSENTANEOUS INTERPRETATION WITH CONSTITUTIONAL ORDERING. SUBSIDIARITY, NEED, ADEQUACY AND PROPORTIONALITY. PASSPORT RETENTION. ILLEGAL COACTION. GRANTING THE ORDER. SUSPENSION OF CNH. NO KNOWLEDGE. [...]
>
> 9. It is illegal and arbitrary to impose a coercive measure to suspend the passport issued in the middle of execution by extrajudicial title (duplicate of service provision), as it restricts the fundamental right to come and go in a disproportionate and unreasonable way. Since the exhaustion of traditional means of satisfaction has not been demonstrated, the measure does not prove necessary. **10. The recognition of the illegality of the measure consisting in the seizure of the patient's passport, in the case under consideration, has no claim to affirm the impossibility of this coercive measure in other cases and in a generic way. The measure may eventually be used, provided the contradictory is obeyed and the decision is justified and adequate, also checking the proportionality of the measure.** 11. The jurisprudence of this Superior Court is in the sense that the suspension of the National Driver's License does not constitute a threat to the right of the holder to come and go, thus, the use of habeas corpus is inappropriate, preventing its knowledge. It is a fact that the retention of this document has the potential to cause considerable embarrassment to anyone and, to some certain groups, even more drastically, as is the case with professionals, who drive vehicles, the source of livelihood. It is also a fact that, if this particular condition is detected, however, the possibility of challenging the decision is certain, however through a different route from habeas corpus, because its reason will not be the illegal or arbitrary coercion to the right of locomotion, but the inadequacy of another nature. 12. Ordinary resource partially known (BRASIL, 2018, emphasis added. (BRASIL, 2018, emphasis added) (RECURSO ORDINÁRIO EM HABEAS CORPUS. EXECUÇÃO DE TÍTULO EXTRAJUDICIAL. MEDIDAS COERCITIVAS ATÍPICAS. CPC/2015. INTERPRETAÇÃO CONSENTÂNEA COM O ORDENAMENTO CONSTITUCIONAL. SUBSIDIARIEDADE, NECESSIDADE, ADEQUAÇÃO E PROPORCIONALIDADE. RETENÇÃO DE PASSAPORTE. COAÇÃO ILEGAL. CONCESSÃO DA ORDEM. SUSPENSÃO DA CNH. NÃO CONHECIMENTO. [...] 9. Revela-se ilegal e arbitrária a medida coercitiva de suspensão do passaporte proferida no bojo de execução por título extrajudicial (duplicata de prestação

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> de serviço), por restringir direito fundamental de ir e vir de forma desproporcional e não razoável. **Não tendo sido demonstrado o esgotamento dos meios tradicionais de satisfação, a medida não se comprova necessária. 10. O reconhecimento da ilegalidade da medida consistente na apreensão do passaporte do paciente, na hipótese em apreço, não tem qualquer pretensão em afirmar a impossibilidade dessa providência coercitiva em outros casos e de maneira genérica. A medida poderá eventualmente ser utilizada, desde que obedecido o contraditório e fundamentada e adequada a decisão, verificada também a proporcionalidade da providência.** 11. A jurisprudência desta Corte Superior é no sentido de que a suspensão da Carteira Nacional de Habilitação não configura ameaça ao direito de ir e vir do titular, sendo, assim, inadequada a utilização do habeas corpus, impedindo seu conhecimento. É fato que a retenção desse documento tem potencial para causar embaraços consideráveis a qualquer pessoa e, a alguns determinados grupos, ainda de forma mais drástica, caso de profissionais, que tem na condução de veículos, a fonte de sustento. É fato também que, se detectada esta condição particular, no entanto, a possibilidade de impugnação da decisão é certa, todavia por via diversa do habeas corpus, porque sua razão não será a coação ilegal ou arbitrária ao direito de locomoção, mas inadequação de outra natureza. 12. Recurso ordinário parcialmente conhecido)

In the aforementioned judgment, the collegiate decision makes it clear that the atypical executive measures do not apply to that specific case, as the typical means of execution have not been exhausted, however, it makes it clear that the measures can be applied, provided that the adversary is obeyed, with reasoned and proportional decision.[6]

The controversy on the subject recently led to the filing of a Direct Action of Unconstitutionality (*Ação Direta de Inconstitucionalidade*), so that it can be declared null, without reducing the text of item IV of article 139 of the CPC, with the argument that it violates the principle of freedom of movement and the principle of dignity of the human person, still under analysis (FALCÃO; TEIXEIRA, 2018).

The Attorney General's Office (*Procuradoria Geral da República*) was favorable in relation to the action, in his understanding the seizure of documents (national driver's license and passport) would be unconstitutional, even with the provision of article 139, item IV of the CPC, since the judge did not can restrict more rights than the legislator. Still, he contended that in case of application of restrictive measures, the decision must be justified, showing that the typical measures were insufficient and that the applied measures are proportional (BRASIL, 2018a).

Therefore, it appears that the matter brings disagreement with doctrine and jurisprudence, since the article 139, item IV of the CPC brings a general clause that has a broad and divergent interpretation of the jurisprudence, as in other matters discussed, it will be up to

6 In the same sense, it is important to mention the following judgments: SUPERIOR COURT OF JUSTICE. 3rd Class. Special Appeal Nº 1788950/MT, by Rapporteur of Minister Nancy Andrighi. Judgment date: April 23, 2019. DJE 26/04/2019; SUPERIOR JUSTICE TRIBUNAL. 4th Class. Special Appeal Nº 1.866.715/SP, by the Reporting by Minister Marco Buzzi. Judgment date: March 23, 2020. DJE 03/25/2020; COURT OF JUSTICE OF PARANÁ. 6th Civil Chamber. Interlocutory Appeal Nº 0049006-91.2019.8.16.0000, by Rapporteur of Judge Hilgenberg Prestes Mattar. Judgment date: February 14, 2020. (Respectively referenced in the original: SUPERIOR TRIBUNAL DE JUSTIÇA. 3ª Turma. Recurso Especial nº 1788950/MT, de Relatoria da Ministra Nancy Andrighi. Data do julgamento: 23 de abril de 2019. DJE 26/04/2019; SUPERIOR TRIBUNAL DE JUSTIÇA. 4ª Turma. Recurso Especial nº 1.866.715/SP, de Relatoria do Ministro Marco Buzzi. Data do julgamento: 23 de março de 2020. DJE 25/03/2020; TRIBUNAL DE JUSTIÇA DO PARANÁ. 6ª Câmara Cível. Agravo de Instrumento n. 0049006-91.2019.8.16.0000, de Relatoria do Desembargador Hilgenberg Prestes Mattar. Data do julgamento: 14 de fevereiro de 2020).

the Supreme Court Federal (*Supremo Tribunal Federal*) decide the scope of application of this institute.

## 5 CONCLUSIONS

In view of the study carried out, it was found, primarily, that the execution process underwent changes with the of Civil Procedure Code of 2015, in its scope, after the initial phase of the procedure, the debtor's assets are seized and possible adjudication or sale of these assets.

However, as already mentioned, there are countless cases in Brazil that remained in frustrated execution, that is, it was not possible to find the debtor's assets, real estate, movable properties, shares, bank accounts, vehicles, among others.

Already with the Civil Procedure Code promulgated in 2015, article 139 which addresses the judge powers, in item IV established the possibility for the magistrate to determine all inductive, coercive, mandatory and subrogatory measures for the effectiveness of his decisions, including pecuniary obligations.

In this way, the atypicality of the executive means for executions for a certain amount was established; and some scholars argue that these measures would be diverse, and may incur, among them, in: passport retention and suspension of the national driver's license, hypotheses discussed in this work.

The application of these measures must be made in a subsidiary manner, so that, after all the possibilities of attachment have been exhausted and with evidence that the executed party is a permanent debtor, the one who shields his assets, the atypical executive measures must be applied. The CPC deals with typical execution measures in more than one hundred articles, so, in line with the procedural text, initially, should seek, by these means, the assets of the executed debtor and in case of frustrated execution, atypical means are used, which, being more expensive, should be used only when other measures are not possible.

However, it is necessary to pay attention to some crucial points, the application of the measures must respect the principles of execution, and should bring less burden to the debtor, with utility and suitability to the case, so that the measures used are not a form of punishment to the debtor. In addition, it is worth mentioning that the application of the measures must be transient, given that their definitive application would have the character of a sanction, which is not sought in this case.

Equally, it should be noted that the objective of the measures is the debtor's psychological coercion, given that if the debtor has financial conditions to pay the debt and hides his assets, it is fair to understand that he is also unable to afford international travel or with a vehicle.

In cases in which there are excesses in the application of the measures, the defendant must seek to guarantee his rights with the use of the appropriate procedural resources, such as those mentioned in this work.

As already mentioned, the application of atypical measures to suspend the national driver's license and retention of passports must respect the principles of civil execution, as well as the Constitution of the Federative Republic of Brazil.

Regarding the retention of the passport, it was found that it is an official document owned by the Union. Even without having it, it is possible to travel through nine countries in Latin America. That is, the retention of the passport is verified as legitimate, since it does not suppress the constitutional right of locomotion of the executed, there is only one limitation, as a way to psychologically coerce that debtor who postpones the payment of his debt.

On the other hand, the suspension of the national driver's license does not impede the right to citizen mobility, taking into account that most Brazilians get around by public transport or even without a vehicle. What can not be confused is the right to drive and the right to move, being different, the right to drive can be suspended or canceled administratively, in cases of violations of the Brazilian Traffic Code, not limited to the right to move.

In this sense, the right to move is composed of four dimensions: the first is the right to enter the national territory, the second is the right to remain in the national territory, the third is the movement within the national territory and the fourth is the right displacement beyond the national territory.

It appears that the right to mobility is not limited to the possibility of driving or entering countries that require a passport, in fact, it is a complex right, which brings numerous possibilities for regulation, as it's a rule of contained effectiveness.

The retention of the passport or suspension of the driver's license clearly does not suppress this right, since there is still the possibility of entering countries that does not require a passport or the options of getting around without driving motor vehicles.

Therefore, what is observed is that the right to travel is being respected in the suspension of the national driver's license and also in the retention of the passport, since in both situations the citizen is still free to move within Brazilian territory and even into the territory of other nations.

Therefore, it is understood that article 139, item IV of the CPC, establishes the subsidiarity of atypical executive measures in execution for a certain amount. These must be adopted as a form of psychological coercion applied to the debtor of execution, and there must be prior exhaustion of the typical means provided for in the procedural statute and with overwhelming evidence that there is patrimonial shielding. This is not the definitive solution to the adversities of the execution processes, however, it can prove to be effective in increasing the compliance, the fulfillment and the credit satisfaction in executions for a certain amount.

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