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The critique of legal positivism through Judge Angelo of the Shakespearean work "Measure for Measure"

A crítica ao positivismo jurídico através do Juiz Ângelo da obra Shakespeariana “Medida por Medida”

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ABSTRACT
This work seeks, using the tool of Law and Literature, to explain the criticisms of several theorists to legal positivism, in particular, the studies of Ronald Dworkin. For this, we will analyze the work elaborated by Shakespeare "Measure for Measure", which demonstrates in a very clear way all the critical notes in which legal positivism is involved. Through its main character, Judge Angelo, it will be demonstrated when a judge acts in an exegetical way, that is, mechanically complies with the words of the laws, and when they start to decide in a way endowed with greater discretion, in which they often act in this way to meet desires and understandings that they see merely personal. Still, the present study seeks to understand the positivist approach to decision-making, to demonstrate the criticisms that both Dworkin, Hart and Kelsen make to the theme. The present study was carried out through a qualitative and descriptive approach, with bibliographic research in legal journals, articles and books.

Keywords: Measure by Measure, Positivism, Ronald Dworkin.

1 INTRODUCTION

This article aims to present in an introductory way the intersection between law and literature, so that it is possible to demonstrate the great feasibility of studying law through literature, as well as the other uses for this tool. Another objective, and of equal importance, is to establish greater communicability with readers in general, and not only with those who have mastery of the technical legal language, considering that the propagation of knowledge should be desired by all those who focus on academic research.

According to Seeger and Andrade, "Literature becomes of great importance in the legal discipline, since it has the capacity to encompass knowledge from several existing areas".[1]

Thus, this study intends to approach Law and Literature through the play "Measure for Measure" by William Shakespeare, in view of the notorious and intimate relationship of his works with Law[2].

To this end, it will first be made an approach to the main aspects of Shakespeare's work, which relate in a unique way the attitudes and ways of deciding legal cases of the main character, Judge Angelo, to the criticisms of legal positivism made by theorists such as Kelsen, Hart and especially Dworkin.

Finally, these criticisms of these theorists are analyzed in a deeper way, giving special attention to Dworkin's studies regarding the development of his theory of constructive interpretation of Law, with the objective of demonstrating what would be, according to the theorist, the path that magistrates should follow.

The approach of his theory is necessary in view of the fact that the aforementioned theorist understands that legal practice is an exercise of interpretation, thus fitting perfectly into his metaphor of the chain novel.

2 LAW AND LITERATURE IN MEASURE BY MEASURE

The dialogue between Law and Literature is necessary to bring the ludic to the legal study, which is sometimes so dogmatic and tied to traditional methodologies. Thus, by means of words with a greater interpretative scope, the Law is absorbed by readers in a significantly easier way, than with the use of terms endowed with a greater technicality.

This connection is also due to the fact that the legal discourse is present in texts from different eras, from Ancient Greece to the present day. Thus, this approach is important for the study of law, especially in relation to the decisions taken by the courts in order to understand the most complex procedural disputes.

The doctrine should not be seen only as a mere reproducer of what the court says, but rather with the important role of exercising both a reflective and a critical function.

[1] SEEGER, Luana da Silva; ANDRADE, Edenise. The Relationship Between Law and Literature and Their Contributions to Overcoming the Crisis of Legal Education and Refounding the Jurisdiction. 2016. XIII International Seminar on Social Demands and Public Policies in Contemporary Society. ISSN 2358-3010. p. 5.

[2] MOREIRA, Nelson Camatta; Soares, Paulo Vitor Lopes Saiter. A brief essay on the relationship between law and morality in the Brazilian constitutional jurisdiction in the light of William Shakespeare's work Measure for Measure. Revista de Derechos Humanos y Estudios Sociales. No. 15, año VIII, San Luis Potosí, 2016, p. 67

Following the example of theorists such as Ronald Dworkin, it is possible to infer that there is a relationship between legal interpretation and literary interpretation. Because, as Dworkin argued, in the thesis of constructive interpretation, special importance is given to artistic interpretation, which is based on a creative interpretation, focused on the purpose and not the cause of something,[3] where it is required that social practices be taken through the best possible forms[4].

All this analysis is necessary in the search for the understanding of Dworkin's criticisms of legal positivism, as well as for the analysis of William Shakespeare's work Measure for Measure.

Such a comparison is justified by the essence of the story versed in Measure for Measure, as can be seen in Olivo's words:

> One aspect that can be deduced from the problem is that, as a whole, Shakespeare's work reveals the existence of an articulated notion of legal themes – especially those related to power, form of government and justice – which would make it possible to sustain the thesis according to which there is in Shakespeare a theory of law that reflects not only his time, but also the but it heralds the emergence of modern law, based on the predominance of human reason and the subject of law[5].

The work "Measure for Measure" is a play published in 1604, classified as a "dark comedy" within the tragic period of the author's life[6]. From its reading, it is possible to glimpse deep reflections on Law, especially with regard to the equitable distribution of justice.

The main characters are Vincent (the Duke), Angelo (the Judge), Claudius (a young gentleman), Isabella (Claudio's sister), and Juliet (with whom Claudius is in love). The play begins with the departure of the Duke of Vienna from the city, who delegates the judiciary to Angelo. This is because the Duke realizes that Vienna is falling more and more into vices, so it is necessary to apply the law more efficiently.

In this interstice, the character Angelo is seen as an example of virtue, showing himself to be extremely rigid in the application of the law:

> It was my fault that the people were unrestrained, it was very hard to punish them for what I allowed them to do; yes, that is to give permission, to let faults circulate freely without the same thing happening with punishment. That is why, my good Father, I have delegated Angelo my power. Concealed by his name, he can be severe without the slightest discredit falling upon my person to see him in the exercise of his office; it is my desire, as a brother of your order, at the same time to visit the regent and the little people. I ask you, therefore, to grant me a habit and assure me of how I should proceed personally,

[3] OMMATI, José Emílio Medauar; QUINAUD PEDRON, Flávio Barbosa. The judgment of ADPF n. 132: practice of judicial activism or an exercise of a constructive interpretation?. Available in https://www.academia.edu/32100201/O_julgamento_da_ADPF_132_pr%C3%A1tica_de_um_ativismo_judicial_ou_exerc%C3%ADcio_de_uma_interpreta%C3%A7%C3%A3o_construtiva.
[4] DWORKIN, Ronald. The rule of law. Martins Fontes, São Paulo, 1999, p. 62.
[5] OLIVO, Luiz Carlos Cancellier de. The study of law through literature. Stadium, Tubarão, 2005, p. 11-12.
[6] MOREIRA. Ibid. p. 71.

> so that the monk may appear to be true. More space I will present you with new motives that justify this act of mine. Now I only tell you that Lord Angelo is form and is protected from envy; He scarcely confesses that the blood flows in him and that the bread is more grateful to him than stone. Let us see if power perverts the intent of men and what in us is pretense[7].

In this way, Angelo begins his work and orders the imprisonment of Claudio, a boy who was engaged to a young woman, Juliet. One of the laws that "slumbered" was the Fornication Law, which forbade sexual relations before marriage, with the death penalty in case of non-compliance,[8] which was the reason for which he was sentenced.

And with that, Angelo's representation of authority is questioned to the extent that such a decision is felt as illegitimate towards society[9]. In this scenario, Claudio's way out is to appeal to his sister, the novice Isabella, to intercede for his life.

However, what she finds is an absolute authority that defends the law:

> [...] ANGELO: Your brother is under the action of the law; That is why you misuse your words.
> ISABELA - Alas! All souls, in the past, were doomed as well; but he who had power to punish them knew how to give them a remedy. Where would you be if He, who is the supreme Judge, were to judge you for what you are only? Think about it, and the Mercy of the mouth will spring up for you, as from the first man.
> Angelo: Resign yourselves, beautiful girl, but it is the law that punishes your brother, not me. Were he, though, my relative, brother, son, it doesn't matter: he would die tomorrow.
> ISABELA - Tomorrow! So fast! He is not ready! Spare him! Even in our kitchens we choose the season to kill the birds. Shall we show heaven less respect than our rudeness? Good lord, my good lord, I reflected, please. Who, to this day, has died from such a crime? In the meantime, many have committed it.
> LUCIUS: *(aside to Isabella)* - Oh, well said.
> ANGELO: The law wasn't dead, the law was just dozing. These many would certainly not have committed the crime, if the first to infringe it had at once expiated the guilt. Now she is awake, she watches as she passes and, like a prophet, she sees in a mirror the crimes of the future, whether new or generated by negligence. And so, almost at the point of growth, they leave no successors, but they dissolve before they have life. [...] [10]

However, although Judge Angelo mentioned in the excerpt above that, "although my relative, brother, son, it doesn't matter: he would die tomorrow", that is, that he would apply the law in the most literal and restricted way possible, no matter who it would affect, it is clear that when the situation became of interest to him, his interpretation changed, at the moment he proposed to Isabella that she sleep with him, in view of his passion for it, and in exchange for it, he would release his brother Claudius

[7] SHAKESPEARE, William. Measure by Measure. Translated by Beatriz-Viégas-Faria, Porto Alegre, 2014, p. 9.
[8] MOREIRA. Ibid. p. 72.
[9] PEGORINI, Fernanda Vecchi. When I Am Authority, I Am Not Authority: Identity in Shakespeare's Ambivalence in Measure for Measure. Annals of I CIDIL, vol. 1, n.1, Passo Fundo, 2012, p.17
[10] SHAKESPEARE. Ibid. p. 19-20.

But, if such a proposal were to come true, Judge Angelo would be committing the same crime that Claudio had committed, which violated the Law of Fornication.

This situation can be seen in the following excerpt from the work:

> [...] ANGELO: Who will believe what you say, Elizabeth? My unblemished name, the austerity of my way of life, the formal contestation to which you assert it, and my position within the State, so much will your grievances prevail that you will suffocate in your own tale, leaving only a whiff of calumny in the end. But since I have begun, I will let go of the sensual instinct: consent at once to what my ardent desire requires, stop those subtleties, those unnecessary blushes, which only serve to banish what they desire; rescue his brother, yielding his body to my desires; Otherwise, not only will he die the death committed, and in the face of your refusal, now increased by a long agony. Tomorrow bring me the answer; If not, by this same passion that dominates me, I become a tyrant for him. As for your truths, spread them, for with my falsehood I will put their wings to death.
> (Exits.)
> ISABELA - Who should I complain to? Who will believe me when I tell you all this? O mouths full of dangers, which, with one tongue alone, can both kill and give life, bending the law with such and such caprices, that the just and the unjust pierce the appetite that wields them at will! I'm going to see Claudio; Although the instigation of blood caused him to fall, he harbors such a spirit of honor, that if he had ten heads to spread on the bloody stumps, he would sacrifice them before his sister's body left so abject a desecration. Die, brother! Elizabeth, always be pure! The brothers pass away, purity hardens. But I'm going to tell you what Angelo told me so that death will accept it lightly. (Exits.) [...][11]

It turns out that Angelo's past has elements that allow us to unmask his exemplarity[12], and it is not necessary for Isabella to accept the proposal to save her brother's life. The judge had promised Mariana marriage, and so, Isabella goes in search of her so that together they can change the entire floor of the decision.

What is necessary for the discussion that is present in this work is about the reflection that the play Measure by Measure presents in the face of the behavior of the magistrate Angelo. To facilitate the understanding of this analysis, the views of the judges of the work will be divided into two, the first is that of a judge who is the mouth of the law, who sometimes even gets confused with it, especially when he expresses himself in the following statement, "it is the law that punishes your brother, it is not me", thus making it seem that there is a barrier between the law and the possibility of judges interpreting the law.

The second view is that of the judge who created the law, such a situation is glimpsed when the judge proposes to change the sentence with the intention of conquering something of his personal interest.

[11] Ditto.
[12] PEGORINI. Ibid. p.22.

In this second moment, it is evident that Angelo acts according to his conscience, in order to serve a personal interest. Here, then, there is a problem of discretion.

In Streck's words, judges should avoid seeking the support of arbitrariness or particular conceptions when making decisions, as observed below:

> The judge, responsible for the productive complementation of the law, cannot, when understanding/applying the law, rely on arbitrariness, solipsisms, particular conceptions of the world – in a word, "decide according to his conscience". On the contrary, the judge, like any other member of a given legal order, is subject to the law and, for this reason, his decision must always be the result of an understanding adequate to the meaning of the law projected by that political community.[13]

Therefore, in view of the plot, it can be observed that both the adoption of the positive system itself, as well as a possible application of a law emanating from the judge, are presented as unsatisfactory for the resolution of the impasse. Therefore, the play is an excellent example of criticism of legal positivism, when it encompasses understandings ranging from exegetism of law to an opening of discretion in view of the realization that the law is not capable of all the most complex dealings.

3 NOTES TO LEGAL POSITIVISM

The beginning of the modern age is marked by the hegemony of legal positivism. This is because society began to demand limits to the concentrated and unlimited power of the sovereign, so that the main means of expression of popular sovereignty became the law[14].

Thus, such a newly given status to the law can be glimpsed in the following words by Fernandes:

> The law then acquires a new status, never seen in history. Society needed to move away from the opening of the legal system to natural justice values, since many atrocities were carried out in the name of law and its natural principles (religious or not). In this context, legal certainty and objectivity of the system were sought, and positive law fulfilled this role well[15].

[13] STRECK, Lenio Luiz. From the Epistemology of Interpretation to the Ontology of Understanding: Gadamer and Tradition as a Background for the Engagement of the World (or a Critique of the Tupiniquim Solipsistic Judge). Law & Praxis Journal. Rio de Janeiro, vol. 06, n. 10, 2015, p. 137.
[14] FERNANDES, Ricardo Vieira de Carvalho; BICALHO, Guilherme Pereira Dolabella. From positivism to legal post-positivism: the current constitutional jusphilosophical paradigm. In Journal of Legislative Information, vol. 48, n. 189, Brasília, 2011, p. 106.
[15] Ditto.

In view of this, the interpretation of the judges becomes "tied" to the legislation, to the concepts of the professors and to the precedents, [16]and from this conception, the magistrate begins to act in a way that is more considered mechanical, his concept came close to what Montesquieu called the "mouth judge of the law".

In this scenario, there is a need to have a method that can ensure the predictability of judicial decisions, which has been called "legal syllogism" or "subsumption" method,[17] in which the validity of legislation would be conditioned to its creation mechanism. Thus, in Measure for Measure, at first, the figure of a judge who firmly believes that through the law legal stability and certainty will be achieved, even if this is far from a conception of justice.

The first decades of the twentieth century saw the growth of the regulatory power of the State in an overwhelming way,[18] until the moment when a new meaning of Law was presented by Kelsen, as a result of his concern with the validity of the norm and the unity of the legal system.

The theorist then starts from the premise that the norm that represents the basis of validity of another norm could only be, in relation to this one, a superior norm[19].

In a deeper analysis of Kelsen's intentions, Streck summarizes the transcendental logical presupposition in the following statements:

> In order not to end in a regress *ad infinitum*, Kelsen presents the fundamental norm (Grundnorm*), that is, a transcendental logical presupposition to give validity to the entire legal system (later Kelsen abandons this Kantian thesis and adheres to Hans Vahingher's "as if" philosophy – als ob- the* Grundnorm it is a necessarily useful fiction). This rule, insofar as it does not contain any content, admits that any content is a law, including that which may be considered unjust[20].

But, at a specific point, Kelsen "surrenders" to his opponents, assuming that the interpretation of the law is riddled with subjectivisms coming from a solipsistic practical reason[21], a practice that is visualized in a second moment of Angelo in Measure for Measure, when he proposes to spare Claudio's life as long as his personal interest in sleeping with Isabella is fulfilled.

[16] STRECK, Lenio Luiz. Dictionary of Hermeneutics: Forty fundamental themes of the theory of Law in the light of the Hermeneutic Critique of Law. Casa do Direito, Belo Horizonte, 2017, p. 160.
[17] MOREIRA. Ibid. p. 76.
[18] STRECK, Lenio Luiz. Is applying the "letter of the law" a positivist attitude? Journal of New Legal Studies, vol. 15, n. 1, Itajaí, 2010, p. 161.
[19] TRINDADE, André Karam. Considerations on the problem of the foundation of Law: Brief analysis of the theories of Kelsen, Bobbio, Hart and Dworkin. Electronic Journal of Law and Politics, Stricto-Sensu Graduate Program in Legal Science, UNIVALI, vol. 9, n.2, Itajaí, 2014, p.1031
[20] STRECK. 2017. Ibid. p. 162
[21] STRECK. 2010. Ibid. p. 161.

Positivism, in this bias, presents discretion as a solution to the incompleteness of the law, that is, the law alone is insufficient to regulate all cases, as in *hard cases*, when there is no clear rule to be applied to the specific case in particular.

The problem of normative positivism, then, is no longer the "judge who is the mouth of the law" (Montesquieu), but rather how cases are decided, that is, how the discretionary power of judges is controlled[22]. It should be noted that the main concern is still with the application of the law, and not necessarily with the effectiveness of justice, through its content.

The confirmation of this discretion of the judge opens the door to understandings such as that of the school of legal realism, developed in the United States at the beginning of the twentieth century, which states that Law does not exist – remembering Justice Holmes, it results only from what the judge had for breakfast – being only different types of predictions[23]. After all, legal realism is based on the conception that judicial reasoning stems from a psychological process[24].

Still, faced with the issue of the insufficiency of the legal norm, Hart proposes a theory in which the role of the interpreter of the system is given greater prominence and, consequently, considers the openness in the process of knowledge[25] of the law, even though he defines the law as a union of primary and secondary rules, necessary for the proper functioning of the legal system[26].

According to Cattoni de Oliveira, Hart understood that Law had its own language, resulting from the daily practices of society, and like all language, it would not be able to encompass the full range of existing possibilities, as can be seen in the following statements:

> For Hart, Law has its own language inscribed in social practices and, like all language, has rules about the use and meaning of its terms. However, like all language, legal language would not be able to foresee and, therefore, regulate all the possibilities of its use[27].

[22] COSTA, Marcelo Cacinotti; LIMA, Vinicius de Melo. A critique of legal positivism and judicial discretion in the light of Shakespeare's measure-for-measure work. Journal of Law, Art and Literature, vol. 1, n.2, Minas Gerais, 2015, p. 132.
[23] PEDRON, Flavio Quinaud. Notes on the constructive interpretation of law in Ronald Dworkin: A study based on the judgment of ADPF n. 132. Law Journal of the Faculty of Guanambi. Year 2, vol. 2, n.1, Guanambi, 2016, p. 168.
[24] STRECK. 2017. Ibid. p. 174.
[25] TRINDADE, André Karam. Considerations on the problem of the foundation of Law: Brief analysis of the theories of Kelsen, Bobbio, Hart and Dworkin. Electronic Journal of Law and Politics, Stricto-Sensu Graduate Program in Legal Science, UNIVALI, vol. 9, n.2, Itajaí, 2014, p.1035.
[26] FERRO, Luiz Bruno Lisbôa de Bragança; FERRO, Sandra Regina Oliveira Passos de Bragança. Analysis of inclusive legal positivism and its evolution after Hebert Hart: a solution to the omissions of Law. Journal of the Faculty of Law of the Federal University of Uberlândia, 2020, p. 327.
[27] CATTONI DE OLIVEIRA, Marcelo Andrade. Dworkin: In what ways does law resemble literature? Journal of Law and Praxis, vol. 4, n. 7, Rio de Janeiro, 2013, p. 370

In this way, Hart ends up developing the thesis of law as a social institution, as a cultural phenomenon constituted by language,[28] which is fundamental for the development of legal hermeneutics. Therefore, from the questioning related to this creative function of the judge, the debate with Dworkin will begin, given that the magistrate should not be the mouth of the law as Angelo acted at first, and also should not create the law according to his personal criteria, as he acted in a second moment. For Dworkin, the judge must seek the correct answer.

4 RONALD DWORKIN AND HIS CRITICISM OF LEGAL POSITIVISM

In "The Rule of Law", Dworkin argues that Austin understands that for a legal proposition to be true, it must correctly convey the command of a sovereign[29]. For Austin, the definition of a sovereign is a person or a group whose orders are usually obeyed and who, moreover, are not in the habit of obeying anyone[30].

Thus, Austin does not accept the rule as a central element of the concept of law. He reduces his concept to a phenomenon devoid of normativity that can be described through purely factual criteria such as "coercive orders" and "habits of obedience."[31]

In this case, when there is no express rule, the sovereign will empower judges to create rules within a margin of discretion[32].

Dworkin goes on to state that Hart refuted Austin's view that legal authority was a purely physical fact of habitual command and obedience. For Hart asserted that the true foundations of law lie in the acceptance by the community as a whole of a fundamental master rule that assigns to specific persons or groups the authority to make laws[33].

In this sense, Hart's theory involves a rule of recognition (fundamental master rule), whose existence and configuration are inextricably linked to the problem of the validity of norms and, consequently, of the legal system[34].

[28] MOTTA, Francisco José Borges. Taking Law Seriously: A Hermeneutic Exploration of Judicial Protagonism in the Brazilian Judicial Process. Master's Thesis. Graduate Program in Law at the University of Vale do Rio dos Sinos. São Leopoldo, 2009, p. 57.
[29] DWORKIN. 1999. Ibid. p. 41.
[30] HART, Herbert, L. A.The concept of Law. São Paulo, Martins Fontes, 2002, p. 59.
[31] STRECK, Lenio Luiz; MOTTA, Francisco José Borges. Rereading the Debate Between Hart and Dworkin: A Critique of Interpretive Positivisms. Brazilian Journal of Law, vol. 14, n. 1, Passo Fundo, 2018, p. 58.
[32] PEDRON, Flavio. Ronald Dworkin's proposal for a constructive interpretation of law. CEJ Magazine, Brasilia, Available at http://www.academia.edu/819233/A_PROPOSTA_DE_RONALD_DWORKIN_PARA_UMA_INTERPRETA%C3%87%C3%83O_CONSTRUTIVA_DO_DIREITO?auto=download.
[33] DWORKIN. 1999. Ibid. p. 42.
[34] TRINITY. 2014. Ibid. p.1036.

Thus, Dworkin states that the great factor that attributes to legal propositions as true are the social conventions that accept them, as expressed in his following words:

> Thus, legal propositions are true not only by virtue of the authority of persons who are usually obeyed, but fundamentally by virtue of social conventions that represent the acceptance by the community of a system of rules that grants such individuals or groups the power to create valid laws[35].

The question is how this can be translated into the area of judgment: there are only these rules and the judge's job is to formulate how they will be applied?

Formalism is a way to understand the role of judges and one of the paths that can be implied in Judgment, in which there is no creative energy for the application of the rules, that is, the law is law and that is the end of[36] it. On the other hand, and in this same scenario, there is Realism, which maintains that Law does not exist, reminding us of Justice Holmes, in which Law results only from what the judge had for breakfast[37].

In order to understand what the judges are doing, Hart is seeking a path between Formalism and Realism. The way in which he does this is with the idea of the "open texture of the law"[38] and in view of this, the rules would necessarily be open in some cases. These cases are called *hard cases*. They are not at the center of the cases in which rules are naturally applied, but they are, in what Hart calls, the Penumbra[39].

In these cases, Hart basically gives the realistic answer:

> Such cases are not only difficult cases, controversial in the sense that reasonable and intelligent jurists may disagree about which answer is legally correct, but that the law in such cases is fundamentally incomplete; it provides no answer to the questions at stake in such situations. They are not legally regulated and, in order to obtain a decision in such cases, the courts must exercise the restricted function of creating the right that I refer to as discretionary power[40].

The problem around judicial discretion is the touchstone of the debate between Hart and Dworkin, which motivated a series of articles by Dworkin, transformed into books such as *Taking Rights Seriously* and *A Matter of Principle*[41]. Thus, the term discretion, as clarified by Dworkin, can be pointed out in three meanings.

[35] DWORKIN. 1999. Ibid. p. 42.
[36] IRON. 2020. Ibid. p. 327.
[37] OMMATI. Ibid.
[38] HART. 2002. Ibid. p. 134.
[39] HART. 2002. Ibid. p. 535.
[40] HART. 2002. Ibid. p. 314.
[41] COAST. 2015. Ibid. p. 134.

The first would be in cases where a public authority, when judging them, could not simply adapt a predetermined rule to them mechanically, but through the use of the ability to judge[42].

The second would be the authority that a public official would have to make a decision in the last instance and that this cannot be reviewed and cancelled by any other official[43], these two being considered discretionary in the weak sense.

Still, there is a third conception of discretion, which would be in a strong sense and the most reprehensible point for the theorist, because it is identified when there is no legal link to previously determined standards:

According to Dworkin:

> Sometimes we use "discretionary power" not only to say that a public official must use his discretion in applying the standards that have been set for him by the authority or to assert that no one will review that exercise of judgment, but to say that, in certain matters, he is not bound by the standards of the authority in question[44].

From this perspective, Dworkin argues that discretion in the strong sense would be considered unjust, since if some genuine political decisions are taken away from the legislature and handed over to the courts, then the political power of individual citizens, which manifests itself at the moment when those citizens elect their representatives in the legislative branch and not those in the judicial branch, is the political power of individual citizens. will be weakened[45].

It is precisely against these issues that Dworkin presents the conception of Law as integrity:

> Law as integrity asks judges to admit, as far as possible, that law is structured by a coherent set of principles of justice, fairness, and due process, and asks them to apply them in the new cases that come before them, in such a way that each person's situation is just and equitable according to the same standards[46].

Still, integrity is presented in the form of a twofold principle, one of them being the principle of integrity in legislation and the other the principle of integrity in judgment:

> The author subdivides the requirement of integrity into two principles: integrity in law and integrity in judgment. The first is the task imposed on the legislature, by producing legal norms, to make the set of laws of the State consistent in principle. As for the second, "it requires judges to see the body of law as a whole, in a uniform way, not as a series of distinct and sparse decisions in relation to which they are free to consider or amend, considering them only with strategic interest for the concrete case".[47]

[42] DWORKIN, Ronald. Taking rights seriously. Martins Fontes, São Paulo, 2002, p. 51.
[43] Ditto.
[44] Ibid., p. 52.
[45] DWORKIN, Ronald. A matter of principle. Martins Fontes, trans. Luís Carlos Borges, São Paulo, 2000, p. 30.
[46] DWORKIN. 1999. Ibid. p. 291.
[47] RESCHKE, Daniel. Notes on Ronald Dworkin's theory of law as integrity. Jus. 2020. Available at: https://jus.com.br/artigos/86433/apontamentos-acerca-da-teoria-do-direito-como-integridade-de-ronald-dworkin

In Taking Rights Seriously, Dworkin states that the norms known as a genus, and that genus is subdivided into species, such as rules, principles, and policies[48]. The author also states that the term principles, in a generic way, refers to this whole set of standards that are not rules, while the distinction between principles and policies is made more precisely:

> I call "politics" that kind of standard that establishes a goal to be achieved, usually an improvement in some economic, political, or social aspect of the community [...] I call "principle" a standard that must be observed [...] because it is a requirement of justice or fairness or some other dimension of morality[49].

Thus, it can be observed that while policies describe goals for a community, principles establish a more individualized objective, so Dworkin understands that especially in difficult cases, the decisions that come as a consequence should be made based on arguments of principles[50].

This reasoning can be assimilated to the metaphors of "Judge Hercules" and the "Chain Romance".

Bearing in mind that Judge Hercules' proposal concerns the challenge of, in addition to recognizing the right created through laws, the judge must also follow the decisions that the Judiciary itself created in the past[51].

Thus, in Streck's words, it can be seen that:

> It is precisely by overcoming the subject-object scheme that Dworkin does not transform his "judge Hercules" into a solipsistic judge, nor into someone concerned only with elaborating previous discourses, unconcerned with application (decision). Hercules is a metaphor, demonstrating the possibilities of controlling the subject of the object relation, that is, with Hercules, Dworkin wants to demonstrate that it is not necessary, in order to overcome the solipsistic subject (Sebstsüchtiger) of modernity, to replace it with a system or a structure (e.g., as Luhmann and Habermas do).[52]

With regard to the central idea of the chain novel, each judge should assume his role as "a novelist in the chain", and thus should have the duty to read what the other judges have done in the past[53] and at the same time, ensure an opening so that the next writer can continue the enterprise[54].

[48] DWORKIN. 2002. Ibid. p. 36.
[49] Ditto.
[50] DWORKIN. 2002. Ibid. p.132.
[51] OMMATI. Ibid.
[52] STRECK, Lenio Luiz. The interpretation of law and the dilemma of how to avoid juristocracies: the importance of peter haberle for overcoming the solipsistic attributes (eigenschaften) of law. Observatory of Constitutional Jurisdiction. Brasília, IDP, year 4, 2011, p. 12.
[53] MOTTA. 2009. Ibid. p. 87.
[54] OMMATI. Ibid.

The essence of the metaphor of the chain novel can be easily absorbed by analyzing the following excerpt from Trindade's writings:

> Thus, it can be observed that each writer, with the exception of the first, has a double responsibility: to interpret, since the story already written must be given meaning, and to create, since the story must continue, with the decision of who the characters are, what are the reasons that move them, what is the central theme developed so far, what literary resources or figures are capable of contributing to the story taking one direction or another. etc[55].

In the face of this, what is in opposition is the notion of a mechanical formula to decide, as in the first moment was done by Judge Ângelo in Measure by Measure, and also the strong discretion to decide according to his personal criteria, in the second moment of the aforementioned piece. This is because there is a correct answer when the decision is based on arguments of principle.

There is a whole framework of considerations that the judge must take into account when deciding a case, especially when it is a difficult case, because in this case, there must be coherence and integrity in its reasoning, considering that all individuals in the community of principles must be treated with equal consideration and respect[56].

Therefore, what Dworkin is arguing as a critique of legal positivism, especially when it comes to discretion, is that the magistrate should not be the one who creates the law, much less should he also be the one who merely applies the law literally, the so-called mouth judge of the law. Therefore, for him, the activity must contain a self-reflexive and interpretative attitude.

5 FINAL CONSIDERATIONS

As stated at the beginning of this study, one of the reasons for the use of the research and teaching methodology arising from the junction of Law and Literature is due to the intelligence of this tool, considering that with the use of literary texts to exemplify and help illustrate the legal scenario for the various types of readers, Such concepts, which previously would have been restricted to only those who master the technical legal language, will now be within the reach of a considerable number of the population, and thus, the propagation of knowledge will become more and more effective, thus being a rung on the ladder of development of humanity.

[55] TRINDADE, André Karam. Hermeneutics and Jurisprudence: the control of judicial decisions and the Copernican revolution in Brazilian procedural law. Journal of Constitutional Studies, Hermeneutics and Theory of Law, vol. 7, n. 3, Unisinos, 2015, p.247.
[56] OMMATI. Ibid.

As for the choice of the play Measure for Measure, elaborated by Shakespeare, it was due to the fact that it demonstrates a legal world that, through what was reported in the course of this study, makes clear all the problems in which legal positivism is involved.

When one starts from the point at which Judge Angelo is attached to the idea that "the law is and period", when he understands that Claudio must die, one glimpses the aspect of the judge who is the mouth of the law, who simply repeats in his decisions the sayings contained in the body of the norms in a mechanical way.

However, soon after informing Isabella that if she slept with him, her brother would be released, the judge abandons his profile as the mouth of the law, and begins to enjoy judicial discretion, in view of his voluntariness to change a previously determined law.

At this point in the present study, it is necessary to understand how legal positivism permeated exegesis, detaching itself from any concern with effecting justice from the content of the norm to Kelsen, who understands that the law is not sufficient by itself.

In addition, and in view of these gaps, the criticisms of Hart and Dworkin are present, because the former's thoughts revolve around that laws have an open texture, which allows for a great exercise of a creative function of the magistrate, thus presenting itself as a fundamental milestone for legal hermeneutics and the theory of law.

Meanwhile, Dworkin's thinking takes place mainly when it engages in what he calls strong discretion (absence of attachment to previously determined standards), because according to his understanding, the fundamental piece for correct decision-making is when the arguments that support it are used based on principles and not on policies.

Thus, when deciding a judicial case, magistrates must be guided by attitudes that involve a self-reflexive and interpretative practice.

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