

## CONSTITUTIONAL OBSERVATORY OF RONALD DWORKIN: RECONSTRUCTING THE HERMENEUTIC EXPERIENCE OF THE LAW

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### ABSTRACT

this study investigates the legal arguments from the Regional Labor Court of the 8th Region, state of Pará, using for this purpose the research program hermeneutic of Ronald Dworkin, based on the theory of integrity that shows the presence of a community judicial principles and four behavioral traits linked in argument hermeneutics of judges.

**KEYWORDS:** sociology judiciary; constitutional argument; judiciary culture.

### OBSERVATÓRIO JUDICIÁRIO RONALD DWORKIN: reconstruindo uma experiência hermenêutica do direito

### RESUMO

O objetivo deste breve estudo é investigar o modo como foram produzidos os argumentos jurídicos de dois acórdãos do Tribunal Regional do Trabalho da 8ª Região, estado do Pará, utilizando com essa finalidade o programa de pesquisa hermenêutico de Ronald Dworkin baseado na teoria da integridade, através do qual identificamos a formação de uma comunidade judiciária de princípios e quatro características comportamentais interligadas na argumentação dos juízes.

**Palavras-chave:** sociologia judiciária; argumentação constitucional; cultura

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judiciária principiológica.

## INTRODUCTION

What is the Law? Why is so important to answer that question? What are the theoretical divergences about the concept of Law? Why is relevant the way how judges decides their cases?

There are voluminous process. Countless judicial decisions! Divergent and conflicting decisions! After all, is the Judiciary Power a chaos? A box full of surprises?

According to Ronald Dworkin in his book “The Rule of Law” we can know this dynamic and complexity and even make predictions by considering the theories of Conventionalism, of Pragmatism and the Integrity as three parameters that evaluates and describes the reality.

A famous american judge, for example, remembered by Ronald Dworkin, used to say he was more afraid of a judicial process than of the death penalty or of the taxes to be paid. Judicial civil procedure, said that same judge, have sometimes effects very open and unpredictable.

The difference between dignity and ruin in the moment of the judicial decision depends on a simple argument that maybe is not as powerful in another judge’s perspective or even to the same judge in the next day.

People often imagine they are about to win or lost a judicial case much more due to a “head wave” of the judge than due to any other general rule that comes from the Legislative.

How can be explained this fact? How can the Law and the Order command our lives when the legal texts (are) mute or obscure or ambiguous?

The objective of this paper is exactly to realize a programmatic study about the application of the concept of Law inside this complexity, intending to know how is developed the argumentation of three judgments from the Regional Labor Court of the eight Region, state of Pará, applying with this finality the scientific research from Ronald Dworkin, systematically organized by professor Heraldo Montarroyos (2012), where are

available the critical and methodology required to a well succeeded realization of this institutional research applied to the Law.

According to Montarroyos (2012), the concept of integrity is used in many fields of the Law in order to describe the dynamic of judicial procedures, that is, the way how judges decide their cases.

The book written by Ronald Dworkin- “The Rule of Law”- propitiates, according to the analyses from professor Montarroyos (op. cit.), a complex hermeneutic program of research that enable a deep analyze about the decision from judges, enabling to evaluate if a given decision had integrity or not and, more than that, revealing what kind of institutional behavior was adopted by the judge in the decision’s structure.

With this technology of observation of reality, we can map the decisions to know the logic of the judicial argumentation by applying three possible institutional theories. The conventionalist theory represents certain judicial tradition, propitiating the conventional rules used by judges.

On the other hand, the theory of pragmatism describes the creation of the Law by the judge when he has to deal with an obscure case, believing his decision will become a legislative rule or applied in future based strictly on a personal criterion of the judge.

Last, in theory of Integrity, “past” and “future”, comunitarism and individualism are synthesized in current reality of the judge, experimenting a critical situation to be resolved, whose answer cannot be found ready and finished in any place but “inhabits” invisibly the constitutional and legal order, reason why it can be “discovered” by creative interpretation of the judge.

As the reader will be able to realize later, the institutional phenomenon described by Ronald Dworkin help us to develop a speculative analysis by making predictions- or prognostic- about controversial cases not yet decided by Judiciary Power in last instance.

In order to maximize the potential of this research program, Dworkin has elaborated an academic hypothesis in the terms of the weberian ideal type, inventing the fictitious of Hercules Judge, who congregates legal, moral interpretative and democratic abilities enviable and extraordinary that help us to compare the real and the ideal in the

applied research. Full of virtues, if Hercules judge really exists, we therefore would have great constructive impacts in political-constitutional system

With this ideal hypothesis, as been shown by the analysis from professor Montarroyos (2012), we can identify the existence or not of a group of principles in judicial decisions, as here and there come decisions and debates that focus on the value and specific usefulness of principles (that are thoughtful and imaginative structures), resizing the function of rules (that are structures that determines what can be done and what cannot) and of criterion (that are structures used to decide attitudes immediate and effective in people's day-to day life.

There is, as noted by Ronald Dworkin, a daily ideological conflict between jurists; a divergence about interpretation that precedes the divergences about what rules should be applied to a specific case.

The divergence happens mainly about what exactly is the concept of Law, because there are different ways to evaluate the problem inside some legal theory, for that reason, there is divergence in the interpretation about what is the best method of application of the law in specific cases.

One of the critics and opposers of the hermeneutic theory of integrity, the positivist Herbert Hart, in his book "The concept of Law", said that rules are objective criterions of validity of the Law and, including, they that validates the principles, to the point to allow them to some judicial decision (MONTARROYOS, 2012). Dworkin, to his turn, claims principles are structures that prevail over rules and, in addiction, considerate that "the Law and the Judge are not neutral or armored against the ideologies and expectations of each one.

Originally, the principle of constitutional integrity was not intended to bound the judicial decision to a pre determined result (being favorable to the victim or the respondent) but is restricted to the study and recommendation of a more comprehensive, democratic and hermeneutic of reality in order to come closer to the concrete situation, intending a new quality or procedural methodology inside the Judicial Power. This methodology is in a first moment only addressed to the social scientist, but it is every time expected to be absorbed by real practice from the agents of the Judicial Power.

By mixing the judicial technique with the literary critic in a process of redesign of the Law, the research program of integrity suggests a new horizon to the study about the logic of judicial argumentation, that is, investigates carefully the way how judicial decisions are made and others decisions from judicial and political fields

For that reason, the application of the research of integrity program is advantageous, especially in the study of the real practice of the Law showing how judicial decisions are, in fact, made by a virtual choice among two extremes and a middle term, that is, between the conventionalism, the pragmatism and a third synthetic possibility, reinforced by the idea of political- constitutional integrity defended by Ronald Dworkin. This third possibility considers the principles as the central elements of the legal argumentation. It is different from the conventionalism, which establishes the dominance of the rules over the principles. It is also different from the pragmatism, which considers as dominant the personal criterions of the judge over the rules and principles present in the law

## **2. HERMENEUTIC RESEARCH PROGRAM**

The principiologic structure of integrity is composed by a group of principles. The practical principles are represented by the legislative, judicial and procedural. The transcendental, for his turn, are represented by the equality, liberty, responsibility, dignity, fraternity, community and legitimacy (MONTARROYOS, 2012). Therefore the practice of the Law presupposes a judge conscious of his task, inspired by the principle of moral integrity or political-constitutional integrality, must use many criterions, among them: the circumstances of the concrete case; the political moral of the community; the opinion of the institutions that are or must be coherent with the social group; the public opinion and, fundamentally, the totality of the present Constitution.

### **2. 1 Program of hermeneutic research**

The epistemology of the research program of integrity has definitions that are: ontological; methodological; axiological; theoretical; practical and contextual (MONTARROYOS, 2012). In general, these categories represented the Moral; the Existentialism; the Democracy; and the Hermeneutic, concentrated in the study of the institutional behavior from the judge, who must be moralist, existentialist, democratic, politicized, and mostly a constitutional entrepreneur

The judge must use the legal rules to decide his cases, but it is also expected that he assurance the coherence between the principles and the constitutional influence over his arguments, grounding his convictions with creativity, integrity, professionalism and autonomy as a thoughtful subject. On the other hand, some social factors contributes to the lack of integrity in the day-to- day of Judicial Power. For example: the excess of judge's work; the institutional corruption; the dishonesty; the lack of time; the political-partisan inclinations; the conventionalist or pragmatic legal culture; the administrative and burocratic massification of the law; the negation of the autonomy and creativity of the judge, and other sociological and historical obstacles.

According to that perspective, the political authoritarianism and the legal technicism are centrifugal forces that are opposed to the personality of the ideal Hercules judge, making more difficult the natural or spontaneous appearance of the convergent principle of integrity in the routine of Judicial Power among "poor and mortal judges"

According the model created by professor Heraldo Montarroyos (2012), the ontology of integrity considers basically the Law as an argumentative concept and that therefore its work methodology requires a constructive interpretation of the Law, as happens in the literary critic, when different persons read "Romeo and Juliet", recreates the story for nowadays and still talking about the same book.

The interpretation of arts and social practices should be concerned mostly about, as suggested by Ronald Dworkin, with the purpose or the meaning, not exactly with the creation with a new romance [or a new Federal Constitution, in our case.]

The axiology of this research program rejects the legal conventionalism and the pragmatism and adds a third critical possibility, beyond the rules and personal criterions; or, in other terms, rejects the individualism and the legal comunitarism.

The theoretical part of this research program defines integrity as an essential political virtue and, as the same time, as an instrument of practical-transcendental connection that orientates the researcher to describe and evaluate the legal arguments used on the case.

The *praxis* declares, on his turn, that the research program of integrity is able to make diagnostics and prognostic of the legal-constitutional reality, putting the principle of the *must be* synthesized with the must do and they should have been done in the same judge's practice.

On that moment, the application of the ideal Hercules type indicates procedures that the real judges should consider as ideally necessary in order to obtain the progress of the political-constitutional order.

For last, the context considers the time and the space where the principle of integrity can expand normally. This category recognizes the existence of a society that is open, democratic, plural, complex and that, inside this context will be judges resistant to bureaucratic basification and who wants to think more; expose more their opinions; participate more; and accordingly, change the political- constitutional order.

On short terms, the research of integrity program is a technology observational of reality elaborated by Ronald Dworkin in order to *describe, evaluate, speculate and intervene* in political and constitutional order (MONTARROYOS, 2012). This program is a critical tool to be used by researcher during the empiric research and it is capable of modifying his thinking and making possible a critical analysis of judicial decision, confrontating mostly the conventionalism, that overrates the function of the rules in the Law; and the pragmatism, that overrates the criterions and intuitive strategies of the judge.

On a different perspective, our scientific program of hermeneutic research is intended to make a principiologic reread of some judicial material. With that expectation, the principiologic structure of integrity is made, specifically, by a number of practical and transcendental principles which are linked by some criterions dominated by the principle

defined by Ronald Dworkin as integrity and that on practice results in the political and constitutional integrity of the Law. On those terms, the research program of integrity indicates suggests criteria, as such: the coherence of principles; moral adequacy to the facts and rules; the justification of conviction; the constitutional scope; the professional integrity and creativity of the judge.

The diagnostics of the research program of integrity observes empirically if there is or not a constructive correlation among the real judge and the principiology structure defined by Ronald Dworkin. After that, in the prognostic, therefore in a speculative way, Hercules shows up and virtually presents to us all the hermeneutic possibilities that would be excellent.

The sociological contribution given by this program of judicial research is the ability to develop case studies describing certain institutional practice related to a possible community or judicial culture of principle, what strategically confirms the Ronald Dworkin thesis.

Classically the reaction to integrity theory is highlighted by the expressive legal scholar Herbert Hart, that rejects Dworkin's theory by saying it is moralist, whereas the theory of moderated positivism is better because presents as a strong point the practical and flexible reality of legal rules.

According to Hart, the rules give the criteria of validity of the Law. Accordingly, if we use this or that principle our choice will be allowed by some rule of recognition, of judgment or valid alteration in the official system and not, as defended by Dworkin, by wrongly privileging the principles that dominate, according to him, the rules and criteria (MONTARROYOS, 2012)

Going beyond, Hart, in the post face of his book "The concept of Law", highlights he has never forgotten the existence of principles, but to him is impossible to the system to be dominated by principles, because these structures are morals, inconclusive, extensive, generic, not specific and subjective. If adopted this perspective would be no more stability or legal certainty in the public order.

Hart recognizes after all that principles exist and must be recognized and used. That is the reason for the existence of rules of recognition in legal positivism. However,



according to Dworkin, the rules of conventionalism are based on classic structure of *everything* or *nothing*, which Hart finds mistaken.

Hart refuted this shallow definition saying the rule of recognition. of his positivist model is flexible, variable and presents an *open texture*. According to Hart, Dworkin is wrong to overrate the autonomy of principles, because they are always dependence of the valid rules that allow or not its presence on the judicial day-to-day

In other terms, Dworkin's theory failed in his mission to disqualify the theory of moderated positivism because the acceptance of the principles is obviously necessary and coherent inside the Legal positivist system.

Hart (1994, p.329) including considered the main difference on that subject among his point of view and argumentation from Dworkin is that whereas the positivism assigns the general agreement among the judges about the criterions of identification of the sources of the Law with the common acceptance of the rules that defines these criterions; on the other hand, Dworkin instead of rules prefers talking about consensus, paradigms and anticipated comprehensions that the members of the same interpretative community share.

Going beyond, Hart said that although exists an important relation between the Law and the Moral, it is outside of the judicial and legal system. According to him, "rights and duties have any moral justification or effectiveness" (apud MONTARROYOS, 2012).

On the other hand, Dworkin refuted this basic idea saying the legal rights "must be understood as a type of moral rights. (HART, apud MONTARROYOS, 2012). About this thought (op. Cit., p. 332) states the most relevant difference between his theory and the model of his critic is due to the fact that "the existence and content of the Law can be identified by references to social sources of the Law (for example, legislation, judicial decisions, social habits) without reference to the moral, except when the Law had incorporated moral criterions to the identification of the Law" (apud MONTARROYOS, 2012)

According to Hart, awkwardly Dworkin considers that propositions of the Law are guided by the moral principles and his interpretative theory globally holistic has for

that reason a double function: not only to identify the Law al also to give to it moral legitimacy

Finally, considered Hart (op. Cit., P 335) the crucial point of controversy with Dworkin is about the power of creation given to the judge. According to Hart, in cases not regulated or predicted the judge creates new Law and applies the given Law that not only concede but also limits his power of creation of the Law. However, this concept of that the Law is partially undetermined or incomplete and that the judge fill the lacunas with his discretion power is strongly rejected by Dworkin, who considers this view mistaken because to him the Law is always “complete”, or, better saying to the reader, able to be completed according with the parameters established by Ronald Dworkin

Two popular ways of creation of the Law, according to Hart and Bobbio (in his book “A Theory of Legal Order” are analogy and systemic interpretation. According to Hart, the use of analogy propitiates many different solutions. However, the judges don’t throw away his books neither the legislative and judicial history in this critic moment, because “they invent new Law, although consistent with the underlying principles or reasons which are acknowledged as part of the existing Law” (HART, 1994, p, 337, in: MONTARROYOS, 2012)

To Dworkin the created by the positivists, according analyzed by Hart, is unfortunately incomplete. Accordingly, to Dworkin the judge never has the opportunity to escape from the ordinary and exercise the power of creation [and here is relevant to stress one more time for the reader that to Dworkin the creative power is always ordinary and elementary, not extraordinary to be used in case of normative blank, as problematized by Herbert Hart.

Whereas to the positivist Herbert Hart the judge is an autonomous subject only when the Law fails, to Dworkin, radically, the judge is always autonomous in judicial routine; furthermore, to Dworkin we should highlight in opposition to Hart that the Law doesn’t fail, instead what really fails are the interpretation of the Law.

In the ontology of Ronald Dworkin’s thought we initially find the central philosophical problems of the deductive system of his research which are question about the existence and interpretation of the object of study, in this case the judicial decision.

In second place, in the *methodological* category of the program of research of integrity we have the methods and techniques to obtain the applied knowledge. In third place, comes the axiology formalizing the values, demerits and values against which are constructive structures of the knowledge and never “noises” naturally found in the practice of the social scientist. In fourth place, we find the *theoretical* category vindicating the critic of the researcher about the identity of his object of study, presenting a generalizing, transcendental and affirmative language of the scientific knowledge. In fifth place, in the *practical* category appear the models of actions of the research program that guide and protect the researcher in order to avoid him to get lost on the “ocean of anomalies” of reality (MONTARROYOS, 2012).

On short terms, the observational technology of integrity- or research program- studies “the way how judges decide cases” (DWORKIN, 2007, p.3) and analyses the judicial process in order to reveal the relevance that the argument from the judge has in the practice of the Judicial Power. The research program of integrity is intended to know what the judges think about what the Law is and the reasons that make them disagree so much about his subject in the everyday practice (ibid. p.5) According to Ronald Dworkin, the empirical divergence happens because there are factual, legal and moral questions integrating the activity of judges and lawyers.

The Law is a social phenomenon and its complexity must be perceived as argumentative practice, consequently its propositions only obtain social meaning when its fundamentals are discussed by all the community. On these terms, we are specifically interested in argumentation of the judge. On second place, we want to diagnose if this way was conventionalist, pragmatist or hermeneutic.

### 3. STUDY OF CASE NUMBER 1

Judgment TRT 8<sup>a</sup>/ 2<sup>a</sup>T T. /RO 0001644-70.2010.5.08.0004 APPELANT: MAX JORGE FERNANDES MOURA. CLAIMANT: BANCO DO BRASIL. JUSTIFIED DISMISSAL OF THE EMPLOYEE. NOT CHARACTERIZED.

The facts narrated in that judgment of the Regional Court of Labor of 8<sup>th</sup> Region,

state of Pará, describe a problematic case in which a former employee of Banco do Brasil (Brazilian Bank) dismissed by a justified reason required on court the declaration of nullity of the act of dismissal and consequent conversion to an unjustified dismissal.

The dismissal happened after the disappearance of 10 thousand reais from an ATM in the Banco do Brasil agency in the city of Almerim/Para, place where worked the claimant. The Banco do Brasil claimed in the contestation that applied the “fair dismissal” because the former employee was guilty of the loss of 10 thousand of the ATM which was with his responsibility, having exclusive ownership of the keys and the password for the periodic supply of the same ATM.

For his turn, the appellant confirmed in his deposition the disappearance of the 10 thousand reais from the ATM, confirming also that the intern rules of the enterprise assigned him in an exclusive and non-transferable way the ownership of the keys and the password of the ATM.

However, he stressed in reality the keys and the password were shared with other employees of the enterprise. He also said during his deposition that ordinarily others persons use the key and the passwords in order to assurance the agility of internal service of the agency and the Bank had perfect knowledge of this practice.

According to the relater judge of this case, the Law has to consider the peculiarities of the reality of the work relations and for that must have the help of the principles who relate the legal text with the social context.

Considering the procedural rule that “the normal is presumed and the extraordinary requires proof”, the onus to prove the guilty of the employee that would justifies the application the justified dismissal in the case is only of the Bank. On that perspective, the judge claimed that

Very likely the claimant shared his password and key to access of the ATM with his colleagues, always in order to speed up and invigorate the work, that is, always in order to fulfill the expectations of services demanded by the respondent, which very often were excessive. It's evident this fact was known by all the employees of the agency. Even the witness, indicated by the respondent, said in her testimony “passwords of the ATMs were shared with all the employees”

Therefore with the elements of the process became evident that whereas in the formal aspect the respondent forbidden this practice, in informal reality not only allowed the practice but also stimulated it, considering the circumstances related to the execution of the work. This conclusion has been for the judge that considers the factual reality through the “*principle of prevalence of reality*”. Thus, with the own words of the judge:

We cannot close our eyes to the factual reality that reveals the share of password among employees of the same agency (even if only among few or a certain staff) is one of the ways to make the service more quickly, obtaining bigger results in less time; this happens because, due to dynamism of modern life, the employee is always overloaded with many tasks, very often without available time to finish all the services in a satisfactory way. Therefore, when he shares the password, he saves time and thus will be execute other to whom he was designated.

Furthermore, the Banks know about that and even encourage it, because if on one hand they always want to make clear their employees knew about the prohibition present in their by-laws of the share of passwords among them, on the other hand, they admit these practice based on a psychological pressure to achievement of goals increasingly demanding, let alone the intense exploration of work, by the habitual violations of the system of electronic control of the hour of input and output. This all with the finality to produce and obtain results with severe psychological pressure, otherwise being fired from the job.

Based on the depositions has been confirmed the claimant very likely moved by circumstances that, although are particular, in general are the same of the large majority of workers of the same professional category really shared the password and the key to access the ATMs with his colleagues, according to deposition from the testimony indicated by the own Bank, who said have share of passwords for all employees always in order to boost the service, that is, always in order to fulfill the expectations of performance of the services, very often excessive, dictated by the respondent.

Based on that, the judge made the following evaluation:

Thus, we cannot say an illegal act committed by the claimant has been definitively proofed. Therefore, remaining doubt, even if a small one, the Law must be interpreted according to the protector principle, that guides the substantial and procedural Labor Law, that is, allows a more benefic interpretation to the employee, as compensation for his asymmetrical position with his employer. As the supposed action that has justified the fair dismissal has not been proofed, we consider the respondent has not get rid of his procedural onus, reason why we grant the request of DECLARATION OF NULLITY OF THE REASON DISMISSALAPPLIED TO THE CLAIMANT, according to the article 9<sup>th</sup> of CLT, CONVERTING THE EXCTINTION OF

THE LABOR CONTRACT FOR FAIR REASON IN UNFAIR DISMISSAL.  
Room of Sessions of the Second Class of the Second Regional Labor Court of  
the Eight Region. Belem, June 20 of July of 2012, MARIA DE NAZARÉ  
MEDEIROS ROCHA, Convocated Judge

On a hermeneutic perspective, when we analyze this judgment we need to consider the principles as propositions that are generic, abstract, thoughtful and imaginative that justify and inspire the legislator in the elaboration of the Law and later the judge in application of the Law to a certain case, acting as an integrating source of the legal system. The principles have an important function by acting as tools that orientate the constructive interpretation of determined rule by the jurist, having also an informative and normative function.

Developing specially the theory of integrity, the application of the Law must obey to a systemic analyze that requires simultaneously a judge conscious of his function, having to apply criterions, among them: the circumstances of the concrete case; the political moral of the community; and the opinion of the institutions that must be coherent with the social group and the national constitution. In the transcription of this judgment, the relater judge has quoted with depth the ideas ideas from Ronald Dworkin which were reorganized by the professor Heraldo Montarroyos on the following terms: The concept of integrity advise the judge to valorize the present time as a immediate source of judicial inspiration, not only the future or the past, as proposed by conventionalism and pragmatism in hard or obscure cases. On a moral perspective, the biggest challenge of the concept of integrity is basically is to orientate the realization of fairness and equity in a simultaneous way, avoiding that the majority of the social group made a decision against individual rights. Thus, the judge's responsibility is not only technical but also political and moral regarding the assurance of justice and common well of the citizens (Judicial Observatory of Ronald Dworkin).

In the present study case of this research has become clear that the Labor Law was interpreted in favor of the worker, based on the application of the basic principles of the protection of the most beneficial rule and the most beneficial condition to the worker

Due to the incontrovertible facts presents in the process, in which the both parties agreed about the disappearance of the money from the ATM and also agreed about the

existence of intern rules that assigned the responsibility only to the Manager (claimant) for the guard of the keys, we cannot for that reason relate the claimant to the subtraction of the money, because other employees have knowledge of the password and free access to the key of the ATM.

As we can see, the way how the judge decided this case is based on the application of the principle of primacy of reality and the principle *in dubio pro misero*.

Analyzing this case always according with the theory of integrity we can conclude, therefore, the judge based her judicial not only on the facts, but also on the principles.

The principles are thoughtful structures, therefore propitiates the judge to opine about the fact and has been shown with the due process of Law the individual right of the employee in a fair and equitable way, absorbing discursive elements of existentialist, political and moral nature, that together characterized the occurrence of the integrity [or integrality] as a judicial phenomenon that appears in the comprehension of the judge.

Deepening this last proposition, we find the presence of existentialists, hermeneutics, political and moral elements that make the judge conclude in the environment of work the employee-claimant didn't have enough autonomy and responsibility enough about himself and his tasks in general, because the whole community of workers of the agency share the password with the order and knowledge of the employer, who including was benefited by the procedure, whose mainly objective was to make the work faster. Thus, the autonomy and responsibility of the employers assigned to the employee was only a simulation and a fake formalism from the higher command of the bank.

On the perspective of the research program of the integrity, therefore, the fair dismissal of the employee was based on a disastrous wile made by the employer, who tried to assign the collective guilt of the loss of the money to only one employee and then dismissed him unfairly. On that point, has been characterized the violation of the individual right, being thrown away the principles of equality and community, for instance. Accordingly, the own judgment literally declares it is impossible to think the reality of the facts without the interpretative analyze of the principles.



Moreover, the claimant cannot be charged by the wrongdoings made by the collectivity and the lack of control and responsibility of his employee, who let the password available to everybody, being s. The judgment also reveals his critical position by highlighting the person cannot be oppressed or inflicted a grave injustice by mistakes caused by the company policy.

From the perspective of the research program of integrity we can therefore observe the judgment made a moral revision of the dismissal for a fair reason, stressing the incompatibility between this practice and the fundamental guaranties and therefore the human dignity cannot be violated by abuses, lies and arbitrariness made by the employer.

Thus, the facts cannot be interpreted without the peculiar context where happened the conflict- after all, every text has its social context, that, as determined by the logic of the thinking of our hermeneutic research program, does not exist in void. On these terms, when we use the programmatic structure of the integrity to rewrite critically this judgment and point out how was built its legal argumentation. In this case, we can observe the own judgment did not prioritize the use of conventional rules neither tried to create individualists criterions from the judge to may be adopted in future by other judges.

On short terms, the principiologic argumentation of this judgment express, in our comprehension, a historical progressive movement that is wider in everyday of the Judicial Power/ a phenomenon where the judge wants to opine, stand for her point, be in the world, escape from the burocratic massification and because of that she exercises her moral and political responsibility using the legal rules, the political criterions and humanists principles, hoping to in the end moralize the order and the constitutional totality.

#### **4. STUDY OF CASE 2**

Judgment TRT 8<sup>th</sup>/ 2<sup>th</sup> S/ RO 0000431-84.2010.5.08.0115. Indemnization for moral damages– Prescription – Civil Code. The moral damage derived from the work relation is a civil credit, therefore the prescriptive period to be applied is the established by the Civil Code. .



The present study show us a judicial decision in which a former employee of the company DENDÊ DO PARÁ S/A- DENPASA (specialized in cultivation, commercialization and exportation of cattlemen products in general and agricultural, with emphasis in palm) went to Judicial Power to request a reparation for moral damages suffered due to a work accident happened in October Fourth, 2006. The former employee worked for 23 years in the company, 20 of them doing activities of conservation and repair in equipments.

On the fourth of October of 2006, when he was about to make a repair in the generator, the claimant suffered a work accident that provoked the squeeze of his right hand. The technical analyze of the medical expert concluded the ex former had partial and permanent disablement of his right hand with reduction of his labor capacity.

The company DENDÊ DO PARÁ S/A transferred the former employee after the work accident to an administrative function and waited to pass three years and some months to dismiss this employee. Curiously the prescriptive period to be required indemnization is of 03 years, according to art. 206, § 3º, V, of the Brazilian Civil Code (“art. 206, *the prescriptive period is of: § 3º three years: V – the claim for civil compensation*”)

When haw dismissed, the former employee was 59 years old; 23 of them he had worked for the same company and for 20 years exercised the mechanical function of maintenance of equipments.

It was obvious that the former employee, who has always worked in a manual position making the maintenance of equipments, knew about the unfavorable conditions to him to return to the job market if he became unemployed because of his advanced age and the deficiency caused by the work accident suffered. These two aspects were decisive to inhibit his judicial request for the due reparation, because the immediate consequence of this act would be his dismissal.

On this context, the former employee did not have full freedom to go to court, because his condition of employee subordinate to the power of the company to which he worked exclusively for almost his life, he only could keep inert and accommodated

It's a fact that in order to impede the access of the ex employee to court and to hide the practice of manual services executed for more than 20 years the company immediately transferred him to an administrative function.

According to the judgment, the company when fired his employee after 3 years of the accident suffered by the worker intended to avoid him to obtain in court the compensation for the damages, due to the triennial prescription present on the art. 206, § 3º V, of the Brazilian Civil Code.

Finally, after being dismissed, the former employee made a labor action in 05/05/2010 (03 years and 07 months after the accident), pursuing the reparation for the suffered damages.

Regarding this fact, the judge from Labor Court, considering the moral and material damages claimed derived from the execution of the work contract, understood the prescription to be applied was not the years from the art. 206, §3º, V of the Brazilian Civil Code but the labor prescription of 05 years, fixed by the art. 7º, XXXIX of the CF/88 and therefore rejected the allegation of prescription made by the defense presented by the DENDÊ DO PARÁ S/A.

Unsatisfied with the judicial decision the company of course appeal to the Regional Labor Court of the 8<sup>th</sup> Region in order to reverse the decision of the judge.

The claim for reparation for the damages suffered was made three years and seven months after the accident, so if it were applied the civil prescriptive period of three years of the art. 206, §3º, V of the Brazilian Civil Code the action would be extinct and the employer who suffered the accident, who had his labor ability reduced, let alone the misfortunes caused by the pain of the bleeding of the hand and psychological situation derived of the mutilation part of his body, would not receive any reparation, what would cause a great sensation of social injustice in the "community". On the other hand, the judge, touched by the situation of the claimant- a poor person- and in a clear intention to "make justice regardless of everything", applied the labor prescriptive period of 05 years, art. 7º, XXIX, of the Federal Constitution.

There is a real jurisprudential divergence about the prescription period that must be applied in the requests of reparation for moral damages derives by work relation

(specially, about work accidents). The divergence remains due to a total lack of express rule to define well this kind of situation. According with the habitual standpoint of the relater judge:

In the cases of illegal behaviors (BCB, art. 186 and 927) practiced by the employer against his employee, related to the work relation, that provides the request from moral damages, I have until today the standpoint that the prescription period of civil reparation to be applied is the present in the article 206, §3º, V of the New Brazilian Civil Code (Law nº 10.406, from January 10<sup>th</sup> of 2002), which establishes prescriptive period of 3 years, starting when happened the damage or when the victim had uncontroversial knowledge of it.

In her current standpoint, based on the theory of integrity analyzed including in the paper published by professor Montarroyos (2012), the relater judge changed her evaluation about that kind of case:

(...) revising my former standpoint, through the systemic analyze of the Law, based on the application of the Law as integrity, as defended by Ronald Dworkin, who predicates the judge conscious of his function and thus must appreciate many criterions, as such: the peculiar circumstances of the case, the political moral of the community and the opinion of institutions that are, or must be, coherent with the social group and the constitution, I have a new standpoint regarding the prescription period regarding the claim for civil reparation for moral damages, related to an illicit act practiced by the employer against his employee. I have the conviction that the rule applied for this case is the one established by art. 205 of Brazilian Civil Code and not anymore the rule from the art. 206, § 3º, V, from the same legal rule.

The dilemma has been established. To the action that request the reparation for damages (material, moral and esthetic) is applied the civil prescription of 03 years, present on art. 206, § 3<sup>th</sup>, V of Brazilian Civil Code or the labor prescription of 05 years present on art. 7<sup>th</sup>, XXIX of BFC/88?

We highlight we are not at all intended to indicate the “right” or the “wrong”, but the way how the way how was elaborated the argument in which the judicial decision is based.

The indemnization for damages (material, moral and esthetic) due to illicit acts practiced by thirds persons is established in the Brazilian Civil Code in its articles 186 and 187; the obligation to repair that damages is established by the art. 927 of the Civil Code.

The claim for indemnization has therefore, status of civil reparation, because is established by the Civil Code. Therefore its prescriptive period is the present on art. 206, § 3, V, from the Brazilian Civil Code and that is the conventional position of diverse judges.

On the other hand, the damages caused by work accident in this case happened during the execution of the contract of work (work relation), which is the reason why the judge from the Labor Court has applied the prescriptive period of 05 years present in the art. 7<sup>th</sup>, XXIX from the National Constitutional, as many judges have been done.

The choice of another option besides the formerly mentioned was however a result of an auto-reflexive decision and very creative from the “judge” which was not mechanically determined by the legal tradition neither represented the pragmatism, which invents individual criterions to solve the problem.

Initially, we should remember that judicial claim is designated “claim of indemnization for suffered damages, whose object is “ request of indemnization of damages suffered due to a work accident and about that we find vast ground on the Brazilian Civil Code:

Art. 927: Anyone who, through an illicit act (arts 186 and 187) causes damage to another is obligated to repair it. Sole paragraph: The obligation to repair the damage will exist, regardless of fault, in the cases specified by Law or when the activity normally carried out by the person who caused the damage entails, by its nature, risk to the rights of others.

We also need to transcribe another two articles of the Brazilian Civil Code mentioned in the art. 927, in order to build the necessary definition of what is illicit act:

Art. 186: A person who, by voluntary act or omission, negligence or imprudence, violates right and causes damage to another, even though the damage is exclusively moral, commits an illicit act

Art. 187: The holder of a right also commits an illicit act if, in exercising it, he manifestly exceeds the limits imposed by its economic or social purpose, by good faith or by good conduct.

Based on the use of the principle of the integrity to analyze the arguments used to ground this judgment, we note it were included the circumstances of the concrete case and the principles that guide the Labor Law, when we showed here the disrupt with the tradition and thus the not application on the judgment’s decision of the prescriptive period

of 3 years, established by the art. 206, § 3º V, of the Brazilian Civil Code. More over, it was not applied the prescriptive period of 5 years established by the art. 7<sup>th</sup>, XXIX of the National Constitution. It was actually concluded that the claim for compensation for moral damages (art. 927 of the Civil Code), derived from an illicit act made (art. 186 of the Civil Code), even though related to a work relation, it has a personal aspect derived from, a fundamental right inherent the human person and his rights of his personality, remaining therefore assurance by the Federal Constitution (art.5º, V and X; and 7º, XXVIII, thus the prescriptive period is the one of the art. 205 of the Brazilian Civil Code, who says: “The prescriptive period is of ten years, whenever the Law has not fixed a smaller one”,

Accordingly, the judgment presented to us a new option, innovating by romper with the conventionalism and the pragmatism, creating thus a new Law by uniting the legal text with its context (the specific fact), rediscovering and reinterpreting the existing Law.

On one hand, the decision was not conventionalist because did not repeat the tradition of the prescriptive period of 3 years or 5 years; on the other hand it was not pragmatism because hasn't invented something new out of nowhere. The relater judge acted with integrity and legal honesty and creatively based her decision in another rule from the Law.

Through this new standpoint, she tried to understand the circumstances in which the facts happened, concluding very often the employer class use the lacunas of the legislation in order to obtain economic vantages, avoiding liability, for example, for the commitment with a safe and healthy work environmental and, in this case, avoiding himself from the obligation to compensate the damage caused to his former employee. The judgment therefore valorized the current opinion of the judge, avoiding the conventionalism.

From a moral perspective, the arguments have been developed to the simultaneous realization of justice and equity, avoiding an unfair decision against the individual rights. On that perspective, the judge showed widely his moral and political responsibility by

assurance the individual rights of the former employee, assurance his dignity and promoting the justice and the social welfare!

Therefore in a first moment the judicial argument observed there are legal parameters to understand the problematic of the case. Little by little, this argument has been noticing the answers from the legal system were not reasonable or proportional to the seriousness of the subject.

The text didn't match with the context of the history of the professional life of the employee. Accordingly, the judicial argument starts creating a new Law and uses as criterion its autonomy, imagination, integrity and pursuit of a decision that must be constitutionally justified and opened.

With the creative analyze of the Law and relevant influence from the existentialism, the judicial argument researched demonstrated the political and moral consciousness integrated to the concrete case, knowing how to correctly link it with the context in which the facts happened.

The argument of the relater judge has concerned on standing its presence in the political-constitutional system with responsibility therefore it is not considered extremely communitaristic or individualist.

The principles propitiated the relater judge to opine about the facts, accordingly assuring the "individual rights of the employee", using in its grounding individual, existentialists, hermeneutics, political and moralists arguments characterizing together the occurrence of the integrity as a judicial phenomenon. Accordingly is implicitly saying the person cannot be oppressed and inflicted a grave injustice by the cold and decontextualized of the Law; moreover, the judge must pursue with creativity and responsibility the realization of the justice and the equity, avoiding to make decisions that are unfair and restrictive to the individual rights.

Using the program of integrity was therefore possible to make a justified application of the already existing rules of the legal system presenting a legal argumentation with proper characteristic, converging to the existential, moral and hermeneutics aspects, grounding conclusively that judicial decision. We also noted the intention of the relater judge to moralize the practice of the prescription regarding the

claim for compensation for damages and thus the judgment tried to assure that the application of the prescriptive period was not used to violate the human dignity, by impeding the worker the pursue of his constitutional rights, in the tentative of avoid his access to the court!

## CONCLUSION

The initial objective of this short study was to know the way how is produced the argumentation of a judicial decision. With that purpose, we apply the model of the analyze by Ronald Dworkin and found, empirically, the presence of the hermeneutic in the researched judgments.

In the development of this study we discovered the construction of legal argumentation of the researched judgments developed a net of principles, linking the transcendental with the practical by special criterions of complementary connections, such as creatively, technical grounding, adequacy among text and context, professional integrity and constitutional scope.

Empirically, the argumentation of the judgments confirmed that statement that says the Law is an interpretative practice made with the distinguished presence of the judge in the world with more social responsibility and existentialist concern about the exercise of his professional activities.

On that perspective, we conclude there are judges Who want to increasingly contributes in the improvement of quality of the community's life and try to find instruments that can make easier its communication, creativity and transforming opinion , recurring to a more frequent use of the principles, that are philosophical structures opened to the imagination and existentialist reflexivity of the judge, from which the judge can also be victim , is some historical occasion, due to the social massification, as happened during the Nazism.

The researched judgments tried to establish a dialogue among the transcendental or reflexive principles, such as freedom, responsibility, fraternity, community, dignity and legitimacy with the practical principles, as the legislative, judicial and procedural,

using elements of existentialist, moral, hermeneutic and political nature, thus presenting a constructive behavior in the constitutional field, protecting specially the individual rights the tyranny of the majority.

Dworkin used the argument of integrity or constitutional integralization in order to justify his theory and rejected the positivist conception that considers that the Law and the Moral are always divorced. According to him, the Law is an interpretative practice, therefore each judicial decision reveals a different form of contextualization of the finalities of the Law, which is ideally supposed to be exercised in an uprightly, honest, coherent, comprehensible, justified and creative way.

This present paper reinforces the importance of the interdisciplinary study of Philosophy of Law and the Sociology of Law linked with the Political Science and the Ethics from the current moment. Accordingly we identify the appearance of an existentialist phenomenon in the Judicial Power in which the judge increasingly wants to do something to transform the Society.

On his turn, the hermeneutic complements the methodological analyze of the legal existentialism and outpaced the restricted concern with the legal stability, assigning a relevant place to constitutional stability, disrupting the relations with the conventionalism and the pragmatism.

In the context of the integrity or of the constitutional integrality we must finally expect from the judge to decide guided by the principles in which the Law is based, using, the transcendental, practical and connectives principles.

It's important to remember political authoritarianism and the technicism represent cultures that are against the personality of the ideal judge "Hercules" complicating the convergent phenomena of the integrity or even to impede its appearance by the overload of work of the judge; institutional corruption; lack of time; the political affiliation; the pragmatic and conventionalist culture; the administrative massification of the Law; or due to negation of the autonomy and the professional creativity.

As the Law is an argumentative practice, it presupposes the uprightly judge is conscious of his constitutional mission thus has to carefully appreciate the circumstances of the concrete case; the political moral of the community; the opinion of the institutions



which are or must be coherent with the social group and the principles that guide the National Constitution.

In the theory of the integrity is considered that, although the judge is only one, he is open to the world; he is polycratic; he keeps actualized with the changes and dilemmas of the plural and complex society in which he is situated.

For this kind of judge an obscure or critic fact is not derived from a linguistic failure of the official text but actually reflects a failure or a conflict that comes in the relation among the legal text and the social context.

## REFERÊNCIAS

BRASIL. *Constituição Federal*. São Paulo: Editora Saraiva, 2012.

\_\_\_\_\_. *Código Civil Brasileiro*. São Paulo: Editora Saraiva, 2012.

DWORKIN, Ronald. *O império do Direito*. São Paulo: Martins Fontes, 1999.

HART, Herbert L. A. *O conceito de Direito*. Lisboa: Fundação Calouste Gulbenkian, 1989.

MONTARROYOS, Heraldo Elias. O observatório judiciário de Ronald Dworkin: O império do Direito e o conceito de integridade. *Jus Navigandi*, Teresina, ano 17, n. 3117, 13 jan. 2012. Disponível em: <<http://jus.com.br/revista/texto/20850>>. Acesso em: 13 fev. 2012.

## Bibliografia consultada

ALMEIDA, André Luiz Paes de. *CLT Comentada*. São Paulo: Editora Rideel, 2012.

ALMEIDA, André Luiz Paes de. *Direito do Trabalho: material, processual e legislação especial*. São Paulo: Editora Rideel, 2012.

DELGADO, Maurício Godinho. *Curso de Direito do Trabalho*. São Paulo: LTr, 2009.

LEITE, Carlos Henrique Bezerra. *Curso de Direito Processual do Trabalho*. São Paulo: LTr, 2006.

PRETTI, Gleibe. *CLT Comentada e Jurisprudência Trabalhista*. São Paulo: Ícone, 2009.

PRUNES, José Luiz Ferreira. *Justa causa e despedida indireta*. Curitiba: Juruá, 2011.

SARAIVA, Renato. *Direito do Trabalho*: versão universitária. São Paulo: Método, 2008.

ZENNI, Alessandro Severino Válber e RAFAEL, Márcia Cristina. *Remuneração e Jornada de Trabalho*. Curitiba: Juruá, 2009.