THE RECONSTITUTION OF NARRATIVES BY THE JUDGE

BETWEEN EMOTION AND (PRATICAL) REASON

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DOI | 10.14195/2184-9781_3_12

ABSTRACT

The judiciary is not a charity house. But it can't be a lottery house either. When dealing with an applied social science (which is not – and cannot be – cartesian) the human factor will inevitably make a difference in the equation because people perceive the same situation differently, according to their own filters. The law, doctrine and jurisprudence could offer limits to this cognitive process, but end up being used (manipulated) later, just to justify what the subject-judge already wanted to do, simply deciding according to his own conscience. The ideal of justice is so discredited that the most modern courses revolve around persuasion (rhetoric) in court precisely because "in every head, a different sentence". That increase the adherents to the empire of the law. But as history has taught, extremes are dangerous. On the one hand, narcissistic judges, who simply do what they want, when they want. On the other hand, judges who do not print their identity in the decision, using only the law, the process in its rawness, forgetting the human factor. The judge can understand what cannot be written: emotions. But he is also a human being, so it is important that he perceives his own to remain in the place of external third party in the concrete realization of law. The intention, therefore, is to reverse the procedure so that it is heeded to legislative changes and contemporary jurisprudence, which should be followed by hierarchy, rather than anchoring itself in "diary-sentences" or "parchment-sentences".Therefore, practical rationality, by encouraging the judge to fit the law (previously studied) to the concrete case (analyzed later) inspires (self) control (emotionally) and allows adequate fundamentation. It is possible and urgent because people under jurisdiction deserves some legal certainty.

KEYWORDS

reconstitution of narratives; emotions; (practical) reason; storytelling; counterstorylelling.

1. Some people know how to communicate their ideas with a skill and confidence that increases their prestige, but this requires communication and oratory technique[1]. One of the most persuasive techniques results from the enormous power of narrative[2].

[1] GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. São Paulo: Saraiva. Tradução: Cristina Yamagami. P. 9 and 20.

[2] GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 10 and 59.

The word «persuade» is usually defined as «influencing someone to act, resorting to reason». Emotions are not included in the definition, but it is the emotional impact of stories that really influences because it is not possible to persuade only with logic[3]. At the point, Aristotle[4] classify the elements of persuasion into three categories: (i) *ethos (credibility* - achievements, titles, experiences, etc.), (ii) *logos* (evidence, logic, data and statistics) and (iii) *páthos* (emotional appeal).

Narratives, also called *storytelling*, are the best way to break the resistance to engage people inclined to disagree with their point of view (including judges, jurors, and other decision makers)[5]. To convince people to trust you, you should avoid anything too esoteric and disconnected from people's everyday lives[6]. Data, facts and analyses are important, but it also needs a narrative that leaves people connected to the point of being interested in what the speaker is defending[7].

Neuroscientists, psychologists and communication experts indicate that storytelling is a very effective way to connect emotionally because it can literally «synchronize» the speaker's mind with the minds of his listeners[8], making it possible to create much deeper connections than other modes of expression: «brain scans studies reveal that the stories stimulate and engage the human brain, helping the speaker connect with the audience and increasing the chances of her agreeing with the speaker's point of view»[9]. This is what Hasson[10] calls «brain-to-brain binding».

That is, the act of telling a story, can effectively planting ideas, thoughts and emotions in the brain of listeners[11] because the stories activate, in addition to the area of language, the sensory, visual and motor areas of the brain[12].

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3 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 61; ANDERSON, Chris (2016). *TED Talks*: o guia oficial do TED para falar em público. Rio de Janeiro: Intrínseca, 1ª ed. Tradução: Donaldson Garschagen e Renata Guerra. P. 88 and 96.

4 *apud* GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 60-61.

5 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 57.

6 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 57.

7 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 59.

8 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 16.

9 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 56.

10 *apud* GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 63.

11 *apud* GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 64.

12 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 64.

Therefore, it is said that better communicators (or the most persuasive) are able to enter the listener's head and heart[13] – with logic and emotion.

Data and statistics are important to support the argument but need to be contextualized with emotional baggage[14] because an «emotionally charged event» (shock, surprise, fear, sadness, joy, admiration) is better processed, they persist longer in memory and are remembered more accurately than neutral memories, explains molecular scientist John Medina[15]. That is: «we are more likely to remember events that awaken our emotions than events that provoke a neutral response»[16]. Posner[17] differ "calm states" and "emotion states".

It is difficult finding a definition for the term "emotion". There isn´t a "widely accepted theory of emotion and many fundamental issues about the nature of emotion remain unresolved"[18]. Although, Bandes[19] infer one crucial point: "emotions have a cognitive aspect and its corollary that reasoning has an emotive aspect". In same way, Posner[20]: "emotions are usually stimulated by the world, either via the mediation of cognition or through a more primitive stimulus-response-like neurological mechanism"[21] that influence "what makes people perceive, feel, react, reason, and choose as they do"[22].

The core of this debate is the continual resistance (or neglect) in legal theory, "which generally subscribes to the formalistic belief that reason can be neatly separated from emotion"[23], raising "questions about the relationship between emotion and law"[24][25], but "emotions play an important role in many

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13 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 18.

14 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 179.

15 *apud* GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 164.

16 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 165.

17 POSNER, Erik (2001). "Law and the Emotions" in *Georgetown Law Journal* 1977. Available at: «https://chicagounbound.uchicago.edu/journal_articles» (acedido em 20/04/2023). P. 1978.

18 POSNER, Erik (2001). "Law and the Emotions". P. 1979-1980.

19 BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements in *International Journal of Law in Context* in The University of Chicago Law Review: vol. 65, nº 2, pp. 361-412. Available at: «https://chicagounbound.uchicago.edu/uclrev/vol63/iss2/1/» (accessed on 20/04/2023). P. 366.

20 POSNER, Erik (2001). "Law and the Emotions". P. 1979-1980.

21 POSNER, Erik (2001). "Law and the Emotions". P. 1979-1980 and 1983.

22 BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 366-368.

23 POSNER, Erik (2001). "Law and the Emotions". P. 1977-1978.

24 MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective in *Emotional Review*, Vol. 6, No. 2, pp. 142-151. Available at: «https://doi.org/10.1177/1754073913491989» (accessed on 27/04/2023). P. 143.

25 POSNER, Erik (2001). "Law and the Emotions". P. 1977-1978.

areas of the law"[26] because in "some contexts the emotional coloring of a preference does have instrumental and normative consequences"[27].

Nussbaum[28] points out that reason has a dominant role in most philosophical studies on ethics, but one should give room for feelings and emotions, so the analysis of various motives, intentions and human dispositions would be part of the reflection, but which are usually underestimated: "these theorists want more recognition of 'non-rational' elements in our make-up, and they take emotions and desires to be such elements". As intend Posner[29], is important "clarifying the relationship between emotions and rational action by placing them in the rational choice framework".

In this sense, Nussbaum[30] suggests that (a) moral philosophy should be concerned as much with choice and action as with the agent; (b) that it should also be concerned with the motives, intentions and desires of this agent by establishing patterns of behavior that allow the perception of the subject by the motives and the habituality of the conduct and (c) therefore, glimpse patterns of conduct, emotions and the context of choice instead of neglecting them by attributing too much relevance to purely rational and isolated choices.

The goal is not to subdue reason, but to frame the passions (here understood as «emotions») in its critical work, which is not simple, given that the personality contains unconscious and ambivalent elements formed during childhood: «the adult experience of emotion involve foundations laid down much earlier in life (…). Early memories shadow later perceptions of objects; adult attachment-relations bear the trace of infantile love and hate»[31].

"Emotions shape the landscape of our mental and social lives"[32], they "shape our perceptions and reactions"[33] because "emotions are evaluative appraisals that ascribe high importance to things and people that lie outside

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[26] POSNER, Erik (2001). "Law and the Emotions". P. 1977.

[27] POSNER, Erik (2001). "Law and the Emotions". P. 1980-1981.

[28] NUSSBAUM, Martha (1999). "Virtue Ethics: A Misleading Category?", in *The Journal of Ethics*, vol. 3, n. 3, September, p. 163-201. P. 169.

[29] POSNER, Erik (2001). "Law and the Emotions". P. 1978-1979.

[30] NUSSBAUM, Martha (1999). "Virtue Ethics: A Misleading Category?". P. 169 and 174.

[31] NUSSBAUM, Martha (2004). "Review: Précis of "Upheavals of Thought"", in *Philosophy and Phenomenological Research*, Mar., 2004, Vol. 68, No. 2, pp. 443-449. Disponível em: «https://www.jstor.org/stable/40040691» (accessed on 27/04/2023). P. 444-445.

[32] NUSSBAUM, Martha (2004). Review: Précis of "Upheavals of Thought". P. 443.

[33] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 368.

the agent's own sphere of control"[34], that is "emotions involve focus on an object and beliefs about the object"[35]. It will not be given, in this work, to scrutinize the difference that Nussbaum makes about «emotions» and «feelings», «general» and «particular» emotions, and between «background» emotions and «situational» emotions[36] or even between "emotion" and "morality"[37][38].

(i) On the one hand, "these observations assume that people remain rational while under the influence of emotion"[39] what means "that people continue to act rationally while in an emotion state, even though they act differently from the way they do in the calm state"[40]: "during the emotion state people experience temporary variations in their preferences, abilities, and beliefs"[41]. This inconsistency makes emotional behavior seem irrational, "but it is important to see that a person in an emotion state does not act irrationally given his temporary preferences"[42], so it can´t be a simple excuse for a "emotional reaction"[43] because "is possible deliberate about the behavior and does not engage in reflexive action"[44].
(ii) In another view, "choices made under the influence of emotion reflect a person's well-being more accurately than choices made in the calm state"[45]: "in general, a person in an emotion state may be more, rather than less, perceptive about moral realities and physical threats"[46]. Then "emotions can enhance understanding"[47]. The problem "with this simple view is that many preferences are registered under the influence of the emotion or are inextricably tied up with an emotion state"[48] what can be an issue for institutional acts.

[34] NUSSBAUM, Martha (2004). Review: Précis of "Upheavals of Thought". P. 443.
[35] NUSSBAUM, Martha (2004). Review: Précis of "Upheavals of Thought". P. 443.
[36] NUSSBAUM, Martha (2004). Review: Précis of "Upheavals of Thought". P. 444.
[37] POSNER, Erik (2001). "Law and the Emotions". P. 1992.
[38] NUSSBAUM, Martha (2004). Review: Précis of "Upheavals of Thought". P. 447.
[39] POSNER, Erik (2001). "Law and the Emotions". P. 1981.
[40] POSNER, Erik (2001). "Law and the Emotions". P. 1981.
[41] POSNER, Erik (2001). "Law and the Emotions". P. 1981.
[42] POSNER, Erik (2001). "Law and the Emotions". P. 1981-1982.
[43] POSNER, Erik (2001). "Law and the Emotions". P. 1980.
[44] POSNER, Erik (2001). "Law and the Emotions". P. 1981.
[45] POSNER, Erik (2001). "Law and the Emotions". P. 2011 and 1984-1985.
[46] POSNER, Erik (2001). "Law and the Emotions". P. 2011-2012.
[47] MORAVCCSIK, J. M. E. (1982). Understanding and the Emotions. P. 224.
[48] POSNER, Erik (2001). "Law and the Emotions". P. 2010-2011.

As Bandes[49], the aim is demonstrated there are differences between reason and emotion so "the rule of law greatly overstates both the demarcation between the two and the possibility of keeping reasoning processes free of emotional variables" but "is not only impossible but also undesirable to factor emotion out of the reasoning process"[50]. So "emotion or passion do not always blind reason; on the contrary, they are at times indispensable aids to certain kinds of understanding (…)"[51].

(iii) The important point is that both "emotion-state preferences" and "calm-state preferences" cannot automatically be either ignored as defective because "emotional," or counted as "just preferences". "Both kinds of preferences must be evaluated"[52]. Despite classifying emotions as "objectual" and "non-objectual" in some cases reason guides the emotions, in other cases the conceptual dependency goes the other way. Seeing the complex interactions between reason and emotion[53] "in some cases emotions aid and supplement reason"[54] or, at least, should.

Accepting "that emotion cannot be factored out of the reasoning process"[55], we consider that law-emotional content is inevitable. Legal reasoning, although often portrayed as rational, in fact, "is driven by a different set of emotional variables, albeit an ancient set so ingrained in the law that its contingent nature has become invisible"[56]. Research has shown that emotion is necessary to practical reason[57]. So, the point for the judge is not eliminate of emotion[58] but be aware about the possibility (and necessity) of understand, accept and get better use of it.

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[49] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 368.

[50] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 368.

[51] MORAVCCSIK, J. M. E. (1982). Understanding and the Emotions. P. 218.

[52] POSNER, Erik (2001). "Law and the Emotions". P. 2012.

[53] MORAVCCSIK, J. M. E. (1982). Understanding and the Emotions, in *Dialectica*, 1982, Vol. 36, No. 2/3, pp. 207-224. Available at: «Understanding and the Emotions on JSTOR» (accessed on 27/04/2023). P. 208.

[54] MORAVCCSIK, J. M. E. (1982). Understanding and the Emotions. P. 207.

[55] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 369.

[56] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 369.

[57] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 143-144.

[58] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 144.

1.1 Since the brain was not made to process abstract concepts[59], with the technique of storytelling, the stories transform abstract concepts into concrete, exciting and tangible ideas[60]. The story presents information, explanations and, at the same time, build emotional connection. They illustrate, clarify and inspire[61]. Jonah Sachs[62] defines the stories as «a particular type of human communication designed to convince the audience of the storyteller's worldview».

Persuasion has even a deconstructive meaning, in order to convince the listener that their normal way of seeing the world is not at all correct, being better (re)build something else[63]. There is a powerful form of rational argumentation, known as «reduction to absurdity» or "reductio *ad absurdum*"[64] that deals «to take the opposite position to what you want to demonstrate and prove that it leads to a contradiction. If the opposite position is false, yours position is strengthened»[65].

The term «narratives» gained relevance in the procedural and probative contexts to the extent that the «stories» that are told in court are treated as «narratives»[66]. Hence why they can be associated with the so-called procedural storytelling[67]. In this sense, they strengthen the dialeticity of the process by the conflict between the hypothesis and the counterhypothesis (*idea fondamentale di contraddittorio)*[68].

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59 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 168.

60 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 72 and 82.

61 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 90; ANDERSON, Chris (2016). *TED Talks*: o guia oficial do TED para falar em público. P. 75.

62 *apud* GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 79.

63 ANDERSON, Chris (2016). *TED Talks*: o guia oficial do TED para falar em público. P. 88.

64 NUSSBAUM, Martha C. (1995). "Poets as Judges: Judicial Rhetoric and the Literary Imagination", in *The University of Chicago Law Review*, Autumn, 1995, Vol. 62, No. 4, pp. 1477-1519. Available at: «https://www.jstor.org/stable/1600111?seq=1&cid=pdfreference#references_tab_contents» (accessed on 20/04/2023). P. 1485-1486.

65 ANDERSON, Chris (2016). *TED Talks*: o guia oficial do TED para falar em público. P. 92.

66 BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 382.

67 TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. São Paulo: Marcial Pons. Tradução de: Vitor de Paula Ramos. P. 53; GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 57.

68 TARUFFO, Michele (1997). *Giudizio: processo, decisione*. Palermo: Convegno Internazionale sul tema «Il giudizio» organizzato dalla Facoltà di Lettere e Filosofia dell´Università di Palermo, pp. 793; LINHARES, José Manuel Aroso (2012). *Evidence (or Proof) as Law's Gaping Wound:* A Persistent False Aporia. Coimbra: Boletim da Faculdade de Direito da Universidade de Coimbra nº 88. P. 83; LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da Juridicidade*: imagens e reflexos pré-metodológicos deste percurso). Coimbra: Coimbra Editora – Stvdia Ivridica 59. Diss. de

At the point, for Aristotle[69], the real is one, being contradictory the language, as a substitute for things. The direct and objective form is replaced by the «mediation of meaning» because it is understood that access to objects always occurs from a point of view[70]. In this sense, dialectics, as an art of contradictions, are useful in the exercise of the word, offering an efficient method of argumentation, confrontation of premises and opinions teaching us to discuss and dialogue, as a practice that integrates the set of relationships that men establish with each other[71].

Some understand that its intends more «persuasion» (hastily instilled adhering) than «convincing» (agreement reflectedly obtained)[72]. Therefore, although aware of the criticisms of modern epistemology (*l'épistémologie moderne*) on the conception of the process as a narrative game (*gioco di narrazioni*) in which narratives would be used only as instruments of informative distortion, intended to provoke a favorable decision, serving only to convince the judge - modern concept of proof (*concezione moderna della prova*)[73], the technique of storytelling is defended here - *technique du récit* (*ars inventa disponendi*)[74] - as an authentic evidential element of an argumentatively structured rhetorical-prudential rationality[75].

Revisiting the confrontation of two traditions ("proof-argument [classical concept] / proof-procedure theoretic [modern concept]")[76], to the extent

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Pós-graduação [Doutorado] em Ciências Jurídico-Filosóficas. P. 595-596).

69 *apud* FERRAZ JUNIOR, Tercio Sampaio (2009). *Estudos de Filosofia do Direito*: reflexões sobre o Poder, a Liberdade, a Justiça e o Direito. São Paulo: Atlas, 3ª ed. P. 177.

70 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? Porto Alegre: Livraria do Advogado, 6ª ed. P. 18; FERRAZ JUNIOR, Tercio Sampaio (2009). *Estudos de Filosofia do Direito*: reflexões sobre o Poder, a Liberdade, a Justiça e o Direito. P. 284; LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da Juridicidade*: imagens e reflexos pré-metodológicos deste percurso. P. 321-322.

71 FERRAZ JUNIOR, Tercio Sampaio (2009). *Estudos de Filosofia do Direito*: reflexões sobre o Poder, a Liberdade, a Justiça e o Direito. P. 177; BRONZE, Fernando José (2012). *Analogias*. P. 17.

72 BRONZE, Fernando José (2012). *Analogias*. Coimbra: Coimbra Editora, 1ª ed. P. 84 e 93; TARUFFO, Michele (1997). *Giudizio: processo, decisione*. P. 796.

73 TARUFFO, Michele (2010). *Il Fatto e L´Interpretazione*. Pouso Alegre: Revista da Faculdade de Direito Sul de Minas, n. 26. P. 203; GIULIANI, Alessandro (1995). Le role du «fait» dans la controverse *In Archives de Philosophie du Droit*. Paris: Editions Dalloz, tome 39. P. 230; GIULIANI, Alessandro (19-??). *Il Declino Del Concetto «Classico» di* Prova. P. 235; LINHARES, José Manuel Aroso (2012). *Evidence (or Proof) as Law's Gaping Wound:* A Persistent False Aporia. P. 72.

74 GIULIANI, Alessandro (1995). Le role du «fait» dans la controverse *In Archives de Philosophie du Droit*. P. 234.

75 BRONZE, Fernando José (2012). *Analogias*. P. 121.

76 LINHARES, José Manuel Aroso (1988). *Regras de Experiência e Liberdade Objectiva do Juízo de Prova*:

that it makes reasonable judgment possible with regard to the action of men and their disputes[77], the *concezione classica della prova come argumentum*, linked to the techniques of a dialectical reason, especially by the currents that conceived judicial activity as reconstructive historiography, interested in the *problem of conoscere attraverso testimonianze*[78] and dissatisfied with the configuration of judicial reasoning as a syllogism, highlights the similarities between the activity of the judge and that of the historian: «*un tale movimento è servito a chiarire che il giudice, al pari dello storico, ha di fronte a sè il fatto non come una realtà già esistente, ma come qualcosa da ricostruire*»[79].

However, the narratives (inevitably) end up being symbolic representations *(rappresentazioni simboliche*) that communicate sensory knowledge[80], different subjects tell the same story differently[81]. Then, the trial turns out to be the result of the interpretation, at the end, by the judge, of a set of reports constructed and proposed by different subjects in different positions of the procedural sequence (own parties, their lawyers, witnesses, technical consultants or other intervening procedural subjects) (*soggettivamente polycentric*). Ultimately, the judge's narrative may be different from both, since he is not required to choose one of the versions provided by the parties.

"Each individual is situated in her own experience. Moreover, in order to interpret and understand that experience, each individual must filter it through the lens of her own point of view. (…) Thus, both the stories we hear and the stories we tell are shaped by who we are"[82]: we make sense of the world by transforming our experiences into stories "with familiar structures and conventions-plot, beginning and end, major and minor characters, heroes and villains, motives, a moral"[83].

convenções e limites de um possível modelo teorético. Coimbra: Separata do vol. XXXI do Suplemento ao Boletim da Faculdade de Direito. Diss. de Pós-graduação [Mestrado] em Ciências Jurídico-Filosóficas. P. 16.

77 MEYER, Michel; CARRILHO, Manuel Maria; TIMMERMANS, Benoît (2002). *História da Retórica*. Paria: Librairie Générale Française, 1ª ed. Tradução de: Maria Manuel Berjano. P. 46

78 (GIULIANI, 19-??, p. 233; LINHARES, José Manuel Aroso (1988). *Regras de Experiência e Liberdade Objectiva do Juízo de Prova*: convenções e limites de um possível modelo teorético. P. 12.

79 GIULIANI, Alessandro (19-??). *Il Declino Del Concetto «Classico» di* Prova. P. 235.

80 GIULIANI, Alessandro (1995). Le role du «fait» dans la controverse *In Archives de Philosophie du Droit*. P. 236; TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. P. 73.

81 TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. P. 63 and 135; BRONZE, Fernando José (2012). *Analogias*. P. 22.

82 BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 384.

83 BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 383.

Therefore, the procedural storytelling shows that stories are both necessary and dangerous[8485]. (i) They are necessary because they are the main instrument through which fragments of event information can be combined into a complex endowed with meaning[86]. "They provide useful ways of thinking about how we order and understand our experience"[87]. "It gives new information that helps provide a particularized context for decision making (…)"[88]. However, (ii) they are dangerous because they are "monolithic, unambiguous entities"[89] in the field of emotion theory that open paths to inaccuracy, variability, as well as manipulation; varying according to the point of view and interests of the subjects who count them at a certain time and in a given context. Dangers of incompleteness and incorrect reconstructions can lead to substantial errors in the final decision of the controversy[90]. Even a narratively good story (which seems normal, familiar, credible and therefore persuasive) is not necessarily true[91].

Despite the distinct context, our point is same as Bandes[92]: "a broader examination of the uses of narrative and emotion in legal processes", aware of the dangers but acknowledging that narrative, like empathy, can be a tool[93] because "emotions (their relation to judgment, their evaluative dimensions, their childhood history) in this way raises a definite group of normative questions and problems, and also offers a set of resources for their solution"[94].

Understanding that the past is the object of imaginative representation, because of the unwavering self-referentiality of language, what is suggested, is that the judge takes into account several elements for decision making as a contextualized evidential set (*filtrage du matériel probatoire*)[95], precisely to

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[84] TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. P. 79 and 87; LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da Juridicidade*: imagens e reflexos pré-metodológicos deste percurso. P. 316.

[85] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 410.

[86] TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. P. 54.

[87] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 385.

[88] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 362.

[89] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 364.

[90] TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. P. 55.

[91] TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. P. 58 and 236.

[92] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 362-363.

[93] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 385 and 388.

[94] NUSSBAUM, Martha (2004). Review: Précis of "Upheavals of Thought". P. 448.

[95] GIULIANI, Alessandro (1995). Le role du «fait» dans la controverse *In Archives de Philosophie du Droit*. P. 236; LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da*

not succumb into to extremes: to legislative objectivity (excessively technical and formalist) on the one hand, or to arbitrary and subjective freedom of evidential evaluation - «*la libertà di valutazione della prova da parte del giudice incominciò ad apparire proprio allora arbitraria e soggettiva*»[96], on the other.

In this sense, the judgment has at least two peculiarities: (a) complexity, both from the objective perspective (concatenations of events in time), and under the subjective prism (plurality of subjects in different legal situations)[97] - due to dialecticity, as demonstrated and (b) aspiration to rationality (*l'aspirae alla razionalità)*, as a reference to controllable criteria of logical and coherent application – «*decision making perché la formulazione di un giudizio di per sé implicail il ridavia a criteri visibili e controllabili*»[98], which is now analyzed.

2. The judge shall construct the last narrative (final decision or judgment) based on the evidence available, such as: a) the allegations made by the parties; (b) information from the process file, in particular witness statements, expert opinions, other documents[99]. This (re)construction (or reconstitution), as seen, should occur through the contextualized analysis of all the (available) elements mentioned above. Nevertheless, would the analysis of these proof (especially oral ones) be based on (c) the views provided by experience[100][101]? The judge must justify his decision, but it´s would be left to be discretionary? How and within what limits should the judge decision occur? It is therefore opportune to make some observations about the peculiarities of justification so that this activity can be defined as rational.

2.1 The positivism of modern epistemology aims to demonstrate a theoretic truth, based on criteria pre-written by the legislator[102]. For this solution, the legislator created, at first, the law and only then the judge applied it according to a pre-written method, ensuring the «scientific objectivity» and

Juridicidade: imagens e reflexos pré-metodológicos deste percurso. P. 37; LINHARES, José Manuel Aroso (2012). *Evidence (or Proof) as Law's Gaping Wound:* A Persistent False Aporia. P. 85.

96 GIULIANI, Alessandro (19-??). *Il Declino Del Concetto «Classico» di* Prova. P. 233-234.

97 TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. P. 228.

98 TARUFFO, Michele (1997). *Giudizio: processo, decisione*. P. 800.

99 TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. P. 234-237.

100 BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 134-135.

101 NUSSBAUM, Martha C. (1995). "Poets as Judges: Judicial Rhetoric and the Literary Imagination". P. 1506.

102 BRONZE, Fernando José (2012). *Analogias*. P. 98.

the «rationality» of the silogistic-subjunctive method is ensured[103]. It was thought that, in this way, the democratic principle, the principle of separation of powers and the (formal) rule of law would be protected.

However, although portion of the doctrine believes that law is a purely instrumental rationality, totalitarian regimes and atrocities committed under the pallium of law[104] have already taught that it should be more than technique or procedure[105]. Therefore, this pre-available system, insufficient, according to its various gaps, leads to the recognition of (intentional) limits and, thus, «the distance that between the abstraction and the generality of the criteria of concreteness and the singularity of the cases – confirmed the insodismable nature of the participation of the judge in the reconstitution of the current normativity»[106].

It is not possible, neglecting the concrete nature of the controversies, but the (necessary) mixture of objectivism and subjectivism[107] in the complex «act of judging» leans, at another extreme, to the conscience of the interpreter, as if the sentence stems from an «act of will» of the judge (judging according to his conscience or according to his personal understanding of the meaning of the law)[108], favoring, overmeasure, the use of psychological, political and ideological arguments in the interpretation (and application) of law[109].

Outdated either the phase in which the problem was defined in extremes the availability of the legislator (axiomatic-deductive) - "strict *logically formal operation*"[110] – sphere of pre-objective impositions, or, on the contrary, the one that refused any linkivity to these prescriptions (voluntaristic-intuitive) – "*finalistically determined choice" or "finalistic decision making*"[111] - replacing

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[103] BRONZE, Fernando José (2012). *Analogias*. P. 14.

[104] LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da Juridicidade*: imagens e reflexos pré-metodológicos deste percurso. P. 60-63.

[105] STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 9.

[106] BRONZE, Fernando José (2012). *Analogias*. P. 15.

[107] STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 12.

[108] STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 18 and 20.

[109] STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 20 and 95; FERRAZ JUNIOR, Tercio Sampaio (2009*). Estudos de Filosofia do Direito*: reflexões sobre o Poder, a Liberdade, a Justiça e o Direito. P. 293.

[110] GAUDÊNCIO, Ana Margarida Simões (2019). "Jurisdictional Realization of Law" as Judicium: A Methodological Alternative, Beyond Deductive Application and Finalistic Decision *Int J Semiot Law* 33, 133–146. Available at: «https://doi.org/10.1007/s11196-019-09668-7» (accessed on 20/04/2023). P. 139.

[111] GAUDÊNCIO, Ana Margarida Simões (2019). "Jurisdictional Realization of Law" as Judicium: A Methodological Alternative, Beyond Deductive Application and Finalistic. P. 139.

one extreme by the other, it was affirmed that the best way would result from a «third way» between syllogistic determinism and irrational decisionism[112], "proposing a practical-normative comprehension of the *realization of law*"[113].

What guarantees non-arbitrariness? How to ensure controllability? "Is it possible to defend *deductivism* as the core claim of law's (and legal adjudication's) rational *identity* whilst simultaneously assuming the challenge of a genuinely practical argumentative thinking? (…)"[114]. The answer would be found in the understanding of legal thought as argumentative *topos*, according to the "*intersubjectively* significant"[115] subject/subject practical rationality[116][117].

At the point, to say that the argumentative-prudential line assumes the investigation-decision of proof/criteria means that the judgment does not need to be made according to predetermined rigid standards, it is possible to some malleability, reliving to the judge the important role of inserting the information received in the process, ensuring a simultaneously autonomous and integrated treatment of evidential materials[118].

This would be a «prudential consideration of concrete achievement, guided by an argumentatively convincing rationality» - (practice) rationality of reasoning[119] or "practical reasoning in law"[120] or "*concrete decision-making*

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[112] BRONZE, Fernando José (2012). *Analogias*. P. 12, 109 and 225; LINHARES, José Manuel Aroso (1988). *Regras de Experiência e Liberdade Objectiva do Juízo de Prova*: convenções e limites de um possível modelo teorético. P. 127-128.

[113] GAUDÊNCIO, Ana Margarida Simões (2019). "Jurisdictional Realization of Law" as Judicium: A Methodological Alternative, Beyond Deductive Application and Finalistic. P. 139.

[114] LINHARES, José Manuel Aroso (2019). The Rehabilitation of Practical Reasoning and the Persistence of Deductivism: An Impossible Challenge? *Int J Semiot Law* 33, 155–174 (2020). Available at: «https://doi.org/10.1007/s11196-019-09670-z» (accessed on 20/04/2023). P. 156.

[115] GAUDÊNCIO, Ana Margarida Simões (2019). "Jurisdictional Realization of Law" as Judicium: A Methodological Alternative, Beyond Deductive Application and Finalistic. P. 139-140.

[116] NEVES, António Castanheira (2013). "O direito como validade: a validade como categoria jurisprudencialista", in *Revista da Faculdade de Direito da Universidade Federal do Ceará*, jul/dez 2013, n.º 2, v. 34, p. 39-76 disponível em http://www.revistadireito.ufc.br/index.php/revdir/article/view/98 (acedido em 29/11/2019). P. 34-36 and 70-71.

[117] LINHARES, José Manuel Aroso (2019). The Rehabilitation of Practical Reasoning and the Persistence of Deductivism: An Impossible Challenge? P. 155.

[118] LINHARES, José Manuel Aroso (1988). *Regras de Experiência e Liberdade Objectiva do Juízo de Prova*: convenções e limites de um possível modelo teorético. P. 14.

[119] BRONZE, Fernando José (2012). *Analogias*. P. 16 and 161.

[120] LINHARES, José Manuel Aroso (2019). The Rehabilitation of Practical Reasoning and the Persistence of Deductivism: An Impossible Challenge? P. 155.

judgment (*juízo decisório*)"[121]: "the judgment to which this is alluded (…) intends authentically the dialectical-dialogically realized search, in a certain contextual framework and attentive to a certain concrete situation (…)"[122], developing a "concrete justification"[123] which is unavoidably corresponding uncertainties, if not indeterminations[124].

It would be assumed, that the «free motivated convincing» (also known as system of rational persuasion of proof) would be the best possible alternative as a «rationalized discretion»[125][126]. But often, it is only an alibi invoked for total discretion, which knows no limits or any element that binds its conviction *a priori*.

It is required to demonstrate the reasons behind the decision as the most appropriate interpretation of the right and the proofs by the pre-understood undertaking[127], but it is merely intuitive which boils down to the result of a «I want and command», translating mere choice of several choices stems from the author *voluntas*[128].

2.2 Streck[129] criticizes the mixing (or syncretism) of «irreconcilable and self-contradictory» paradigms, by which «free conviction» or «binding to the conscience of the judge» prevails with some caveat. In essence, prevail the (pessimistic) conclusion that the judge is not controllable and that, in fact, what they do is to shape their feelings and emotions about the case to the legal system, that is, «first he has the solution, then seeks the law to found it»[130].

The sentence is merely an «act of personal will» (of power)[131]. That is, the judge is obliged to motivate his decisions, but in fact, the motivation of

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[121] GAUDÊNCIO, Ana Margarida Simões (2019). "Jurisdictional Realization of Law" as Judicium: A Methodological Alternative, Beyond Deductive Application and Finalistic. P. 139-140.

[122] BRONZE, Fernando José (2012). *Analogias*. P. 16.

[123] LINHARES, José Manuel Aroso (2019). The Rehabilitation of Practical Reasoning and the Persistence of Deductivism: An Impossible Challenge? P. 156.

[124] LINHARES, José Manuel Aroso (2019). The Rehabilitation of Practical Reasoning and the Persistence of Deductivism: An Impossible Challenge? P. 156.

[125] STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 33; TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. P. 251; LINHARES, José Manuel Aroso (1988). *Regras de Experiência e Liberdade Objectiva do Juízo de Prova*: convenções e limites de um possível modelo teorético. P. 272.

[126] TARUFFO, Michele (1997). *Giudizio: processo, decisione*. P. 797.

[127] STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 35 and pp. 116-118.

[128] BRONZE, Fernando José (2012). *Analogias*. P. 16 and 161.

[129] STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 40.

[130] STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 42.

[131] STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 43 and 46.

the sentence «is, as a rule, written at a time successive to the one in which the decision is formulated»[132]. It would be nothing more than a strategic discourse[133]: «the core of judgment hides conviction, convinced thinking, not method (motivation)»[134]. The possibility of meaning emerges from the dimension of significance not in a contemplative theoretical view, but instead in a shared world[135].

The meaning is anticipated and only then the (legal) methods of interpretation substantiate what (personally) he was already intended to do[136]: «we do not interpret to understand, we understand to interpret»[137]. Belittleling the democratic space built in the legality, doctrine and (updated) jurisprudence of the higher courts[138][139], «conscience, subjectivity, inquisitive system and discretionary power become variations of the same theme»[140], especially regarding to the so-called «judicature of the floor», object of this work.

The concept of democratic state of law rightly seeks to prevent public authorities from acting as they wish, but, with regard to judges, the intrinsic interpretative activity makes it difficult to define limits that avoid distorting the content of the law (or even the Constitution)[141] and assist in the analysis of (oral) evidence.

This definition is important because the interpretations they make, not ignoring the human condition of being-in-the-world, are given by their internal assumptions, with historical, political, social conditioning, etc.[142]. If there is no *a priori* element that link the judge's decision, the motivation becomes only an unnecessary formality, since he ends up choosing how he will decide. It is (the camouflaged turn of) unrestricted solipsism or subjectivism[143].

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132 TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. P. 211.

133 LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da Juridicidade*: imagens e reflexos pré-metodológicos deste percurso. P. 742.

134 FERRAZ JUNIOR, Tercio Sampaio (2009*). Estudos de Filosofia do Direito*: reflexões sobre o Poder, a Liberdade, a Justiça e o Direito. P. 293.

135 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 111.

136 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 84.

137 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 99.

138 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 21; BRONZE, Fernando José (2012). *Analogias*. P. 306.

139 NUSSBAUM, Martha C. (1995). "Poets as Judges: Judicial Rhetoric and the Literary Imagination". P. 1511.

140 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 26.

141 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 37.

142 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 37.

143 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 37 and 69.

This type of mixing, the result of the recognition that understanding the role of the judge is a complex subject[144], would thus be dependent on the role played by practical reason, derived from Aristotelian philosophy[145][146]. It is inevitable to accept that theoretical reason cannot be separated from the way we deal with the world (practical reason). Finally, there is no concept without practice[147], but Streck[148] says that it is of no use to replace theoretical reason with «practical reason» if, after all, it is not known what this means.

Hence, the question that remains is: each decision part (or establishes) a «zero degree of meaning»?[149] How to (re)reverse the order and first understand the (current) and (aprioristic) right-prescription ordering to culminate in the right-decision judicative (apotheortic) only then[150]? How we can control of the aforementioned intersubjectivity, that is, how to guarantee the specific practical rationality at issue here[151] since it is not possible to build «automative judges», immune to personality and the historicity[152], nor is it intended to block the process of humanization of man?[153][154]

Many surrenders: the interpretation of law is elongated from subjectivism stemming from a solipsistic practical reason and this «deviation» is impossible to be corrected[155]. So why do we continue to defend the argumentative-prudential line? Because, since the subject-object dimension can never replace

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144 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 105.

145 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 71.

146 NUSSBAUM, Martha C. (1995). "Poets as Judges: Judicial Rhetoric and the Literary Imagination". P. 1482.

147 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 128.

148 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 127.

149 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 27.

150 BRONZE, Fernando José (2012). *Analogias*. P. 316.

151 BRONZE, Fernando José (2012). *Analogias*. P. 55; LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da Juridicidade*: imagens e reflexos pré-metodológicos deste percurso. P. 202.

152 BRONZE, Fernando José (2012). *Analogias*. P. 36.

153 BRONZE, Fernando José (2012). *Analogias*. P. 32.

154 BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 371: But what does it mean to say that an attribute "interferes with judgment?" How is it possible to determine which are the fears, neuroses, prejudices, blind spots, and unsavory emotions that interfere with judgment, and which are the attributes and particular perspectives that make up each person's unique personality? How is it possible to determine which other perspectives should be taken into account, and how much weight to accord them? In Judith Resnik's words, "how can we tell the good bias from the bad?"' The enterprise founders without a normative principle to guide it.

155 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 95.

communication in the subject-subject dimension[156], there is no other (legal) better solution. Those currently available, as already explained, imply a setback. How to decide (people's lives) is much more a responsibility than a power, what we do is illuminate a behavioral change of judges. But it is necessary to go beyond virtues[157], is important an authentic principle[158][159], according to the jurisprudentialist assumption[160] that rights result from principles, which in turn, are axiological commitments of a concrete society.

It happens that judge's actions are not isolated, but before the encounter with the other. The judge cannot depart from reality and isolate himself in a «parallel and fictitious world» to «judge well»[161]. Praxis is precisely the intersubjectivity that materially densifies the meeting of everyone in the world that we must share[162]. Life must be lived together. Bandes says that "personal experience, identification, compassion that flows for all sorts of reasons, articulated or unarticulated, will always influence decision-making"[163]. As

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156 LINHARES, José Manuel Aroso (1988). *Regras de Experiência e Liberdade Objectiva do Juízo de Prova*: convenções e limites de um possível modelo teorético. P. 297.

157 LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da Juridicidade*: imagens e reflexos pré-metodológicos deste percurso. P. 203.

158 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 116.

159 GAUDÊNCIO, Ana Margarida Simões (2019). "Jurisdictional Realization of Law" as Judicium: A Methodological Alternative, Beyond Deductive Application and Finalistic. P. 139: This *jurisprudentialist* option, axiologically-materially and practically-normatively outlined, is built from the *autonomous* reflection about practice that concerns law and the specifically legal content it mobilizes [37: 87–114, 106], with practical implications directly arising from the autonomization of *normative principles* and determining the understanding of the dialectical (re)construction of the *legal system* itself. This also means assuming directly the point of view of the *concrete judicative-deciding realization of the law* [30: 196–205], as a particular moment of reflection and articulation between *system* and *problem*, even between *problem*—the one stated in abstract in the foundations and criteria mobilized—and *problem* [30:155, 2: 139]1—the *concretum* that, spatio-temporally located, requires an answer from law—which will, in *space* and *time*, resist the *centrifugal* forces created, and *centripetally* connect the essential valuations that the law brings to the reality which challenges it [12: 91–103].

160 NEVES, António Castanheira (2012). *O 'jurisprudencialismo' – proposta de uma reconstituição crítica do sentido do direito*, in Nuno Manuel Morgadinho dos Santos Coelho/Antônio Sá da Silva (Org.), Teoria do Direito. Direito interrogado hoje – o Jurisprudencialismo: uma resposta possível? Estudos em homenagem ao Senhor Doutor António Castanheira Neves, Juspodivm/Faculdade Baiana de Direito, Salvador, p. 9-79.

161 TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. P. 127.

162 BRONZE, Fernando José (2012). *Analogias*. P. 11; ARISTÓTELES (2018). *Ética a Nicómaco*. Lisboa: Quetzal Editores, 4º ed. reimpressa. Tradução, prefácio e notas de António de Castro Caeiro. P. 31; LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da Juridicidade*: imagens e reflexos pré-metodológicos deste percurso. P. 293.

163 BANDES, Susan A. (2017). Compassion and the Rule of Law in *International Journal of Law in Context*. Available at: «https://www.researchgate.net/publication/311813929» (accessed on 20/04/2023). P. 23.

each one has their own story to tell[164], ′selective empathy′ is inevitable. More dangerous is lack of awareness of the limits of individual perspective (…)"[165].

Now, it is the judge who, intersubjectively conditioned, in a self-referential language[166], can think of the appropriation-assimilation of the other as an experience (constructive or deconstructive) of self-reformulation[167]. This means that he can take personal learning from people's stories[168]. He can get inspired, emotional and reflect so as not to go through the same situation. He can even understand the situation better. What he cannot is project in this third story his own frustrations, pains, traumas, or expectations as if deciding the fate of that story he was solving his own problems. Because this third story is his, but not about him. What he can't do is turn into part (or the lawyer of one of them) because he should still be third. He must be aware of his triggers or "stimulus"[169] or even "emotional disposition"[170].

There is no such thing as "emotionless baseline"[171]. No judge could be entirely dispassionate[172] but no judge wants to be seen as "soft", so they probably never gone to admit that were influenced by emotions. As we see, nothing can be done about that except that he admits for himself and try to deal with before sentence the case. The point, then, is to draw a certain limit in this complex of (institutionalized) relationships[173]. This limit is self-restraint[174][175]

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[164] NUSSBAUM, Martha C. (1995). "Poets as Judges: Judicial Rhetoric and the Literary Imagination". P. 1491-1493.

[165] BANDES, Susan A. (2009). Empathetic Judging and The Rule of Law in *Cardozo Law Review de Novo*, pp. 133-148. Available at: «http://cardozolawreview.com/index.php?option=com _content&view=article&id=111:bandes2009133&catid=19:empathyandjustice&Itemid=23» (accessed on 03/05/2023). P. 145.

[166] LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da Juridicidade*: imagens e reflexos pré-metodológicos deste percurso. P. 76.

[167] LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da Juridicidade*: imagens e reflexos pré-metodológicos deste percurso. P. 84.

[168] BANDES, Susan A. (2009). Empathetic Judging and The Rule of Law. P. 143.

[169] POSNER, Erik (2001). "Law and the Emotions". P. 1985.

[170] POSNER, Erik (2001). "Law and the Emotions". P. 1982.

[171] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 370.

[172] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 144.

[173] ARISTÓTELES (2018). *Ética a Nicómaco*. P. 31.

[174] POSNER, Richard A. (2013). *Reflections on Judging*. England: Harvard University Press. P. 149.

[175] ARISTÓTELES (2018). *Ética a Nicómaco*. P. 167; LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da Juridicidade*: imagens e reflexos pré-metodológicos deste percurso. P. 175-178.

or "self-awareness": "the ideal is not to shed all the attributes that encompass one's personality, but rather to become aware of and perhaps exercise some control over those that interfere with judgment"[176].

In resume, "judges have emotions. But what is crucial is what they do with these emotions"[177]. The point is "provides a useful framework for understanding how judges do, and should, manage the emotions they inevitably experience. To ask judges to be dispassionate is to ask them to engage in ′emotion regulation′ (…)"[178], not "emotion elimination"[179][180].

That means that "what judges can and should do is to learn to effectively manage - rather than eliminate - emotion", proposing "the emotionally well-regulated judge"[181] because (i) "judges are people, and people naturally feel emotions - particularly when exposed to emotionally vivid stimuli, as judges routinely are (…)"[182] and because (ii) "emotion regulation is particularly essential at work, where one is expected to feel and display emotion differently than in private life"[183].

Understood that "emotions are not merely instinctive and uncontrollable, but are also partially cognitive"[184][185][186], "the cognitive aspect allows emotions to evolve with exposure to new information and experiences" [187] being possible (i) to mitigate the limitations of one's own perspective and (ii) "consciously split off some of the factors-for example, blind spots, prejudices, and fears-

[176] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 371 and 146.
[177] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 148.
[178] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 143.
[179] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 143.
[180] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 147.
[181] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 142.
[182] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 142.
[183] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 144-145.
[184] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 370-371.
[185] POSNER, Erik (2001). "Law and the Emotions". P. 1983.
[186] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 148.
[187] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 370-371.

that inappropriately interfere with judgment"[188] or even (iii) take steps to modify emotional dispositions[189] [190] by avoiding conditions that activate them or through "behavior modification techniques"[191] or "emotion-regulation strategy" [192]. That means that people can cultivate their emotions[193]. That´s what Nussbaum[194] called "appropriately constrained emotion".

These are some examples of "regulation strategies"[195]: (a) Situation Selection - "judges may try to choose cases based on their predicted emotional impact"[196]; (b) Situation Modification – "whatever level of control a judge has over her docket, she may attempt to control how emotional situations unfold in her chambers and courtroom"[197], self-directed or shaping the emotions of others[198]; (c) Attentional Deployment – "if, as suggested earlier, many situations cannot be avoided or significantly modified, a judge might direct her attention only to those situational features that evoke a desired emotion"[199]; (d) Cognitive Change – "if the judge cannot avoid, alter, or ignore an emotionally salient situation, (…) one sort of cognitive-change strategy is to change one's appraisal of the stimulus"[200] - "adopting a professional attitude is a form of cognitive precommitment that can change how the mind processes stimuli (…)"[201]; (e) Response Modulation – "as the prior discussion suggests, not every emotional stimulus can be rethought. (…) While

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188 BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 370-371.

189 POSNER, Erik (2001). "Law and the Emotions". P. 1982.

190 POSNER, Erik (2001). "Law and the Emotions". P. 1978.

191 POSNER, Erik (2001). "Law and the Emotions". P. 1982.

192 MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 148.

193 POSNER, Erik (2001). "Law and the Emotions". P. 1985.

194 NUSSBAUM, Martha C. (1995). "Poets as Judges: Judicial Rhetoric and the Literary Imagination". P. 1480-1481.

195 MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 145.

196 MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 145.

197 MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 145.

198 MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 145-146.

199 MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 146.

200 MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 146.

201 MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 146.

it might be possible for the judge to recast that experience, its most likely interpretation (…)"[202]; (f) Emotional Disclosure – "describing an emotional episode to another person"[203] - "though thinking and talking about emotions does not generally lessen their intensity, it enhances self-knowledge (…)"[204].

Was discussed the relation between non-linguistic cognitions, social norms, and individual history establishing that emotions have a rich cognitive content at the expense of «blind forces that lack selectivity or intelligence"[205]. We assume "reason that is not self-sufficient and needs to be helped by emotion"[206]. "Perhaps if we had a complete theory of emotions, we might be able to single out ´emotional primitives´"[207].

From the assumption that (i) emotion is an inextricable part of legal discourse and that (ii) emotions are partially cognitive, and, therefore, educable is possible to ask if emotions are hierarchical and (in case of a positive answer) which or if emotions deserve the most weight in legal decision making. Which perspectives are the most desirable[208][209]?

2.3 At this point, we discussed "emotions" in general. Now, is important analyze some of them in particular. Exist such thing as "wrong emotions" or "less ´agreeable´ emotions"[210] or "simpler emotions", "not complex", "durable emotions", "higher emotions"[211]? "Is it possible to decide *which* emotions belong in the law"[212]? In the legal context certain emotions are appropriate[213]? It is understood that even «good emotions» should be analyzed with caution. To exemplify, let´s investigate these two emotions: "compassion"[214]

[202] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 147.
[203] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 147.
[204] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 147-148.
[205] NUSSBAUM, Martha (2004). Review: Précis of "Upheavals of Thought". P. 445.
[206] MORAVCCSIK, J. M. E. (1982). Understanding and the Emotions. P. 220.
[207] MORAVCCSIK, J. M. E. (1982). Understanding and the Emotions. P. 217-218.
[208] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 370.
[209] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 393.
[210] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 371-372.
[211] POSNER, Erik (2001). "Law and the Emotions". P. 1991 and 1985-1986.
[212] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 371-372.
[213] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 389-390.
[214] NUSSBAUM, Martha (2004). Review: Précis of "Upheavals of Thought". P. 447.

and "empathy" in the role of storytelling in the legal process[215], focusing on legal questions[216].

The law can present itself as authoritative, emotionless, and inevitable, transcending passion, avoiding the stigma of "emotionalism". "Compassion, empathy, and mercy are marginalized as ′emotional′ and therefore inappropriate,' (…)"[217]. "Yet even a legal process devoid of such ′soft′ emotions as compassion or empathy is not emotionless; it is simply driven by other passions" [218].

"Emotion terminology is always slippery. These terms - compassion, empathy, sympathy, pity - have no fixed meaning"[219]. Compassion is addressed by Nussbaum[220] as «basic social emotion» and «a certain sort of reasoning»: «compassion is 'rational' in the descriptive sense in which the term is frequently used – that is, not merely impulsive, but involving thought or belief»[221]. Realizing the cognitive foundation of emotions, as stated earlier, treats compassion more than «the unintelligent (unthinking, nonreasoning) parts of our animal nature»[222].

Compassion was perceived by Nussbaum as an emotion related to the suffering of another person not with a tone of condescension and superiority, but because it understands that (a) it is not a trivial situation (*seriousness*), that (b) it was not caused by one's own fault, so that the suffering is not deserved (*fault*) and that (c) could be in that situation, paying attention to one's own vulnerability (*similar possibilities, empathetic identification*): "she makes sense of the suffering by recognizing that she might herself encounter such a reversal"[223].

Compassion can be understood as "the feeling that arises in witnessing another's suffering and that motivates a subsequent desire to help, including a call to action on the sufferer's behalf that is not an inherent component of empathy"[224].

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[215] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 363.
[216] POSNER, Erik (2001). "Law and the Emotions". P. 1991.
[217] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 388-389.
[218] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 368-369.
[219] BANDES, Susan A. (2017). Compassion and the Rule of Law in *International Journal of Law*. P. 4.
[220] NUSSBAUM, Martha (1996). "Compassion: The Basic Social Emotion", in *Social Philosophy and Policy*, vol. 3, n. 1, p. 28.
[221] NUSSBAUM, Martha (1996). "Compassion: The Basic Social Emotion". P. 30-31.
[222] NUSSBAUM, Martha (1996). "Compassion: The Basic Social Emotion". P. 47 and 53.
[223] NUSSBAUM, Martha (1996). "Compassion: The Basic Social Emotion". P. 35.
[224] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 5.

Although, Bandes[225] shows an interesting point: the invocation of compassion to justify law issues is troubling because it "implies that solutions to inequality and other injustices are a matter of charity, mercy, condescension and pity[226] rather than a matter of correcting wrongs and expanding rights"[227]. Is also important be "cautioned against a tendency to uncritically embrace compassion, sympathy and empathy as soft, merciful, and therefore a welcome antidote to the hardness of law"[228]. She proposes instead that "compassion's importance lies in its ability to illuminate for decision-makers what is at stake for the litigant"[229] being closely tied to humility: "both are reminders of human fallibility and of the limits of individual understanding"[230] and we agree.

In this way, if we consider compassion as a tool which could influence legal decision-making in a (limited) good way, instead of "make unauthorized exceptions to a rule"[231] that imply "unequal treatment depending on the luck of the draw, arbitrariness"[232] is possible reconcile compassion with the rule of law[233] and accept "compassion as a factor in judicial decision making"[234].

It is important to understand that "simply incorporating some of the language of empathy and compassion into the judicial vocabulary would enable a judge to face more directly the ´burden and pain of judging´"[235]. The main point is that they are legitimate tools.

Despite possible ambiguities, given the aforementioned difficulty of reaching a fixed meaning[236], it is now appropriate to distinguish «empathy"[237] which can be understood as: i) feeling the emotion of another; ii) understanding the experience or situation of another, by imagining oneself to be in the position of the other; iii) action brought about by experiencing the distress

[225] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 1.
[226] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 17.
[227] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 1.
[228] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 12-13.
[229] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 1.
[230] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 1-20.
[231] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 9.
[232] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 10.
[233] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 3 and 7-8.
[234] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 11-12.
[235] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 379.
[236] BANDES, Susan A. (2009). Empathetic Judging and The Rule of Law. P. 134.
[237] NUSSBAUM, Martha C. (1995). "Poets as Judges: Judicial Rhetoric and the Literary Imagination". P. 1486 and p. 1490-1491.

of another[238]; (iv) the facility to perceive the humanity of another person[239]; (v) "it calls for understanding the goals and intentions of others"[240]; (vi) "the capacity to feel 'with' another"[241], toward the powerless or the disenfranchised or not; (vii) "empathy allows us to put ourselves in the shoes of others—it allows a judge to see the perspective of all the litigants"[242]; (viii) "is the ability to take the perspective of another"; (ix) "is a capacity for understanding the desires, goals and intentions of others" [243]. Empathy does not require to act on behalf of any particular litigant, as a command to help [244] like compassion.

It said "that requires a desire to see things from the vantage point of another, but it is really about perspective taking"[245]. "The problems arise from selective empathy and from empathic inaccuracy (…) because judges are encouraged to believe in their own omniscience"[246] but they have prejudices: "whether this ought to qualify as putting oneself in another's shoes or simply as a (…) self-referential reflex is an interesting semantic question"[247].

It begs an important question: "to what extent *can* we truly feel another's pain, or even understand another's situation?"[248]. The effort to achieve imaginative understanding of others, "however well intentioned, is constrained by each individual's particular capabilities and limitations" [249], which conforms to self-referential experience[250]. The problem for the judge is "understand or experience the viewpoint most unlike his own"[251]. As judges should and inevitably exercise empathy, we are back to the importance that he recognizes his own limitations and blind spots, and try to correct them[252] to not affect decision-making[253].

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[238] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 373-374.
[239] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 374.
[240] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 18-19.
[241] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 18-19.
[242] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 7.
[243] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 4.
[244] BANDES, Susan A. (2009). Empathetic Judging and The Rule of Law. P. 136.
[245] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 4.
[246] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 18-19.
[247] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 400-401.
[248] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 375.
[249] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 375.
[250] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 375.
[251] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 376.
[252] BANDES, Susan A. (2009). Empathetic Judging and The Rule of Law. P. 135.
[253] BANDES, Susan A. (2009). Empathetic Judging and The Rule of Law. P. 135.

Bandes says that "empathy", by itself, is an instrumental concept[254], is a capacity, not an emotion like compassion[255]. Still, can also be a tool used to achieve a variety of ends[256]: "a judge uses empathy as a tool toward understanding conflicting claims, assisting the judge in understanding the litigant´s perspectives[257].

"Narrative and emotion are imbued with normative significance" [258] but neither "benign emotions such as empathy or compassion are always helpful or appropriate in the legal scenario[259][260] "with rich historical concreteness"[261]. They are important[262] in the context of judicial decisionmaking as tools, that can be used or not. They are (or can be) "one tool in the judicial toolbox"[263][264] as well as modesty, maturity, sense of proportion, balance, recognition of human limitations, sanity, prudence and sense of reality[265].

So, "recognizing the importance of the education of the sentiments, and the important roles that emotions play in our moral lives and our choices"[266], only when the judge can discern (and balance) his (institutional) autonomy with his (personal/emotional) vulnerability he will be able to accomplish this task. As technical legal reasoning, including prominently the consideration of precedent, should be subordinated to untethered emotions is necessary an institutional constraint[267], articulated by a normative principle[268][269].

The debate about *question-of-law in concrete* and the realization of law *by mediation*[270] emphasized "the differentiation of law both as a *normative*

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[254] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 382.
[255] BANDES, Susan A. (2009). Empathetic Judging and The Rule of Law. P. 136.
[256] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 379.
[257] BANDES, Susan A. (2009). Empathetic Judging and The Rule of Law. P. 137.
[258] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 364-364.
[259] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 365 and 389-390.
[260] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 371-372.
[261] NUSSBAUM, Martha C. (1995). "Poets as Judges: Judicial Rhetoric and the Literary Imagination". P. 1479-1480.
[262] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 364.
[263] BANDES, Susan A. (2009). Empathetic Judging and The Rule of Law. P. 137.
[264] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 15-16.
[265] BANDES, Susan A. (2009). Empathetic Judging and The Rule of Law. P. 137.
[266] MORAVCCSIK, J. M. E. (1982). Understanding and the Emotions. P. 224.
[267] NUSSBAUM, Martha C. (1995). "Poets as Judges: Judicial Rhetoric and the Literary Imagination". P. 1517.
[268] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 373.
[269] NUSSBAUM, Martha C. (1995). "Poets as Judges: Judicial Rhetoric and the Literary Imagination". P. 1483 and 1485.
[270] GAUDÊNCIO, Ana Margarida Simões (2019). "Jurisdictional Realization of Law" as Judicium: A Methodological Alternative, Beyond Deductive Application and Finalistic. P. 140.

discourse and as a specific *narrative*, and the nowadays concomitantly essential *inter-textuality*, on the one hand, and the perception of the *judicial judgment-judicium* as a *translation*, on the other"[271]. Such practical implications "in the effecting of the foundational *principles* in the legal system will reflect directly in - and will be determinant to - the subsequent discussion on the *normatively legal* relationship between *normative principle* and *legal (juridical) criterion*"[272][273][274].

Thus, with principles as fundamentals, and legal norms, precedents and dogmatic models as criteria, it is proposed a practical consonance between the principles, which are invoked as commitments and projects to be or to be-with-the-others, and the specific normative content of the realization of these commitments for the relation between *phronêsis*, prudence and narrativity. This is what the *Principle of Institutional Otherness* intends. We asked many questions and this principle do not intend to be a «magic wand» that solves all problems overnight. Nor is it an escape from reality in beautiful words. It is rather an authentic (intersubjectively) legal contribution that can be added to good legal practice (even if gradually). It has already been contextualized, now it is necessary to clarify its details. But it is really another time story.

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[271] GAUDÊNCIO, Ana Margarida Simões (2019). "Jurisdictional Realization of Law" as Judicium: A Methodological Alternative, Beyond Deductive Application and Finalistic. P. 140-141.

[272] GAUDÊNCIO, Ana Margarida Simões (2019). "Jurisdictional Realization of Law" as Judicium: A Methodological Alternative, Beyond Deductive Application and Finalistic. P. 140-141.

[273] GAUDÊNCIO, Ana Margarida Simões (2019). "Jurisdictional Realization of Law" as Judicium: A Methodological Alternative, Beyond Deductive Application and Finalistic. P. 141: This approach represents, hence, a model of *justice* in which there is a continuously constructing axiological horizon of reference of what should and what should not be *law*, which states the validity of juridical (*normative*) principles, criteria and decisions. And a model of *law* whose practical accomplishment consists in a practical and normative conception of the *realization of law*—not a deductive application nor a finalistic determined choice, but a *judicative decision*, involving *an axiologically founded juridical judgment* [36: 93–94, 3: 73–122, 6]—, whose context-*framework* consists of a *stratified legal system* before which the *juridically relevant controversy*— the concrete problem posed to law—emerges [30: 165–286]. So, the judicative resolution of the juridical controversy consists in a dialectical relation between *system* and *problem* [30: 155–157, 1, 2: 139, 3: 110–122].

[274] NUSSBAUM, Martha C. (1995). "Poets as Judges: Judicial Rhetoric and the Literary Imagination". P. 1483.

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