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Judicial decision and its discontents: among drive, culture, ideology and law[1]

Mal-estar na decisão judicial: entre pulsão, cultura, ideologia e direito

Renato Lopes Becho[*]

Roberto Lima Campelo[**]

Abstract

The aim of this article is to present an approximation between drives and Law. Based on the writings of Sigmund Freud, it is intended to demonstrate that the successive openings of legislative law to jurisprudential law enable the judge, consciously or unconsciously, make value judgements on positive law, legal provisions that promote, in the end, the very destruction of law, part of culture. The work is structured in successive in both legal and knowledge paradigms concerning the judicial decision, each of which is a parameter that expands or creates judicial discretion. Thus, firstly, it shall be made an approximation between the idea of civilization and its discontents in Freud and the underlying tension between individual drives and social rules and institutions, contextualizing this dynamic with the construction of the judicial decision and the law. Secondly, there is the question of truth and process, emphasizing the procedural function of providing a civilized decision and not exactly a superior truth, in addition to the limitations in the search for the truth. In a third part, two criteria for correcting the Law will be possible that seek a supposed objectification of the legal argument, considering that these corrective elements can be simulators of satisfaction of the impulse to attack the Law itself. In the fourth, the aggression drive is approached with ideology, which is operationalized by a judge of the judge's value in relation to the Law and an impetus to transform it as it is understood as it should be. Finally, it is concluded that the judge must be aware of his own impulses and verify in which measures are used as an instrument of destruction of Law and culture.

Keywords: tax procedure law, jurisprudence, interpretation and application of law, judicial decision.

Resumo

O objetivo deste artigo é apresentar uma aproximação entre pulsões e Direito. Baseado nos escritos de Sigmund Freud, pretende-se demonstrar que as sucessivas aberturas do direito legislativo ao direito jurisprudencial possibilitam que o juiz, de forma consciente ou inconsciente, acaba por fazer um juízo de valor acerca do Direito positivo, inserindo normas jurídicas que promovem, em verdade, a própria destruição do Direito, parte integrante da cultura. O trabalho é estruturado em sucessivos paradigmas jurídicos e do conhecimento que concernem à decisão judicial, sendo, cada qual delas, um parâmetro que expandem ou reduzem a discricionariedade judicial. Assim, primeiramente, será feita a aproximação entre a ideia de mal-estar na civilização em Freud e a tensão existente entre as pulsões individuais e as regras e instituições sociais, de um lado, associando contextualizando essa dinâmica com a construção da decisão judicial. Em segundo lugar, passa-se pela questão da verdade e o processo, realçando a função processual de prover uma decisão civilizada e não propriamente uma verdade superior, além das próprias limitações na busca da verdade. Em uma terceira parte, serão analisados dois critérios de correção do Direito que buscam uma suposta objetivação da argumentação jurídica, ponderando-se que esses elementos corretivos podem ser simulacros da satisfação da pulsão de agressão ao próprio Direito. Na quarta parte, é feita a aproximação da pulsão de agressão com a ideologia, sendo esta operacionalizada por um juízo de valor do juiz em relação ao Direito e um ímpeto de transformá-lo conforme se entende como ele deveria ser. Conclui-se finalmente que o juiz deve

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[*] Doutor, Mestre e professor de Direito Tributário na Pontifícia Universidade Católica de São Paulo (PUC-SP). Livre-docente em Direito Tributário pela Universidade de São Paulo (USP). Estágio pós-doutoral no King's College de Londres. Juiz federal em São Paulo/SP. Orcid: https://orcid.org/0000-0002-1025-1204

[**] Juiz Federal | Ex-Procurador do Município de São Paulo | Ex-Conselheiro Efetivo do Conselho Municipal de Tributos do Município de São Paulo | Mestre e Doutorando em Direito pela Pontifícia Universidade Católica de São Paulo. Especialista em Direito Público com foco em Advocacia PúblicaOrcid: https://orcid.org/0000-0002-9090-6337

estar ciente de suas próprias pulsões e verificar em que medida estão sendo usadas como instrumento de destruição do Direito e da cultura.

Palavras-chave: *jurisprudência, interpretação e aplicação do Direito, decisão judicial.*

1 Introduction

The aim of this article is to present an approximation between the drives, explained by Sigmund Freud, and Law, relating them to culture and Ideology.

We begin our reflections by stating the obvious: judges are people who carry out an institutionalized activity with the purpose of resolving conflicts. This simple phrase reveals two very different realities. The first is that the judge, being a person, has his own psychic constitution, with his streams of consciousness, such as perceptions, thoughts, sensations and emotions. The second reality pointed out here is that the judge fulfills an institutional activity, being, at this point, a part inserted in a certain system of principles and rules that are expected to be applied in the construction of the decision, since the idea of having a system of rules that is not complied with by its executor would be absurd. To be applied is, therefore, the function of being of a legal system.

Thus, we trace two very well defined fields in the figure of the judge: his internal world, charged with the subjectivism inherent in the human mind, full of desires, desires, beliefs, prejudices and visions of the world; and the external, contingent world, materialized by the law understood as an organizer of conduct, which, depending on the degree of cultural development of society, can be more or less restrictive, which imposes a certain type of conduct, often contrary to elements of the internal world, thus demanding certain individual renunciations in favor of a collective good.

Having presented this dichotomy, there are elements, which we will expose throughout this article, that allow us to say that there is a tension between the mind of the judge and the law, insofar as the law imposes on the judge-State, at the institutional level, respect for the pre-established principles and rules, which reinforces the idea of order, of collectivity and respect for the expectation of coherence, but, at the same time, it imposes on the subjectivity of the person of the judge, the exercise of self-control, or a kind of alienation from himself and from his desires and beliefs, which are or should be inhibited, in the name of the maintenance of institutions and of the collectivity.

Let us now imagine another destination for the tension between the mind of the judge and the law. As we have presented, the attitude of self-control and self-alienation in favor of system

coherence is associated with the idea of cost. Let us suppose then that the judge does not want to pay this cost, that is, he does not want to renounce his wishes or desires, but to make them prevail in a certain solution of the conflict taken to the Judiciary. At this point, we open two questions that seem to us to be the most problematic. The first is to approach the reasons why the judge would take such an attitude. The second is to identify how the judge will justify the decision, since in civilized countries, the idea of stating the reasons for the judicial decision is inherent to the very idea of the legitimacy of the jurisdiction. Thus, in other words, we consider it relevant to reveal the origin of the rupture of the coherence of the system through the judicial decision, as well as the way in which this conduct is justified in objective terms.

To this end, we propose an analysis of the judicial decision under the methodological cut of psychology and, more precisely, in the studies of Sigmund Freud, in particular, in his analysis of how external factors – that is, factors not derived from the human mind, conscious or unconscious – influence the psyche and human behavior itself. Thus, we adopt a different approach to that adopted by the science of Law, not with the aim of substituting one for the other, but with the intention of building an interdisciplinary language and, ultimately, proposing answers, albeit partial, but always based on possible scientific rigor, taking into account not only our own limitations, but also those inherent to psychology.

At this point, we believe it is important to clarify another obvious aspect: the lines that we draw here are exclusively on the plane of argumentation and use Freud's categories, constructed from the clinic and the conscious abstractions of the psychoanalyst to propose an objective language that explains to the scientific community how the human mind works. Thus, clearly, we do not propose a clinical diagnosis of the judge and his decision, either because we do not have the qualification to do so and, more importantly, because we do not address a specific object, that is, a patient or group of patients who could make up an empirical sample of our observations.

Thus, we are on the plane of possibilities, not yet that of probabilities. It is a proposal to bring Freudian concepts closer to the study of judicial decision in order to construct a language that can explain one of the possible sources of the difficulty in establishing a coherent legal order, especially when jurisprudential law is gaining more and more autonomy, even with the seal of constitutional law and legislative law. In this sense, we try to present arguments that can collaborate in the complex task of deciding at the institutional level.

We emphasize, however, that the approach does not intend to exclude any other type of analysis of the judicial decision, much less to propose definitive answers. We present a psychological analysis of the decision that coexists very well with so many other cuts that can

be made on the object of study, such as political, sociological, economic or legal (this one to which we legal professionals already have more intimately). On the other hand, we justify our proposal based on the perception that the factors that support the judicial decision must all be observed, highlighted, analyzed and subjected to the scrutiny of the legal community so that it can receive the product of the jurisdictional activity with less perplexity and with more instruments of refutation, whether at the academic-scientific level, or at the procedural-pragmatic level.

2 The judicial decision as the object of the death drive

There is a malaise in Brazilian jurisprudence. And when we talk about malaise, we refer to the expression introduced by Sigmund Freud, in 1930, when dealing with what was called "malaise in civilization".[2] In the work of the same name, Freud defines the term "civilization" as "the sum total of the achievements and institutions that separate our life from that of our animal ancestors, and that serve two purposes: the protection of man against nature and the regulation of the bonds between them."[3]

In the same work, the Austrian psychoanalyst records that law, part of culture, is the way in which human relations are regulated, establishing the power of the community in opposition to the individual, pointing out that life in common only becomes viable when there are

[2] The term "civilization" is not a consensus in Brazilian translations. By way of example, we can cite the works Freud, Sigmund. Complete Works volume 18 – **The malaise of civilization, new introductory lectures to psychoanalysis and other texts (1930-1936).** Translation by Paulo César de Souza. São Paulo: Companhia das Letras, 2010 and FREUD, Sigmund. **Culture, Society, Religion**: The Discomfort in Culture and Other Essays. Translation by Maria Rita Salzano Moraes. São Paulo: Autentica, 2020. As Gilson Iannini and Pedro Heliodoro point out, in an introduction to the 2020 book, although the work is originally titled "Das Unbehagen in der Kultur" from the German, Freud, deliberately or not, prefers not to distinguish the terms "Kultur" and "Zivilization", considering them synonymous in his texts. However, the authors of the presentation defend the thesis that Freud's choice would be deliberate, and that the malaise to which he was referring was that of culture, a term that would denote the interest in morality and inner experience, of a Germanic character, as opposed to the term "civilization", coined in France and referring to political thought and focused on social issues (FREUD, Sigmund. **Culture, Society, Religion**: The Discomfort in Culture and Other Essays. Translation by Maria Rita Salzano Moraes. São Paulo: Autentica, 2020, p. 21). The distinction, however, goes beyond the limits of the present work to the extent that, in addition to the fact that Freud's work does not interfere with the subject, it provides a concept of civilization or culture, useful for the development of the reasoning presented here, which is why the terms will be used as synonyms in this work.

[3] FREUD, Sigmund. Complete Works volume 18 – **The malaise of civilization, new introductory lectures to psychoanalysis and other texts (1930-1936*).*** Translation by Paulo César de Souza. São Paulo: Companhia das Letras, 2010, p. 48-49.

institutions that guarantee the power of institutions over the individual.[4] It is precisely in this sense that the idea of culture or civilization is opposed to barbarism.[5]

In this same context, Freud enumerates, according to him, the three sources of human suffering and, consequently, of the limitations to one's own happiness: the arrogance of nature, the fragility of our body and the insufficiency of the norms that regulate human bonds in the family, in the State and in society. As for the first two, the psychoanalyst observes that man has not many alternatives but to resign himself to the physical impossibility of overcoming it. However, in a different way, Freud states that man does not want to admit failure in the face of the realization that the institutions he himself created would not bring well-being and protection to all.[6]

Freud also expresses his perplexity at the assertion that much of the blame for this malaise comes precisely from civilization, and that the formula for bringing us happiness would be to return to the primitive, simpler state of fewer needs, pointing out what might be called the paradox of civilization in the sense that, At the same time that civilization is built to protect us from the sources of suffering, it is also itself a source of suffering, establishing a relationship of hostility between the individual and the cultural collective. This individual conflict is represented by the dichotomy between opposing drives: on the one hand, the[7] drive of Eros, which tends to preserve living substance and to agglomerate it into larger and larger units; and the drive of death, destruction,[8] or aggression, which tends to dissolve these units and return them to the primordial and inorganic state.[9]

At this point, in order to correlate the exercise of the drives with the construction of the judicial decision, a small analytical digression of the drive is necessary that seems most relevant

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[4] Idem, p. 56-57.

[5] FREUD, Sigmund. **Culture, Society, Religion**: The Discomfort in Culture and Other Essays. Translation by Maria Rita Salzano Moraes. São Paulo: Autentica, 2020, p. 341.

[6] Idem, p. 44-45.

[7] The term "drive" – from the German "trieb" – in Freud could be broadly defined as a stimulus internal to the human being – not from the external world, from the collective, from culture – which manifests itself constantly and through a pressure that impels the individual to drive satisfaction, aimed at an object. **Drives and their destinies**. Translation by Pedro Heliodoro Tavares. São Paulo: Autentica, 2020, p. 19 and 25.

[8] The dichotomy between the life drive and the death drive was first constructed by Freud in the work "Beyond the Pleasure Principle" (we use as a reference book the work Complete Works volume 14 – **History of an infantile neurosis (The Wolf Man), Beyond the Pleasure Principle and other texts (1917-1920)**). Translation by Paulo César de Souza. São Paulo: Companhia das Letras, 2010). According to Freud, the life drive, the Eros drive or sexual drive is derived from the libido and is not restricted to the reproductive function, but rather to an institute of uniting and making the parts of a substance remain united, which represents the drive of all living beings for self-preservation. On the other hand, and in opposition to the Eros drive, there would be the death drive, which would correspond to the natural tendency of every living being to return to the inorganic state. See the works cited: pp. 153, 160, 162, 163 and 177.

[9] FREUD, Sigmund. **Culture, Society, Religion**: The Discomfort in Culture and Other Essays. Translation by Maria Rita Salzano Moraes. São Paulo: Autentica, 2020, p. 341., p. 371.

to the purposes of this study. According to Freud, the drive can be divided into four parts: pressure, goal, object and source.[10] The pressure and the source, although relevant, move away from the epistemological cut that we intend, so we will deal with these factors more quickly, to delve into the goal and the object. Pressure is the very motor or measure of the force or demand that the impulse exerts on a given person.[11] The source of the drive, in turn, is the somatic process in an organ or part of the body, whose stimulus animates or gives rise to its own function, being a biological concept and still imprecise, according to Freud himself.[12]

On the other hand, the goal and object of the drive are factors that are more easily distinguished and intuitively associated with the right. The goal of the drive is satisfaction, which represents the suspension of the stimulation of the source of the drive, that is, the psychological state that is intended to be achieved,[13] which Freud calls, on another occasion, as happiness itself, and the external world is an obstacle to this goal to the extent that external factors prevent us from satisfying our needs.[14] More important in satisfaction, however, is the fact that there may be approximate or intermediate goals of a final goal, which would imply complete satisfaction of the drive, and it is acceptable to achieve certain goals as a way of achieving the greater one. In fact, Freud records, the drives inhibited in the goal correspond to processes that are *tolerated* for the satisfaction of the drive.[15] In this case, there would be a temporary acceptance of an upset in order to achieve greater satisfaction. Finally, the object of the drive is "that along which or through which the drive can reach its goal",[16] being "what is most variable in the drive, not being originally linked to it, being only attributed to it because of its capacity to make satisfaction possible".[17]

At this point, we arrive at the hypothesis put forward in this work: the judicial decision as the object of the death drive. The object of the drive, according to Freud, is broad, and can be anything or person, even the person from whom the drive derives and is not *intrinsically* linked to it, so that the death drive, that is, the return to a pre-civilizational state, can have as its object the law, through the construction of the judicial decision. which formally can be done

[10] FREUD, Sigmund. **Drives and their destinies**. Translation by Pedro Heliodoro Tavares. São Paulo: Autentica, 2020, p. 25.
[11] Idem, p. 25.
[12] Idem, p. 27.
[13] Idem, p. 27.
[14] FREUD, Sigmund. **Culture, Society, Religion**: The Discomfort in Culture and Other Essays. Translation by Maria Rita Salzano Moraes. São Paulo: Autentica, 2020, p. 324.
[15] FREUD, Sigmund. **Drives and their destinies**. Translation by Pedro Heliodoro Tavares. São Paulo: Autentica, 2020, p. 25.
[16] Idem, p. 25.
[17] Idem, p. 25.

through a supposedly rational and logical reasoning, but which subliminally hides a means of evasion of institutions, and the satisfaction of a certain drive.

In this sense, the judicial decision can be the very object of the death drive, because it is the means by which the judge, by introducing a legal norm that is not formally valid into the system, can try to satisfy the objective of producing small cracks in the law, attributing responsibility for the attitude adopted towards the law. doctrine or economics. For example, what would represent a supposed instinctive renunciation, when, in reality, what was intended was precisely to deny the attitude of renunciation and satisfy one's own drive, in this case, modifying the right according to a desire or impulse.

We also call attention to the fact that the satisfaction of the drive admits intermediate goals, which would mean concluding that even the death drive of culture would not necessarily imply the destruction of civilization or of the law, but it would be admissible to promote small ruptures in the system, which can serve as a partial satisfaction of the goal of the drive. which can be done deliberately or not. In this sense, admitting openings in the system, moving from a formalistic jurisprudential law to one that introduces other elements in the field of interpretation or decision, allows the authority to introduce into the legal system a judicial decision that is more convenient to the instinctive satisfaction of the person who occupies such a position, thus replacing legislative law with judicial law. By inhibiting the objective of the drive and tolerating the established rules and institutions, as long as they correspond to the inhibited goal, a more casual right must be repeated, which corresponds to the drives themselves.

The aforementioned observation of a certain failure of institutions is a sentiment that can be carried over to the theory of law and its evolution. In this sense, in the context of Brazilian precedents, institutes created to give more efficiency and legal certainty to the Law, there is a discomfort in the construction and proper use of judicial decisions. In this sense, jurisprudence, an institution within the field of a larger institution – law – would represent civilization or culture, and the discomfort would be the anguish caused by the feeling that the growing autonomy of judicial discretion has not promoted the principles of legal certainty and justice.

This malaise has been felt in the doctrine for a long time [18] , but over the years it has acquired different Carthusian styles. If at the time of the school of exegesis there was an

[18] By way of example: "Hitherto we have remained tacitly attached to the assumption that, in the application of the Law and in the interpretation that serves it, it is essentially an act of knowledge, albeit endowed with a sui generis spiritual structure. Even so, many things we encounter can irritate us, even distress us: such is the insecurity in the realization of "subsumption", the ambivalence with which interpretation is debated at all stages, the diversity of the methods of interpretation and the pendency over the fundamental scope of interpretation, and finally the plurality of meanings of the concepts of "extensive" and "restrictive" interpretation. But the truth is that all science has to face difficulties. What is important and decisive is to know whether, in principle, the search

attachment to the literal interpretation of law, an idyllic past that may never have been sustained, and goes back to the belief that legal certainty[19] would be achieved as long as the judge limited himself to replicating the content of the law, the historical evolution of interpretation led the legislator, deliberately, in some cases, and unconsciously[20] in others, to promote openings in the system, giving more autonomy to the judge in the interpretation and application of the law, greatly expanding the creative activity of jurisprudence.

The issue becomes problematic to the extent that, by granting more autonomy to the judge to analyze the specific case according to broader normative guidelines, through principles,[21] indeterminate concepts[22] and general clauses,[23] for example, it ends up *implicitly allowing* a loosening of the legal system without method, without control mechanisms and much less limits. and the weighting of values becomes the instrument of excellence in the interpretation and application of the law[24] or another corrective factor of the same.

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for "truth" makes sense and promises success. However, in the domain of law and its knowledge, there are a series of phenomena that make the very principle of the investigation of truth a problem, that make the limits of a purely scientific knowledge appear to our eyes as a "penumbral line".(ENGISCH, Karl. **Introduction to legal thought**. Translation by João Baptista Machado. 11th ed. Lisbon: Fundação Calouste Gulbenkian, 2014, p. 205).

[19] Norberto Bobbio points out, among other causes, two ideological causes that reinforced the School of Exegesis: the principle of separation of powers, on the basis of which the judge could not create a law, limiting himself to declaring its meaning; and the principle of certainty of the law, from which would arise the requirement of legal certainty and the duty of the judge to renounce the creative activity and make explicit the meaning of the law through a procedure Of course, the syllogism. (BOBBIO, Norberto. **Legal positivism**: lessons in the philosophy of law. Compiled by Nello Morra. Translation by Márcio Pugliesi, Edson Bini and Carlos E. Rodrigues. São Paulo: Icon, 1995, p. 79-80).

[20] Here we refer to cases in which the legislator approves a law with a certain objective, however, the courts, for various reasons, establish an understanding that frustrates, at least immediately, that desideratum. We exemplify the hypothesis with the thesis called "mitigated taxation". The legislator of the 2015 Code of Civil Procedure gave a new treatment to the interlocutory appeal, different from the previous Code, of 1973. If previously the interlocutory appeal against interlocutory decisions was relatively free, CPC/2105, in its article 1.015, introduced a supposedly closed list of procedural situations in which the processing of the appeal would be appropriate. However, the Special Court of the High Court of Justice, in judging Special Appeal No. 1,696,396 and Special Appeal No. 1,704,520, under Article 1,036 of the CPC/2015, established the following jurisprudential thesis: "The enumeration of Article 1,015 of the CPC is of attenuated exhaustiveness, so it admits the filing of an interlocutory appeal when the urgency derived from the uselessness of the judgment of the question in the appeal is verified". Thus, even if the legal hypotheses are maintained, it is possible to process the appeal, even if it does not fit into them, whenever there is urgency, thus opening up the system, to the detriment of legislative law, but, it must be said, in accordance with the constitutional principle of the inalienability of jurisdiction (art. 5, XXXV, CRFB).

[21] The doctrine contextualizes the phenomenon of the use of principles in Brazil and the so-called "fascination with "legal-constitutional principles". (NEVES, Marcelo. **Between Hydra and Hercules**: Constitutional Principles and Norms as a Paradoxical Difference in the Legal System. 3rd ed. São Paulo: WMF Martins Fontes, 2019, p. 171).

[22] "An indeterminate legal concept is a concept whose concept and scope are largely uncertain." (ENGISCH, Karl. **Introduction to legal thought**. Translation by João Baptista Machado. 11th ed. Lisbon: Fundação Calouste Gulbenkian, 2014, p. 208).

[23] "(...) A general clause should be understood as a formulation of the legal hypothesis that, in very general terms, covers and subjects to legal treatment a whole area of cases. (ENGISCH, Karl. *Introduction to legal thought*. Translation by João Baptista Machado. 11th ed. Lisbon: Fundação Calouste Gulbenkian, 2014, p. 229).

[24] Marcelo Neves points to a doctrinal and jurisprudential current that considers principles as a "new panacea" for Brazilian constitutional problems, in the form of "absolutization of principles" or "compulsion to ponder" that

In this same evolution, the most recent legislative opening is the introduction into the legal system of Article 20 of the Law of Introduction to the Norms of Brazilian Law (LINBD), added by Law No. 13,655, of 2018,[25] which prohibits the judge from using abstract legal values without considering the practical consequences of the decision. The norm, therefore, admits and consolidates the movement of the weighing of values, recognizing and allowing this activity, but, at the same time, it brings another plane - that of prospective facts - that must be taken into account in the judicial decision.

The legislator, therefore, considers ambivalent the relationship between the theory of values – abstract, imprecise, ambiguous – and, on the other hand, the practical consequences of the decision – political, social, economic, cultural, environmental – thus opening the system to the possibility of speculation based on the social sciences parallel to Law, further explaining the openness of the legal phenomenon. It indicates, in Brazil, a gap that has not yet been systematically resolved between legislative law and jurisprudential law. There is some point between the text and the decision[26] that, although it admits the creative activity of the judge and the fact that it complements the construction of the legislator, raises debates about the numerous limitations to be overcome by the Judiciary in this experience, but which has been transforming the judicial process into a scenario for the *constant correction* of legislative law.

It is precisely on this point that the limitations of the Judiciary become more evident, including, in particular, three pointed out by Mauro Cappelletti. According to the Italian jurist, judicial law is casuistic, casual, discontinuous[27] and dependent on the specific case. And, in addition, judicial law has retroactive effect.[28] In addition, from the operational point of view, the Judiciary lacks institutional competence to create law, in the sense that instruments are needed that are not within the reach of the courts and that go beyond the simple knowledge of

may be due to the "strategic concealment of practices aimed at the satisfaction of interests contrary to legality and constitutionality" and "the continuous erosion of the normative force of the Constitution". (NEVES, Marcelo. **Between Hydra and Hercules***:* Constitutional Principles and Norms as a Paradoxical Difference in the Legal System. 3rd ed. São Paulo: WMF Martins Fontes, 2019, p. 196).

[25] "Article 20. In the administrative, control and judicial spheres, decisions shall not be made on the basis of abstract legal values without considering the practical consequences of the decision.

Sole paragraph. The statement of reasons shall demonstrate the necessity and suitability of the measure imposed or the invalidation of an act, contract, adjustment, process or administrative rule, including in the face of possible alternatives."

[26] Here we adopt the path of the decision as described by Eros Grau, who explains that the path of the activity of interpretation and application of the norm is carried out from the text, which once interpreted leads to the construction of the legal norm and, after application, with the judicial decision. It is therefore necessary to distinguish, on the one hand, the legal rules elaborated by the interpreter on the basis of the texts and reality and, on the other, the rule for deciding the case, expressed in the judicial judgment. (GRAU, Eros Roberto. **Why I am afraid of judges** (the interpretation/application of the law and principles). 10th ed. São Paulo: Malheiros, 2021, p. 33-34).

[27] CAPPELLETTI, Mauro. **Legislative judges?** Porto Alegre: Sergio Antonio Fabris, 1993, p. 83.

[28] Idem, p. 85.

the law. There are cases that, in order to be adequately resolved, require social, economic and political data, as well as technical and financial resources that the Judiciary does not have, but that parliaments, legislative commissions and ministries do[29]. Undoubtedly, these three limitations lead to the construction of an erratic, casuistic and unpredictable law and, moreover, allow the system to open up to the introduction of legal norms created with a high degree of subjectivism, including those resulting from the death drive to the detriment of culture and law, whether or not they have entered the judge's stream of consciousness.

This state of affairs is exactly the opposite of what Freud calls the order drive, according to which, "order is a kind of compulsion to repetition, which, by a device established once and for all, decides when, where, and how something is to be done, so that, in each identical case, hesitations and oscillations are avoided."[30] The way in which society organizes and institutionalizes this order is exactly the law, the only way for a society to exist, in which the concept of the individual is replaced by that of community, and in this sense it is essential to limit the possibilities of satisfaction, in the name of the demands of justice and order. that cannot be infringed for individual benefit.[31]

Finally, after the analytical study of the drives, we come to the possibilities of the destinies of the drives. As we have seen, the satisfaction of the drive is the total or partial satisfaction of our own drives. However, Freud points out that following this path, although more tempting, since we put enjoyment before prudence, leads to undesired consequences, implying punishments,[32] especially because we are inserted in a degree of civilization that does not allow such a destiny. As an alternative to the direct satisfaction of the drive, Freud proposes the moderation of the demand for happiness, through other destinations, in the face of the principle of reality[33] that the external world itself imposes. It is in this sense that the psychoanalyst affirms that "happiness, in the moderate sense in which it is recognized as possible, is a problem of the libidinal economy of the individual."[34]

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[29] Idem, p. 86-87.

[30] FREUD, Sigmund. **Culture, Society, Religion**: The Discomfort in Culture and Other Essays. Translation by Maria Rita Salzano Moraes. São Paulo: Autentica, 2020, p. 342.

[31] Idem, p. 344-345.

[32] FREUD, Sigmund. **Culture, Society, Religion**: The Discomfort in Culture and Other Essays. Translation by Maria Rita Salzano Moraes. São Paulo: Autentica, 2020, p. 322.

[33] For Freud, the reality principle would be a kind of barrier from the external world to instinctive satisfaction, which would require an inhibition or even a renunciation of that goal. (See Complete Works volume 14 – Complete Works volume 14: **History of an infantile neurosis (The Wolf Man), beyond the pleasure principle and other texts (1917-1920).** Translation by Paulo César de Souza. São Paulo: Companhia das Letras, 2010, p. 123-124).

[34] FREUD, Sigmund. **Culture, Society, Religion**: The Discomfort in Culture and Other Essays. Translation by Maria Rita Salzano Moraes. São Paulo: Autentica, 2020, p. 330.

Among all the instinctual destinies, what interests us in the solution of the tension between the individual and the law is sublimation, in the Freudian sense, which corresponds to a displacement of the instinctual goals in such a way that they cannot be achieved by the external world but which, even so, provide a moderate level of satisfaction – different from the achievement of the goal. comparable to the joy of the artist with the realization in a work of the figure of his fantasy or to that of the researcher with the solution of problems and with the recognition of truth.[35]

In this respect, it is possible to associate the idea of law as ambivalent, to the exact extent that, if, on the one hand, legal norms and institutions are themselves sources of our suffering and unhappiness, since they force us to renounce our impulses in the name of a minimally organized coexistence, on the other hand, The maintenance of such rules and institutions can be seen as a moderation of the demand for happiness. To divert the death drive, to destroy, towards a destiny of sublimation, overcoming and replacing that instinct with an attitude of self-preservation, based even on the principle of reality, read here as the evidence that living in a society has unprecedented gains in relation to a primitive, inorganic and therefore inorganic state. unregulated.

Having made this brief exposition, and presented our hypothesis, which we have now formulated in a complete way – the judicial decision as the object of the drive and the ruptures of the law as the goal of the inhibited drive – it is necessary to record, finally, that among all Freud's contributions to the full development of the human psyche and even to the preservation of culture and law, we call attention to the care taken to distinguish, from jurisprudential law, what is a legally valid argument consistent with the rule of law and what is a simple instinctive satisfaction that has its objects in law and in judicial decision. It is therefore necessary to discriminate against what is a legitimate attempt to construct objective responses based on the openings of positive law and, therefore, of culture, in particular of legal culture; and, on the other hand, of what constitutes, in fact, a pure exercise of the individual freedom drive that is directed against the institutions themselves, consisting of satisfying the impulse of aggression against the law, in an attempt to return to a primitive state and, according to Freud himself, to barbarism.

[35] Idem, 325.

3 The truth and the judicial process

Truth is a metaphysical concept, that is, not empirically demonstrable, which consists of a proposition of relationship - right or wrong - between two or more statements taking into account the conditions of a given frame of reference. This crisis of absolute truth is highlighted by Dardo Scavino as a challenge to the philosophy of postmodernity, indicating that, if before an objective, universal and necessary truth was sought, at the same time, there are multiple interpretations.[36]

In this sense, following the current of the linguistic turn,[37] truth is not a relation of correspondence between a proposition and fundamental reality, but between two statements organized within a linguistic system of statements (elements) coordinated with each other, and therefore there is no absolute truth, taken directly from an observation of the so-called reality, but only a relative truth that depends on the conditions of space and time established by the established linguistic system.

Among other reasons, it can be said that the admission of a relative – and not absolute – truth is the dialectical synthesis between the fallibility of knowledge and the rigor of language. This is because, although it is admitted that conditions exist for the enunciation of truths, it is a fact that man is, let us say, a slave to language, so that only through language is he able to know the world. Language, in turn, is a system with its own rules and man, in order to affirm or refute propositions, must respect this system of ordering established by culture.[38]

The judicial process, as a cultural institution, is no different. Therefore, a higher form of argumentation is not sought, but a civilized method of conflict resolution.[39] According to Luhmann, "legitimacy by procedure and by the equality of probabilities of obtaining satisfactory decisions replaces the old foundations of natural law or variable methods of establishing consensus."[40] On the other hand, legitimacy by procedure does not refer to a theory of truth, but to the set of behaviors that must be observed in a given decision-making procedure

[36] SCAVINO, Dardo**. Current philosophy**: thinking without certainties. Buenos Aires: Paidós, 1999, p. 18.
[37] Idem, p. 8
[38] The meanings of the texts, however, although constructed as the content of acts of consciousness of the knowing being (subjective, personal), are conditioned by the experiences of the subject, which are determined by the categories of a language (collective, social). This is what brings interpretations closer together and makes the world "seem" one to all who live in the same linguistic community. (CARVALHO, Aurora Tomazini de. Logical-semantic constructivism as a working method in legal elaboration). In: **O constructivismo lógico-semântico**. vol.1. São Paulo: Noeses, 2014, p. 30).
[39] DEVLIN, Patricio Arturo. Judges and Legislators. London: **Modern Law Review**, 39, 1976, p. 3.
[40] LUHMANN, Niklas. **Standing by the procedure**. Trans. Maria da Conceição Côrte-Real. Brasilia: UNB, 1980, p. 31.

and that allow the formation of a disposition in the participants to "accept decisions of content not yet defined, within certain limits of tolerance."[41]

In this sense, the judicial process is a procedure for the construction of language that has its own rules and that is based precisely on compliance with those rules. In other words, the judicial process is based on the belief of its actors – judge, parties and other intervening parties – that the language constructed in that context will be accepted because compliance with procedural rules generated a legitimate expectation from the parties to believe that this was a civilized way of resolving the conflict. On the other hand, the breaking of rules or the introduction of rules different from those previously established is the opposite of the notion of Law, which is based on the assumption of ordering intersubjective conduct.

This conception of legitimation by procedure is in accordance with the linguistic turn and with the observation that a process of construction of reality through language (relative truth) is more possible than the objective verification of reality (absolute truth). Hence the fundamental importance of procedural rules. In this sense, the process is considered an institution made up of people, rules and procedures that generate an expectation, a belief, or even an illusion[42] that in that context a tolerable and acceptable truth will be constructed. Thus, the judgments of certainty are replaced by judgments of probability, of reliability.

The judicial process is, therefore, a method of conflict resolution based on relative but acceptable truths, because the premises and the means of its construction have been accepted. These premises and means are outlined in the first place by the legislator, who establishes the procedural rules that will serve as beacons for the construction of acceptable truth, either through the openings of the system, allowing the judge to work with weak or strong codes, or through the formal rules of preclusion and contradiction.

However, in order for the truth to be acceptable, especially when working in the field of legislative openness, there is an effort to objectify the truth, that is, the search for relatively precise criteria for making a decision, evading, even if intentionally, pure voluntarism, in order to make it more acceptable. Thus, one passes from a formal criterion – the phrase "the law

[41] Idem, p. 30.

[42] The term "illusion" is used by Tércio Sampaio Ferraz Jr. in the presentation of the aforementioned work by Niklas Luhmann, when he points out that legitimacy by the procedure, especially the judicial one, is a technique for neutralizing the decision in the face of inevitable disappointments, since the parties, by previously agreeing with the rules of the process and with the possibility of accepting the judicial decision to be issued, They admit, even if only mediately, the disappointment of having a decision against them that does not respond to their immediate interests, but that accepts, globally, the terms in which the decision was taken. (LUHMANN, Niklas. **Standing by the procedure**. Trans. Maria da Conceição Côrte-Real. Brasilia: UNB, 1980, p. 5).

forced me to do it this way" –[43] to the theory of values – morality imposes a categorical imperative, even the one we have today, appealing to the social sciences – the practical consequences of the decision would be more unfair than the absence of judgment itself.

So far it has been shown that the attainment of an absolute or ontological truth is impossible, at least if one takes into account what is known, up to the present moment, about the process of human knowledge, which would be common to all those who propose to investigate the facts in search of a truth. However, for the purposes of this work, it is still necessary to investigate the limitations – or drivers – that vitiate the very access to knowledge by judges.

In this sense, Richard Posner states that whenever the judge is faced with a case, he must remember his own limitations, limitations that all judges have, which are the limitations of knowledge of the law, the limitations to his knowledge of the case in question, the limitations of the real-world context in which the case is inserted, and the limitations or distortions of their way of thinking that result in biases that all judges have. Judges take to trial. In addition to these limitations, there are also the assumptions[44], which would be expectations, formed by the experience and temperament that all judges have. This causes the same judges to read the same petitions, hear the same oral arguments, and yet react in significantly different ways, either because of different assumptions or because of a different weighing of the evidence. In this context, Posner warns that the judge must be aware of his assumptions so as not to be too influenced by them.[45]

In fact, biases and assumptions are limitations on the judge's own knowledge of the case. However, in this work these restrictions are not the object of investigation, but the instinctive passions of the unconscious that lead the judge to adopt an ideological position in relation to the Law from a value judgment of how it should be, which will be analyzed later. At this point, what is important to contrast is that there are elements – of the unconscious – that have not yet been fully internalized in the doctrine and that do not concern the limits of the knowledge of the human being in general or of the judge in particular, although these impulses can be introduced into the decision by objectively valid arguments. but which disguise impulses of aggression against the Law. This is the case, for example, of criticizing the formalistic position

[43] Richard Posner points to the English phrase "law made me do it" as the one that would best describe the formalistic position of the judge who sees law as a simple repository of texts, being the only activity of the legal professional to apply the internal logic of this body of laws. Law seen from the formalist perspective is a compendium of texts, such as the Bible, and the task of the judge. (POSNER, Richard Allen. **Reflections on judgment**. Cambridge: Harvard University Press, 2013, p. 4-5).

[44] In free translation of the English word "priors".

[45] POSNER, Richard Allen. **Reflections on judgment**. Cambridge: Harvard University Press, 2013, p. 129-130.

of the judge and its substitution by an action beyond the syllogism, using, for this purpose, the argument that the judge should have an attitude more focused on the analysis of the consequences of his own decisions.

To illustrate this succession of approaches – from the formalistic judge, through the moralistic judge and, finally, what can be called the *empirical-pragmatic judge* – we illustrate what has been recorded by Judge Roberto Barroso in some votes. For the magistrate,[46] we live in a second turn of law. The first began in the post-World War II period and was characterized by the recognition of the normative form of constitutions, particularly in the catalog of fundamental rights, which brought law closer to morality. The second turn would be current and would be characterized by the approximation of law to science, which imposes on the judge not to be satisfied only with the syntactic and formal level of law, but in addition to weighing values, he can and must be pragmatic, evaluating the practical effects of his decision, even through the empirical analysis of the data.

Morality and pragmatism open up the possibility of opening up judicial argumentation and, consequently, expanding the margin of subjectivity of the judicial decision.

The boundaries between Morality and Law are not comfortable fields in doctrine. On the contrary, the philosophy of Law itself, at least since the first writing on the subject,[47] the tragedy "Antigone", by Sophocles, has already registered the ambivalence between morality, or justice, in its broadest sense in the field of Law, and positive Law, each discussing the prevailing criterion of legal validity. It is from the same work that the dichotomy between the written law and the spirit of the law is extracted, an aspect recorded by Richard Claverhouse Jebb with the phrase "Creon is right in the letter, but he is wrong in the spirit. Antigone is right in spirit, but she is wrong in the lyrics."[48] In the end, it is clear in Sophocles' work that the human being seeks to defend a higher order as a priority criterion in the solution of a conflict and, in addition, the argumentative effort to convince the other party about the objectivity and universality of his own thesis.

This attitude, when applied in the context of judicial argumentation, is not without criticism. According to Richard Posner, the figure of the moralistic judge is based on the hypothesis that it would be possible to construct correct answers in any situation, or objective

[46] HC 152752, Rapporteur: EDSON FACHIN, Full Court, judged on 04/04/2018, PROCESO ELECTRÓNICO DJe-127 DIVULG 26/06/2018 PÚBLICO 27/06/2018.

[47] BOBBIO, Norberto. **Legal positivism**: lessons in the philosophy of law. Compiled by Nello Morra. Translation by Márcio Pugliesi, Edson Bini and Carlos E. Rodrigues. São Paulo: Ícone, 1995, p. 25.

[48] JEBB, Richard Claverhouse, Sir. **Essays and speeches**. Cambridge: University Press, 1907, p. 31-32. In the original: "Creon is right in the letter and is wrong in the spirit; Antigone is right in spirit and wrong in letters."

criteria that can be applied in each and every one of the legal systems, an attitude with which he does not agree insofar as the defense of universal principles would be too abstract and subjective. moreover, it would not be the necessary purpose of the law to give effect to moral precepts.[49] It must be considered, however, that although it is not possible to construct absolute and objective truths about all the facts, but even so there is doctrine that understands in this sense, what we have is, in short, the imposition, via legal doctrine, of personal impulses that seek to change the normative system.

Brazilian jurisprudential practice allowed the observation of the doctrine that, instead of legal principles, built on the basis of moral maxims, guaranteeing objectivity and rationality to the system, in reality, they allowed an excess of subjectivism of judicial decisions with the consequent trivialization and even erosion of the normative force of the Constitution, as Marcelo Neves has already pointed out, already cited in this work. This excess of subjectivism, in certain cases, can hide precisely an impulse to erode the Law. In this sense, the attempt at objectification is used as a simulacrum of the driving force that would be precisely to correct and modify the legal order, because simply what is established is not in accordance with the instinctive objective of destroying the law and imposing a new law that is different and more in line with the personal wishes of the agent of the law.

The possibilities of opening up the system are not limited to morality. By way of example, Posner, based on the assumption of legal pragmatism, greatly influenced by the pragmatism of William James, stresses the need to overcome the figure of the formalistic judge and the insufficiency of the theory of law to justify the judicial decision. In this sense, Posner defends the archetype of the realistic or pragmatic judge, understood as one who evaluates the specific and systemic consequences of the decision, thus having to face not only the internal complexity of the Law, but also the external complexities, looking for scientific and empirical data in legal argumentation.[50] Thus, Postnerian thought is anchored in ethical-legal skepticism and maintains that economics and, in general, sociology have a great contribution to the construction of judicial decision, denying, on the other hand, the possibility that moral theory proposes objective answers in this activity.[51]

[49] POSNER, Richard Allen. **The Problematic of Moral and Legal Theory**. Cambridge: Harvard University Press, 2002. pp. 97-98.
[50] POSNER, Richard Allen. **Reflections on judgment**. Cambridge: Harvard University Press, 2013. pp. 108-120.
[51] POSNER, Richard Allen. **The Problematic of Moral and Legal Theory**. Cambridge: Harvard University Press, 2002. Page 12.

Having highlighted in this title some elements of correctness of law – whether moral or economic – we move on to a brief analysis of how ideology can be inserted into the judicial decision as a form of instinctive satisfaction.

4 Ideology as a driving instrument

The exercise of the jurisdictional function – which includes interpretative activity – coincides with the innumerable currents of thought that, through a long historical process, have consolidated the methodological and theoretical bases of legal positivism. After a long analysis of this historical process, Bobbio distinguishes three ways of analyzing law from the perspective of legal positivism: as a method for the study of law, as a theory of law, and as an ideology of law. As a method of studying law, positivism, like the natural sciences, proposes an evaluative study of law, focusing on the legal system as it is. As a theory of law, legal positivism is based on the study of the concept of law, the legal norm and the legal system, under the axioms of the conceptualization of law inseparable from the concept of the State and of the unity, coherence and completeness of the legal system, the latter being one of the main objectives of the criticisms against legal positivism. Finally, as an ideology, there is a distinction between what is conventionally called the moderate version and the extreme version of positivism. For the latter, the law is an end in itself, and it is only up to the interpreter to replicate or reproduce the legal mandate. On the other hand, for the moderate current, law is an instrument, not an end in itself, which will bend according to the historical moment or the needs of a society, so that values such as order or legal certainty can finally be chosen as the supreme value. In short, in the ideological context of positivism, there is a distinction between the law as it is and the law as the interpreter understands it to be or should be followed by a value judgment, not being subject to a judgment of true or false, but of just or unjust.[52]

Ideology, therefore, has a fundamental role in the process of positivization of Law, especially in Jurisprudential Law, insofar as it means a value judgment that the judge makes from his own observation of positive Law, which can often lead him to correct the legal norm according to his own ideology. It is precisely at this point that the death or destruction drive of culture – and of its institutions such as law – is confused with ideology itself, which allows us to reach the conclusion that judicial argumentation fulfilled the role of rationalizing or

[52] BOBBIO, Norberto. **Legal positivism**: lessons in the philosophy of law. Compiled by Nello Morra. Translation by Márcio Pugliesi, Edson Bini and Carlos E. Rodrigues. São Paulo: Icon, 1995, p. 235.

objectifying a certain decision as a mere simulation, in which dissimulation would be precisely what is intended to be hidden: the partial destruction of positive law and the successive replacement of the established norm by another that better responds to the value judgment that the magistrate imagines the law should be.

It is also relevant to deal specifically with the role of judicial argumentation, being in itself a factor of correctness of Law, and which, under the guise of presenting a supposedly logical and objective reasoning, allows the use of other means of correcting Law, such as those presented so far: morality and the economic analysis of Law. In other words, it is possible that morality and the economic analysis of law represent the judge's own ideology and his impetus or drive to attack legal institutions in order to divert them to others more in line with his notion of the world. In this sense, the first reason that would lead a judge to construct the meaning of the norm that best suits him is not an attitude resulting from a scientific doubt about the truth, or from a penumbra between morality or law, or from an ambivalence in the sense of a legal mandate, but rather a deliberate attitude of destroying culture – the law – replacing it with what is desired. This is why Freud asserts that it is the function of culture to establish barriers to the aggressive impulses of human beings in order to suppress their manifestations through reactive formations.[53]

5 Conclusion

At this point, it can be said that no one would accept being judged without first knowing the rules that would be applied in a given trial. In this context, the judicial decision is not alien to this primary thought. The judicial decision is limited by the rules of procedure and content previously established. Therefore, without prior knowledge of such rules, it would be unimaginable for anyone to accept them. Once the procedure is known and accepted, the decision is accepted. On the other hand, if they accepted purely subjective or random criteria, such as, for example, the political criterion or luck, or what the judges decided, the Law would be unnecessary, insofar as it would no longer lend itself to ordering intersubjective behaviors, focusing on social reality and implementing values. It would simply be a matter of recognizing a political or sociological fact in a given culture.

[53] FREUD, Sigmund. **Culture, Society, Religion**: The Discomfort in Culture and Other Essays. Translation by Maria Rita Salzano Moraes. São Paulo: Autentica, 2020, p. 341.

The opening of legislative law to jurisprudential law allows, in addition to greater flexibility of legal norms to the specific case, the introduction of elements of correction of positive law by the judge, including the satisfaction of destructive impulses, the result of the unconscious and molded in ideology, creating legal norms loaded with subjectivity, which violates the very notion of Law as a cultural or civilizational object.

It is necessary, therefore, to discriminate to what extent attempts to correct the Law are used as a disguise for the instinctive passions of aggression against the Law. It is not intended, however, to encapsulate all forms of correctness of law as a pure satisfaction of the destructive impulses of culture, but rather the legal community has the duty to investigate, in legal argumentation, what drive is and what culture allows.

In this sense, the discomfort in jurisprudence may not be precisely the lack of objectification criteria that support judicial argumentation, but rather the lack of instinctive renunciation instilled in every human being, including the judge. Although this investigation is still relatively difficult insofar as it would be necessary to investigate elements of the unconscious, it is possible, although with a certain margin of error, to verify in the specific case, from the reading of the votes and decisions, whether the element objectively introduced into the argumentation was taken from a solid basis, in the context of legal culture, or if it is in fact a peripheral understanding, which was not, in turn, the subject of serious analysis and criticism by specialized doctrine.

On the other hand, it was not intended to conclude with this work that the elements of correctness of the Law are used exclusively in the name of drives of the unconscious, and it is true that the attempt to construct a more objective legal argument, based on premises that can be rationalized and debated, is more appropriate than simply not presenting any argument. On the other hand, this is what is defended: these elements of correctness can be mere formal simulations of argumentation to hide drives, desires and impulses that motivate the judge in the search to modify positive law, based on his own value judgments, which seems to be to a certain extent natural, but, at the same time, incompatible with a notion of order.

Finally, to paraphrase Voltaire's thought represented in Candide's classic conclusion,[54] after a long and tortuous journey around the world, the judge needs to cultivate more of his own garden and follow less what is happening in Constantinople – or in the doctrine of the moment – and evolve from a cynical "the law forced me to do this" or "the principle made me do this"

[54] VOLTAIRE. **Candid or optimism**. Translation, presentation and notes by Miécio Táti. Rio de Janeiro: Ediouro, 1987, p. 135-137.

or even "economics made me do this" to a cynical sincere "my impulse made me do this" and, from there, start a long process of critical introversion for the sake of culture and law.

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