

DOING JUSTICE TO RONALD DWORKIN: THE INTEGRITY OF THE LAW AND THE COMMUNITY OF PRINCIPLES INSTITUTED BY THE 1988 CONSTITUTION IN THE LIGHT OF MENELICK DE CARVALHO NETTO



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ABSTRACT

The present *paper* aims to reread Dworkin's theses in the light of the work of Menelick de Carvalho Netto, in order to better understand the exact dimension of the transformations that Dworkin operates in the field of the theory of law (and, above all, of the theory of the Constitution) and thus lay the theoretical foundations for a critical appraisal of the reception of Dworkin's work in the light of the work of Menelick de Carvalho Netto. After a brief introduction, the divergence between Dworkin and the so-called neopositivist authors about judicial discretion will be used as a motto to present Menelick de Carvalho Netto's particular reading of Dworkin's work, concluding with the demonstration of how Dworkin operates, in the field of Law, the so-called linguistic-pragmatic turn.

Keywords: Philosophy of Law. Law Theory. Ronald Dworkin. Menelick de Carvalho Netto. Judicial discretion. Linguistic-pragmatic turn.

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INTRODUCTION

In 1991, on the occasion of a colloquium organized by the Society for the History of Psychiatry and Psychoanalysis on the occasion of the 30th anniversary of the work *"History of Madness"*, the philosopher Jacques Derrida gave a notorious lecture, suggestively entitled *"Doing Justice to Freud"*, through which he resumed his debate with Michel Foucault, held a few decades earlier³, seeking to resize some points of Freud's work Taking the aforementioned exhibition as its motto, the work proposed here aims to proceed to a critical appreciation of the reception of Ronald Dworkin's work by some of his readers (and staunchest critics), especially in Brazil.

More specifically, it is proposed a rereading of Dworkin's theses in the light of the work of Menelick de Carvalho Netto, in order to better understand the exact dimension of the transformations that Dworkin operates in the field of the theory of law (and, above all, of the theory of the Constitution), as well as to lay the foundations for an eventual inquiry about how an unreflective and inconsistent use of his theoretical instruments can explain many of the obstacles we have faced, in the last 30 years, in the achievement of the Democratic Rule of Law instituted by the 1988 Constitution.

THE PROBLEM

Ronald Dworkin is, undoubtedly, one of the most relevant theorists to think about law in the context of the last quarter of the twentieth century. Widely cited, Dworkin had his scathing criticism of the judicial discretion of Hart's legal neopositivism (DWORKIN, 1978) adopted worldwide, having his stance in relation to the principled dimension of law, and even his concept of integrity of law, served as the basis for much of the theoretical developments that followed it. Jürgen Habermas, for example, borrows practically the entire theory of law as integrity to support his discursive theory of law, even though he makes a point of recording his divergences with the American author (HABERMAS, 1997a, pp. 241-296). Robert Alexy, on the other hand, appropriates Dworkin's developments to construct his own interpretation of the principled dimension of law, also seeking to control arbitrariness, through the proposition of a rigorous method through which the principled incidence would be effective (ALEXY, 2015) – in spite of the inherent complications of such a project in the face of the theoretical assumptions of the conception of law as integrity.

³ DERRIDA, Jacques. "Doing justice to Freud: the history of madness in the age of psychoanalysis". In: ROUDINESCO, Elisabeth et. Al. *Foucault: readings of the History of madness*. Trad. Maria Ignes Duque Estrada. Rio de Janeiro: Relume-Dumará, 1994.

Also in Brazil, Dworkin's work has found great reception. According to Lenio Streck, the importance of Dworkin's theory as a foundation for the attempt to overcome the historical powers of free conviction or free appreciation that were expressly conferred on the Judiciary by the Brazilian procedural legal system is unequivocal. Article 926 of the CPC/2015, by providing that "the courts must standardize their jurisprudence and keep it stable, integral and coherent", used, according to Streck, Dworkin's theory of law as integrity (STRECK, 2016, p. 62).

In fact, it is not at all uncommon to find, in judicial decisions throughout Brazil, citations and evocations of the theoretical construct of law as integrity – although, in many cases, without due methodological rigor or as a mere argument of authority or erudition. The phenomenon is such that some authors will even speak of the existence of a "*doctrinal fascination*" with the question of principles in Brazil (NEVES, 2013, pp. 171-220) – a debate that largely stems from the appropriation (adequate or not) of Dworkin's work.

At the same time, in addition to adoptions and appropriations, Dworkin's work is also the object of harsh criticism. His thesis of the only correct decision is sometimes considered inadequate because it supposedly does not account for the even philosophical impossibility of conceiving, in the context of a hypercomplex social practice, an answer that, a priori, can solve the problems that are posed to the law. In this line, the model of judge proposed by him, the one that follows the theory of law as integrity (Judge Hercules), is sometimes characterized as a "*monological*", "*abstract*", "*superhuman*" ideal type and, therefore, a mere abstract mental construction, of dubious explanatory capacity in the face of the concrete reality of legal practice. These, to a greater or lesser extent, are the objections that authors such as José Rodrigo Rodriguez (RODRIGUEZ, 2013, pp. 16-17), Marcelo Neves (NEVES, 2013, p. 59-60) and Habermas (HABERMAS, 1997, v. I. p. 276-278) will formulate to it.

To these readings, the work of Menelick de Carvalho Netto, also advanced by Guilherme Scotti, is opposed, who, based on Hans Georg Gadamer and Habermas himself, will undertake an original reading of Ronald Dworkin's theoretical framework, always having as a background the Democratic State of Law instituted with the advent of the 1988 Constitution.

From this perspective, Dworkin's work is based on a rejection of the neopositivist thesis of reducing the legitimacy of law to simple legal textuality, without, however, giving up the distinction between law, politics and morals, insofar as this distinction is concretized

precisely in the "translation of moral principles and political objectives into properly legal language, thus internalizing and resignifying its contents in positive law" (CARVALHO NETTO; SCOTTI, 2011, p. 57-58).

Dworkin conceives law, then, as an interpretative practice undoubtedly immersed in the past context of institutional history in which it is inscribed, but which, at the same time, must open itself to the task of resolving each concrete case submitted to it in its uniqueness. And it is in this context that the thesis of the only correct answer is inscribed, taken not as the a priori anticipation of the content of a given judicial decision (much less as a method to be followed by the interpreter to guarantee the rectitude of his conclusions), but rather as a counterfactual posture of the interpreter, who must take rights seriously, interpreting reconstructively and in their best light the legal principles chosen by a given community to govern their life in common.

Dworkin operates, in the field of legal theory, the so-called linguistic turn (which he calls "*semantic goad*"), reworking its epistemological consequences for legal practice (DWORKIN, 2014, p. 55-56) – an exercise that is effected by shifting the question of what a Constitution is to the questioning of what a Constitution constitutes. In this line, the Constitution constitutes "a community founded on principles" based on the "reciprocal recognition of the freedom of each and every one of its members" (CARVALHO NETTO; SCOTTI, 2011. p. 158).

Such principles consist precisely of the most essential commitments to equality and freedom (fundamental rights) reciprocally recognized by the members of a given community as co-authors of these same commitments. It is a notion, therefore, closely linked to the daily practice of democracy, which is particularly true of the process that resulted in the institution of the 1988 Constitution, in which, as Menelick de Carvalho Netto points out, a "growing organization of civil society", verified and intensified throughout the work of the National Constituent Assembly, "not only forced the transition to the democratic regime, but, above all, it lent to the national constituent process, even though the Assembly was not exclusive, legitimacy never achieved in our constitutional history, due to the active and direct participation of the citizen" (CARVALHO NETTO, 1992, p. 293)⁴.

It is democracy, taken in its procedural dimension of elaboration of the constitutional text, that is the great novelty of the constituent process of 1987/1988, and it is this circumstance, which, in a way hitherto unexpected, effectively breaks with the autocratic

⁴ In this line, see also FERNANDES BASTOS, 2018.

order and confers the original and genuinely instituting character to the work of the National Constituent Assembly (REZENDE, 2017).

The integrity of law means precisely "the experiential densification of the ideal of the community of principle [...], as well as, in a diachronic dimension, the reading in the best light of its institutional history as a learning process in which each generation seeks, in the best way it can, to live this ideal" (CARVALHO NETTO; SCOTTI, 2011. p. 67).

In the midst of this debate, the work now carried out aims to proceed to a critical appreciation of the reception of Dworkin's work in the light of the work of Menelick de Carvalho Netto. More specifically, due to the delimited scope of the collective work in which this effort is inserted and in view of the very limits of time and space of the Congress in which this exhibition was originally presented, the present *paper* will focus on the theoretical bases of Menelick de Carvalho Netto's reading of part of Ronald Dworkin's work.

JUDICIAL DISCRETION AND "ONLY CORRECT ANSWER": THE INDISPENSABILITY OF THE DUTY TO STATE REASONS FOR JUDICIAL DECISIONS FOR THE INTEGRITY OF DWORKIN'S RIGHT

It is known, as acknowledged by H.L.A. Hart himself in his revealing *Postscript* to the second edition of his work "*The Concept of Law*", that the central point of the theoretical clash between him, the greatest exponent of Anglo-Saxon legal neopositivism, and Ronald Dworkin, his main critic and successor in the chair of Theory of Law at the University of Oxford, revolved around *judicial discretion* (HART, 1994, p. 272).

Starting from the reconstruction of this important divergence, a good motto to present Menelick de Carvalho Netto's particular reading of Dworkin's work lies in elucidating what the theory of law as integrity has to say about the grounding of judicial decisions as an instrument to safeguard the validity of the Law against casuisms and preferences of judges when the Law is applied concretely.

LEGAL NEOPOSITIVISM AND THE DISCRETION OF THE APPLICATOR: OPEN TEXTURE OF THE LEGAL SYSTEM (HART) AND FRAME OF POSSIBLE MEANINGS (KELSEN)

Hart adopted, in his explanation of how the law would be applied, the idea that there are situations in which the judge does not have at his disposal a legally ready solution on

how to decide a particular case before him (HART, 2009, p. 163-167). In his words:

Whatever idea is chosen for the transmission of patterns of behavior, whether precedent or legislation, these patterns, however easily they may work in the great mass of common cases, will prove inaccurate at some point, when their application is called into question; will have what has been called an open texture (HART, 2009, p. 166).

And this is because "[...] in the case of legislation, as a general characteristic of human language; uncertainty in bordering areas is the price to pay for the use of general classificatory terms in any form of communication regarding factual issues" (HART, 2009, p. 166).

Giving a somewhat skeptical response to this indeterminacy of the Law in some border cases, Hart states, about the judge, that "[...] the discretion that language confers on it [...] can be very broad, in such a way that [...] the conclusion, although it may not be arbitrary or irrational, will in fact be the result of a choice" (HART, 2009, p. 165).

In a similar way, Hans Kelsen, also starting from the neopositivist background of belief in the scientificity of Law through the control of language, created his own theory of judicial discretion. In particular, the theory of interpretation proposed by Kelsen is also based on the premise that the Law does not prescribe all solutions for all cases – that is, the act of applying the Law is partially indeterminate, either intentional (KELSEN, 1987, p. 364), or unintentionally (KELSEN, 1987, p. 365). Thus, Kelsen establishes the crucial thesis of the frame of possible meanings:

The norm of the higher echelon cannot bind in all directions (in all aspects) the act through which it is applied. There must always be a margin, sometimes greater or smaller, of free appreciation, in such a way that the norm of the higher level always has, in relation to the act of normative production or execution that applies it, the character of a framework or frame to be filled by that act (KELSEN, 1987, p. 364).

For Kelsen, the judge, when assessing a concrete case, must keep in mind that any decision that sticks to the limits of the frame, that is, any possible decision-making meaning extracted within this framework, is Law (KELSEN, 1987, p. 366). And who would then be responsible for fixing the limits of the frame of possible meanings? According to Kelsen, this would be the role of interpretation, that is, "[...] the fixation by cognitive means of the meaning of the object to be interpreted", resulting in "[...] the knowledge of the various possibilities that exist within this framework" (KELSEN, 1987, p. 366).

According to Dworkin, the *skeleton of (neo)positivism*, common to its various

strands⁵, can be synthetically described as follows: (a) by Law one must understand the set of rules that govern life in society, which can be identified not according to their content itself, but according to their *pedigree*, that is, according to the way they were inserted into the legal system and how they gained authority; (b) since the Law is the set of rules of the community, in the event that a claim is not covered by the clear application of a certain rule, there will be discretion of the applicator, who must decide the case; and, (c) legal rights and obligations derive solely and exclusively from the rules, and there is no need to speak of pre-existing rights and obligations predetermined to the positive legal system (DWORKIN, 2002, p. 27-28).

As can be seen, despite their particularities, the neopositivist theories of H.L.A. Hart and Hans Kelsen, as far as the object of the present work is concerned, are convergent in terms of the semantic openness of normative statements and in terms of the discretion of the applicators at the time of choosing one of the possible meanings to be applied in cases without immediate solution by the technique of subsumption of concrete problems to legal norms in the abstract. In this line, both authors reject the idea, which will later be re-signified by Dworkin's theory, that there is a single correct decision for a given concrete case (HART, 2009, p. 171; KELSEN, 1987, p. 371).

Dworkin, in his scathing criticism of Hart, will point out that both neopositivism and realist antinormativism have not been able to answer the question underlying the central problem of the Theory of Law: "[...] there are controversies related to moral principles that underlie an apparently linguistic problem" when analyzing factual court decisions in so-called easy or difficult cases (DWORKIN, 2002, p. 9). As Dworkin points out, "the theory of law should respond to this concern by exploring the nature of moral argumentation, trying to clarify the principle of equity that critics have in mind, to see if judicial practice really satisfies this principle" (DWORKIN, 2002, p. 9). This is the central objective of his theory of law as integrity.

INTEGRITY IN POLITICS: FACING THE OLD-NEW QUESTION ABOUT THE FOUNDATIONS OF LEGITIMACY OF LAW

Dworkin raises, at the outset, the fundamental philosophical question regarding the political and moral legitimation of the legal apparatus of a community (DWORKIN, 2014, p.

⁵ As Dworkin points out, "[...] the different versions differ mainly in their description of the fundamental test of pedigree that a rule must satisfy in order to be considered a legal rule" (DWORKIN, 2002, p. 29).

231): where does the moral authority of the Law come from to monopolize the coercive force of the State, creating legal duties and obligations for people?

For him, the explanations given by classical political philosophers, such as Kant and Rousseau, with their ideas of legitimation through notions of social contract, self-legislation and autonomy, would not satisfactorily explain the nature of the legitimacy of Law, since they would forget the indeclinable aspect referring to the most intimate and fundamental moral obligations that the members of a given basic community have in relation to each other. In his words:

Integrity [...] promotes the union of the moral and political life of citizens: it asks the good citizen, when deciding how to treat his neighbor when the interests of both conflict, to interpret the common organization of justice to which they are committed by virtue of citizenship (DWORKIN, 2014, p. 230).

In his conception, these basic political and moral obligations are important to the extent that the "[...] A State is legitimate if its constitutional structure and practices are such that its citizens have a general obligation to obey political decisions that intend to impose duties on them" (DWORKIN, 2014, p. 232). To characterize the nature of these obligations, Dworkin recovers one of the famous mottos of the French Revolution (1789), fraternity, known more commonly by the synonym "community" (DWORKIN, 2014, p. 228). What characterizes a community? What political-moral ties unite its members?

According to him, associative communities and the obligations resulting from them are defined by the history of their social practices, which occurs "[...] not by decree or ritual, not through the explicit extension of conventions, but in a more complex way, introduced by the interpretative attitude" (DWORKIN, 2014, p. 238).

Dworkin combines two complex biases when characterizing the associative obligations of a community: the social practice that creates the obligations and the critical interpretation of these same practices. This is because there are social practices that forge groups that do not fit the requirements for mutual individual responsibilities to be seen as true fraternal obligations (DWORKIN, 2014, pp. 242-243). Precisely the delimitation of the fulfillment or not of these conditions is a matter of critical interpretation (DWORKIN, 2014, p. 246-247).

It is in this sense that policies of racial purity and discrimination are social practices that, despite creating genuine *a priori obligations*, must be extinguished due to the profound injustice they cause, as well as the flagrant disrespect for the requirements of

associative communities, notably with regard to the requirement of equal interest, consideration and respect by citizens among themselves.

In fact, Dworkin is not simply concerned with the sociological observation and description of community practices, but with "[...] the interpretative question of the nature of the mutual interest and responsibilities that our political practices must express to justify the claim of true community that we seem to have" (DWORKIN, 2014, p. 252). Thus, Dworkin proposes three general illustrative models of political association, based on the types of attitudes and ties between their respective members: (a) *de facto association*: there is no special character in the association of its members, since it results from mere historical-geographical causality from which no special associative obligation or responsibility is derived; (b) *the model of rules*: the members of the community share the general pact to obey the rules particularly established by the community as commitments that reflect negotiations of diverse interests, the obligations of individuals to others being exhausted only within the limits prescribed by the contents of the rules and not in any underlying principles of political morality; and, (c) *the model of principles*: it is based on the assumption that the members of the community are bound by common principles and not simply by consensually stipulated rules, and individuals are bearers of rights and duties when these are derived from this list of principles, even if they have never been formally declared by any public authority (DWORKIN, 2014, p. 252-255).

Of these three specimens of community, only the third, the *model of principles*, would satisfy the three requirements for the configuration of an authentic association, since it would be the only one to present the third requirement, that is, the genuine and profound interest of each member in all the individuals of the community. In other words: "[...] its demand for integrity presupposes that each person is as worthy as any other, that each should be treated with the same interest, according to a coherent conception of what this means" (DWORKIN, 2014, p. 257).

According to Menelick de Carvalho Netto and Guilherme Scotti:

A true community, which Dworkin calls principles, is a special community. In addition to sharing these common principles, they understand it as a community of principle, since its members know each other reciprocally as free and equal, there is a respect for the difference of the other that is not to be confused with moral emotion, altruism or love. The reciprocal obligations of this community derive from this special nature that constitutes it. These norms are not obeyed as the realization of a global, universal justice, in the example given by Dworkin. Such obligations arise precisely from this sense of belonging to a community that shares the same principles (CARVALHO NETTO; SCOTTI, 2011, p. 62-63).

In fact, a true community accepts the postulate of integrity, insofar as "[...] successful constructive interpretation of our political practices as a whole" (DWORKIN, 2014, p. 259), as one of its greatest political virtues, alongside equity, justice and due process of law (DWORKIN, 2014, p. 62). Thus, for him, in response to the classic dilemma of political philosophy, one can see "[...] the legitimacy of our institutions, and the political obligations they presuppose, as a matter of fraternity, and we should therefore try to perfect our institutions in such a direction" (DWORKIN, 2014, p. 258).

That is why, for Dworkin, the Constitution constitutes a *community of principles* (CARVALHO NETTO; SCOTTI, 2011, p. 158), founded on equal respect and consideration among its members; political integrity being a requirement and a greater virtue of coherence when reconstructing the political trajectory of a given genuine association of individuals governed by common principles, by the same Constitution. In the words of Menelick de Carvalho Netto: "Constitutional Law is life; either it is life or it is nothing" (CARVALHO NETTO, 2003).

INTEGRITY IN LAW: "CHAIN ROMANCE" AND "ONLY CORRECT ANSWER"

However, this political virtue of integrity does not apply exclusively to the legislative process. Dworkin derives the reasoning woven about the political legitimation of legal practice for judicial deliberation itself, starting to speak of *integrity in law* and focusing on the figure of the judge.

According to him, unlike conventionalism and pragmatism, law as integrity is intended to be an interpretative theory and not a certain interpretation or specific program of how judges should decide (according to the decisions of the past – *conventionalism* – or through calculations that maximize collective well-being – *pragmatism*). This is because the law as integrity requires that the judge continue "[...] interpreting the same material that he himself claims to have successfully interpreted. It offers itself as the continuity — and as the origin — of the more detailed interpretations it recommends" (DWORKIN, 2014, p. 273).

In this sense, as with integrity in politics, the political-constitutional history of the community is essential for integrity in judicial deliberation, since it requires a vertical and radical coherence of principle between the claims declined by the parties (to be assessed by the judge), and the set of principles of equity, justice and due process of law necessary for its justification as an institutional mechanism that attributes rights, duties and obligations to people (DWORKIN, 2014, p. 273-274).

It is important to point out what coherence means to him. Dworkin criticizes a "[...] blind form of coherence" (DWORKIN, 2014, p. 266), according to which the roles of the legislator, when proposing and deliberating on a bill, and of the judge, when dealing with a dispute, cannot be seen as the mere thoughtless repetition of past decisions. According to him, the coherence required by integrity is deeper, because "[...] it demands that the public norms of the community be created and seen, as far as possible, in order to express a single and coherent system of justice and equity in the correct proportion" (DWORKIN, 2014, p. 264).

It is in this way that his theory, recognizing the permanently interpretative condition of Law, will defend the perfect compatibility between innovations and new interpretations of legal practices with the concept of coherence that it raises. This is because "[...] an institution that accepts this ideal will sometimes, for this reason, move away from the narrow line of previous decisions, in search of fidelity to the principles conceived as more fundamental to this system as a whole" (DWORKIN, 2014, p. 264).

And he adds: "[...] Integrity is a more dynamic and radical norm than it seemed at first, as it encourages a judge to be more comprehensive and imaginative in search of coherence with the fundamental principle" (DWORKIN, 2014, p. 265). In this context, the concept of creative interpretation inherent to law as integrity emerges, which prescribes that interpreting the community's legal material, like artistic interpretation, is not simply describing, but rather "[...] impose a purpose, to the text, to the data or to the traditions that it is interpreting" (DWORKIN, 2014, p. 275). This is the normative aspect of interpretation, which is even more evident for Law, which is, for Dworkin, a system of action coherently organized and primarily aimed at resolving conflicts according to the postulate of equal respect and consideration, including for the different moral conceptions of the political community (DWORKIN, 2014, p. 202).

With this model of interpretation in perspective, Dworkin proposes a comparison between the role of the judge and that of the literary critic who analyzes a complex poem, with the peculiarity that judges are, at the same time, authors and critics of interpreted law (DWORKIN, 2014, p. 275). As a consequence, Dworkin creates the metaphor of the *chain novel* to explain legal practice⁶: imagine a daring literary project composed of several novelists with the objective of collectively writing a novel, with each writer being responsible for writing a chapter, which develops from the previous chapter written by someone else and so on, so that, in the end, the novel appears to have been written by a single author, even though it is a collective work (DWORKIN, 2014, p. 276).

Revoking the classic question "do judges discover or invent law?", Dworkin states that "[...] we cannot establish a very clear distinction between the stage in which a chain novelist interprets the text that has been handed to him and the stage in which he adds his own chapter, guided by the interpretation he has chosen" (DWORKIN, 2014, p. 279).

In other words:

A judge who decides [...] introduces additions to the tradition he interprets; Future judges are faced with a new tradition that includes what was done by the former. It is clear that literary criticism contributes to artistic traditions in which authors work; The nature and importance of this contribution configure, in themselves, problems

⁶ On the chain novel: "By taking into account constitutional history, we can see what this hard process of institutional learning has taught us about the fundamental rights to equality and freedom. The productive constitutive tension inherent to these principles is present in all the classical dichotomies typical of modernity, such as public and private, popular sovereignty, constitutionalism, republicanism and liberalism, etc., as they only apparently present a paradoxical nature. Here too, these effectively opposed poles are also, at the same time, constitutive of each other, in such a way that they establish a rich, productive and permanent tension, capable of endowing the constitutional doctrine with the necessary complexity to face problems that it was not even capable of seeing before" (CARVALHO NETTO; SCOTTI, 2011, p. 67-68).

of critical theory. But the contribution of judges is more direct, and the distinction between author and interpreter is more a matter of different aspects of the same process (DWORKIN, 2014, p. 275).

Dworkin, in advancing his theory, proposes as an archetype of law as integrity and its holistic and permanently interpretative character, the metaphor of a superhuman judge named Hercules:

Law as integrity, then, requires a judge to test his or her interpretation of any part of his or her community's vast network of political structures and decisions, asking himself or herself whether it could be part of a coherent theory that would justify that network as a whole. No royal judge could impose anything that, at once, comes close to a full interpretation of all the law that governs his community. That is why we imagine a herculean judge, endowed with superhuman talents and with infinite time at his disposal. A true judge, however, can only imitate Hercules to a certain extent. It can allow the scope of its interpretation to extend from the immediately relevant cases to cases belonging to the same field or general department of law, and then unfold even further, as far as the prospects seem most promising (DWORKIN, 2014, p. 294).

And here arises the postulate of the *only correct decision*. Against the thesis of judicial discretion in difficult cases (*Hard Cases*), widely supported by the legal neopositivism of Hart and Kelsen, Dworkin suggests that, even in these cases without a pre-defined solution by any rule – given that each case is unique and unrepeatable – there is a pre-established right to have one's legal claim assured (SCOTTI, 2008, p. 18).

It must be said, however, that this argument of the only correct decision does not represent, in any way, a method⁷ capable of determining, *a priori*, the solution of a given dispute. On the contrary, it is "[...] a *posture* to be adopted by the applicator in the face of the concrete situation and based on legal principles, understood in their integrity" (SCOTTI, 2008, p. 18-19, emphasis in the original). In the author's own words, "[...] law as integrity consists of an approach, in questions more than in answers, and other jurists and judges who accept it would give answers different from theirs to the questions posed by this conception of law" (DWORKIN, 2014, p. 287).

⁷ In fact, "[...] Dworkin's starting point here, therefore, is that of the criticism of the excess of unconscious rationality that marked the previous view not only of the concept of science but of the very concept of law, of norm and of the legal order, it is to know that a general and abstract norm will never regulate by itself the situations of individual and concrete application, even by incorporating greater complexity into the ordering of principles that their adoption necessarily means, by giving greater density to the basic constitutional principles and, at the same time, opening up new possibilities for abusive claims" (CARVALHO NETTO; SCOTTI, 2011, p. 65-66)..

CONCLUSION: DWORKIN AND THE OPERATION OF THE LINGUISTIC TURN IN LAW

"The judge's sensitivity to the specifics of the concrete case before him is fundamental, therefore, so that he can find the appropriate norm to produce justice in that specific situation."

Menelick de Carvalho Netto (2004)

Contemporary theories of law have realized, with great difficulty, that the rigorous control of legal language and social reality through the promulgation of general and abstract laws would not be possible, precisely because language cannot be controlled. We are language (CARVALHO NETTO; SCOTTI, 2011, p. 50). Ronald Dworkin, deeply influenced by such developments in the philosophy of language and philosophical hermeneutics, operates, in the field of Theory of Law, the so-called linguistic turn (which he called "*semantic goad*"), reworking its epistemological consequences for legal practice (DWORKIN, 2014, p. 55-56).

According to Dworkin, the positivist explanation for legal rights and obligations, starting from a self-centered perspective in an eminently rule-based model, ignored other obligatory standards of conduct that regulate the decisions of judges, especially in difficult cases (those in which there is no predefined solution by a supposedly self-applicable rule): legal principles and policies (DWORKIN, 2002, p. 35-36).

By policies, Dworkin calls those reasons for deciding based on the maximization of collective objectives of the community, be they economic, political or social. Principles, on the other hand, would be standards of conduct dissociated from any objectives of this nature, since they embody "a demand for justice or equity or some other dimension of morality" (DWORKIN, 2002, p. 36) or, in other words, *trumps* against claims of distancing rights to the detriment of policies (DWORKIN, 2014a, p. 499-536).

The basic difference, as to the logical nature of the orientation they offer, between rules and principles would be related to the fact that, while rules work "in an all-or-nothing manner", being applicable if valid (DWORKIN, 2002, p. 39), while principles have a "dimension of weight or importance", and can be invoked, in the resolution of a concrete case, in contrast to another principle that may or may not be set aside⁸ depending on its importance for the resolution of the claim (DWORKIN, 2002, p. 42-43), which does not definitively exclude it from the legal system as is often the case with rules that would be, a

⁸ According to Dworkin, "[...] Only rules dictate results. When the opposite result is obtained, the rule is abandoned or changed. Principles don't work that way; they tilt the decision in one direction, though not conclusively. And they survive intact when they do not prevail" (DWORKIN, 2002, p. 57).

priori, valid and applicable (DWORKIN, 2002, p. 39).

For Dworkin, there is no need to speak of the judge's discretion in the sense used by the positivists, since, starting from the fundamental fact that the legal system is composed of rules and principles, in the event that there is no specific rule regulating a given concrete situation to be assessed, the judge will still be bound by patterns of behavior, namely, the principles, which, interpreted in their entirety, offer a legal restriction to the magistrate's act of deciding.

On how legal principles can be identified, Dworkin will say that, contrary to what is suggested by the neopositivist construction of the rules of recognition – which supposedly represent the transition from a primitive society to the rule of law, they would provide a test to determine the *pedigree* legal of the rules – the principles emerge as such to the extent that they represent an important dimension of political morality for the community, being discovered interpretatively. The rules themselves, in this scenario, are presented as densification of principles.

For him, therefore, the view of Law as a staggered order of legal norms is no longer sustained, which, given the open texture of language, could be challenged in different ways in *easy cases* and *hard cases* – a neopositivist classification to differentiate concrete cases in which there is, respectively, a clear rule disciplining a certain situation and others in which there is true legal indeterminacy as to the solution of the case. Seeking to overcome this simplification, Dworkin goes on to affirm that Law is an essentially interpretative practice and that interpretation carries with it the marks of its time, being subordinated to a true paradigmatic condition, that is, to a shared background of silence that constitutes and shapes the interpreter's view of the meaning of a certain normative statement and a certain principle, at that time and in view of the institutional history of the legal community.

There is no need to speak, then, of a

[...] reduction of the legitimacy of the text to simple legal textuality, in terms of a purely formal genesis of Law, as in Kelsen or Hart. The differentiation between law, morality and politics must be maintained, but this becomes possible precisely by translating moral principles and political objectives into properly legal language, thus internalizing and resignifying their contents in positive law (CARVALHO NETTO; SCOTTI, 2011, p. 57).

For Dworkin, contrary to what the neopositivists defend, Law is an open system of rules and principles. And why would it be an open system? The answer lies precisely in the hermeneutic-pragmatic turn operated by the American professor in the field of Theory of

Law and in his recognition that it is impossible to control language by general and abstract rules, allegedly exhaustive and rationally capable of regulating all its situations of application.

One of the great questions posed by Dworkin, when developing his theory of law as integrity, is to point out, against positivist discretion, that "[...] even in cases considered by positivism as hard cases, where there is no established rule clearly providing for the case, one of the parties may still have a pre-established right to have its claim assured" (CARVALHO NETTO; SCOTTI, 2010, p. 55).

On this point, Menelick de Carvalho Netto discusses it as follows:

Dworkin, of course, knows as well as Kelsen, that any text allows for several readings, the problem with the judicial decision, however, is that it occurs as a solution to a concrete conflict and also involves the interpretation of the facts that configure a situation of unique and unrepeatable application. These facts, as revealed by science itself and its theory, for example, through Thomas Khun's concept of 'paradigm', are, in fact, equivalent to text, that is, only apprehensible through the activity of interpretation, through an activity of reconstruction of the factual situation deeply marked by the point of view of each of those involved. For this very reason, here, in the domain of normative application discourses, justice is done not only to the extent that the judge is able to make a decision consistent with the current Law, but for this he has to be equally capable of putting himself in the place of each of those involved, of seeking to see the issue from all possible angles and, thus, proceed rationally or reasonably to the choice of the only norm fully adequate to the complexity and uniqueness of the application situation that presents itself (CARVALHO NETTO, 2004).

One of the great problems to be answered by the Democratic State of Law, competently diagnosed by Dworkin, is that referring to the rationality of Law and the linguistic-pragmatic impossibility of obliterating its structural indeterminacy through any method or through the pretense of strict control of language and the shameless edition of normative acts, supposedly capable of predicting and regulating any and all social problems.

Dworkin's great *insight* was to point out that judges have the indeclinable mission of, when poring over a concrete case to be judged, to analyze the peculiarities of the demand in their best light (DWORKIN, 2014, p. 292), reconstructing the institutional history of the constitutional principles involved in the litigation, resignifying them for the solution of that specific case, with the full awareness that the existence of a heuristic method can no longer be assumed capable of conferring superhuman rationality to an eminently human social mechanism such as Law.

In fact, according to Menelick de Carvalho Netto:

[...] in the paradigm of the Democratic Rule of Law, it is necessary to require the Judiciary to make decisions that, by constructively reworking the constitutive principles and rules of the current Law, satisfy, at the same time, the requirement to give course and reinforce the belief both in legality, understood as legal certainty, as certainty of the Law, and in the feeling of justice accomplished, which flows from the adequacy of the decision to the particularities of the concrete case (CARVALHO NETTO, 2004).⁹

Therefore, Dworkin's importance lies in realizing that "[...] rational is the knowledge that knows the precariousness of our own knowledge and seeks to deal rationally with the risks that it entails" (CARVALHO NETTO; SCOTTI, 2011, p. 65).

According to Menelick de Carvalho Netto and Guilherme Scotti:

Dworkin's starting point here, therefore, is that of the criticism of the excess of unconscious rationality that marked the previous view not only of the concept of science, but of the concept of law, of norm and of the legal order, is to know that a general and abstract norm will never regulate by itself the situations of individual and concrete application, even by incorporating greater complexity into the ordering of principles that its adoption necessarily means, by giving greater density to the basic constitutional principles and, at the same time, opening up new possibilities for abusive claims (CARVALHO NETTO; SCOTTI, 2011, p. 65-66).

Thus, for Dworkin, the neopositivist pretension of conceiving Law as a closed system of rules, sufficiently rational to govern life in society, is untenable. Contemporary Law, with the awareness of the limitations of its rationality and the paradigmatic condition in which we live, no longer supports the non-subsisting pretension of regulating all social problems through the pure and simple edition of normative acts.

As Menelick de Carvalho Netto points out:

With this openness to the complexity of every application situation, the applicator must then demand that the legal system present itself before him, not through a single rule that is part of a passive, harmonious and predetermined whole that has already regulated the application of its rules in an absolute way, but in its integrity, like a rough sea of norms without permanent tension competing with each other to govern situations (CARVALHO NETTO, 2004).

Thus, legal rationality can no longer depend, in the paradigm of the Democratic State of Law, on a hermetic system of rules, but – on the contrary – must represent a procedural opening for the reconstruction, before the public sphere and always having the concrete case as a guiding thread, of those pacts of freedom and equality called fundamental rights, which legitimize Law in late modernity, to the extent that they provide a productive and co-original tension with democracy, understood as popular sovereignty, as

⁹ In the same vein, see also CATTONI, 2013, p. 153.

the people making decisions about their life in community.

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