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DECISION THEORY AND THE MAN WHO MISTOOK HIS WIFE FOR A HAT

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ABSTRACT: The inspiration for this essay comes from the literary short story by Oliver Sacks – *The man who mistook his wife for a hat*. The proposal is to highlight possible and necessary interfaces between Law and Literature, without neglecting minimum methodological requirements. The object of reflection is the judicial decision and the problem of judicial activism. Specifically, we intend to explore, based on the literary short story, (a) the importance of narrative to Law and (b) the limits of jurisdictional action, all this in the context of the Brazilian Constitution's thirtieth anniversary. All this, in order to establish a dialogue between Sacks' story and the main theoretical references that guide the central argument.

KEYWORDS: law and literature; judicial decision; judicial activism; autonomy of law.

In most cases, hallucinations are not evidence of insanity. When extreme emotions are involved, anyone can hallucinate
(Oliver Sacks)

1 INTRODUÇÃO

Women are not hats. Judicial decisions are not acts of will. These warnings are, to a large extent, part of the discussion about the meaning (or

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sense) of the Law (Castanheira Neves, 2002; Cover, 2016)². A jurist must not and cannot confuse the law with the non-law. This is the engine for the reflection outlined here.

The title of this essay is based on the literary short story by the writer and neurologist Oliver Sacks³ (1997, p. 22-37). This reflection is developed in the field of decision theory, appropriating the contributions of *Law and Literature*⁴, cemented in the high degree of autonomy of the Law in the problem of the jurisdictional execution of the law and the criticism to the normativism and functionalism from the perspective of Castanheira Neves (2002, 2003, 2013).

It is not overlooked that Oliver Sacks' work interacts intentionally with psychology or psychiatry and not with the law or the theme of decision theory. This is, therefore, the great challenge of Law and Literature, not always achieved.

Of course, the trichotomy of *Law in Literature*, *Law as Literature* and *Law of Literature*⁵ is well-known, but it is not the subject of explicit analysis. This paper is in the area of *Law as Literature*. For Cárcova (2014, p. IX), to understand law as literature is to admit a possible internal articulation between Law and Literature, in order to reveal remarkable analogies between the process of discursive production of Law and Literature, taken in a broad sense.

[...] law as literature is predominantly concerned with bringing up categories developed in the last hundred years by linguistics and semiotics: the theory of

² For Castanheira Neves, law is now problematic, it has become a radical problem, that is, not only a question is raised by the determination and foundation having rights (it is not an ontological question), but above all by law's normative basis. For the author, the current problematic of the law reaches its subsistence, it is in question not only its true meaning, but the very possibility of its meaning. (Castanheira Neves, 2002, p. 10). For Cover, "the normative universe is held together by the force of interpretive compromises – some small and private, others immense and public. These commitments – involving civil servants and others – determine what the law means and what the law should be. If there were two legal orders with the same legal precepts and standards of public violence – identical and predictable – they would necessarily differ essentially as to their meaning if, in one order, the precepts were universally venerated, while in the other they were considered by many to be fundamentally unjust" (Cover, 2016, p. 190191). In this sense, see also (Espindola, 2015, 2016b).

³ Another short story from this same work by Sacks – *The Disembodied Lady* – was analyzed from the perspective of Law and Literature in (Espindola, 2016a).

⁴ See Chueiri (2006); Trindade (2012); Streck and Trindade (2013); Olivo (2013). For a timely understanding of the study of "law and literature" in Brazil, see Trindade and Bernsts (2017).

⁵ On this trichotomy, see Schwartz and Macedo (2006); Cárcova, Price and Ruiz (2014).

discourse, narrativity, the theory of reception and the semiotics of the text. These categories, projected in the area of legal hermeneutics, allow to dissolve a large part of the problems that jurists have been discussing for many decades. [...] By the way, with different forms of organicity, what happens in the US is repeated in Europe and Latin America (Cárcova, Price, Ruiz, 2014, p. iv).

In this same sense, Nussbaum (1997, 36-37) affirms that the literary imagination, which exalts emotions and feelings, must impregnate, but not replace, the rules that determine legal and moral reasoning. Castanheira Neves (2003) agrees with that, and, studying Segre (1989, p. 57-69), defines narrating as “a mediatic linguistic realization whose purpose is to communicate to one or more interlocutors a series of events, in order to take part in their knowledge, thus broadening their pragmatic context”. He affirms that for this reason the narrative faculty presupposes and translates “a certain knowledge (which is not reduced to science, not even denotative-objective knowledge) in the context of a certain common or socio-cultural experience, of a certain shared human praxis, which concretely summons a particular communicative mode and is associated with a personal legitimation of the narrator” (Castanheira Neves, 2003, p. 370). Thus, narrating is an *exemplum* or a paradigmatic sense (as in myths and parables), an interpretation, by reconstruction, of reality and life (as in the literary function) (Castanheira Neves, 2003, p. 370-371).

This point of view justifies the choice of the short story, as a narrative, as the object of analysis for this essay. It also signals to a conception of law that is not limited to conventionalism or legal pragmatism, since it has a fundamental ethical-juridical dimension, which comprises the practical, historical-social community as an integrated and integral ethical-political-juridical community, with an essence that is not only political (Castanheira Neves, 2003, p. 352-353).

Based on these premises, the structure of this essay is split in two. It begins by presenting the literary short story, evidencing the relevance of narrative⁶ and its indispensability for the acquisition of sense and meaning,

⁶ On the double dimension of narration in the trial and the ambivalent relation that links the power of language to the language of power, see A. Vezpaziani (2015).

after all, no fact or phenomenon exists separately from the narratives that situate them and give them meaning. The aim is to lead to the importance of Literature (and the understanding of Law as Literature) for the autonomy of Law. Then in the second part, from the metaphor of *the man who mistook his wife for a hat* and with support in philosophical hermeneutics⁷, the intention is to bring up the problem of legal interpretation and judicial decision in post-positivist times. The theme is not unprecedented, nor new, but it is relevant and deserves to be faced in the way it is now proposed, above all, in this third decade of Brazilian constitutional period. The debate is absolutely necessary and unavoidable. In the end, this essay intends to prove the argument that the judicial decision is not an act of will, it is not a free assignment of meaning and it is not mere data, nor is it granted, but rather the result of an interpretative process, mediated by legal institutions, with a necessarily constitutional support, within a legal framework of thought, thus the importance of the autonomy of the Law and, of course, of doctrine⁸. All this, having as a background the approximation of jurisdiction to literature, in line with the aforementioned movement Law and Literature, seeking a special meaning for legal rationality, distant from normativist and dogmatic systematic thoughts.

2 WOMEN ARE NOT HATS, JUDICIAL DECISIONS ARE NOT ACTS OF WILL, AND THIS IS NOT A PIPE

In the work *The man who mistook his wife for a hat*, by Oliver Sacks⁹, several clinical accounts are gathered and transformed by the author into

⁷ The theoretical contributions for the reflections presented here, therefore, date back to the second half of the twentieth century, after the hermeneutic turn and the changes of philosophy. It was Gadamer, in *Truth and Method*, who adjectived *hermeneutics* with the *philosophical* expression, thus making a change in the understanding of hermeneutics, quite different from that presented in Heidegger, approaching a Husserlian line. As Stein says (2011, 24), Gadamer's hermeneutics is based on question and answer, and so it is always happening, and it does not intend to have the last word.

⁸ There has been long-standing scientific production on this subject, with Castanheira Neves (2002, 2013), Streck (2009a, 2009b, 2017, 2018a); Trindade and Moraes, (2011); Trindade and Neto (2017).

⁹ Oliver Sacks (1933-2015), a British neurologist and scientist, professor of neurology and psychiatry at Columbia University, was also an accomplished storyteller, turning clinical accounts into literary pieces. Oliver Sacks gained more notoriety after having one of his books, namely *Awakenings*, published in 1973, adapted for the cinema in 1990, starring Robin Williams and Robert De Niro (Mashall, 1990).

true literary narratives. Sacks' patients, in the short stories, are immersed in a world of dreams and brain dysfunctions, but with the imagination preserved in order to constitute their own moral identity. The story that gives the book its name¹⁰ reports a special form of neurological disorder with visual agnosia¹¹, whose patient seemed to be lost in a world of lifeless abstractions: he was able to talk about things, but he did not see them face to face. All sense of reality was destroyed, though he was a magnificent musician and an accomplished music teacher: preserved in some neurological areas and ruined in others. A rare case to challenge the axioms of classical neurology and even psychology. Precisely because of this, the damage appeared to be in the right hemisphere, as the syndromes on this side are almost imperceptible compared to those on the left side¹².

Let us now revisit the story and then bring up our proposal to reflect on the problem of legal interpretation in the light of *Law and Literature*.

The character-narrator is Sacks, a neurologist. The protagonist is dr. P., patient, musician, singer and university professor. The secondary character is the wife of the patient, who accompanies the doctor's appointment. The facts unfold initially in the doctor's office and end up in the patient's home. The whole plot revolves around the diagnosis, prognosis and therapeutic possibilities of the patient by the physician, with emphasis on the rarity (and incomprehensibility) of the symptoms.

The plot begins with the description of some of the weird confusions of dr. P. detected in everyday life. He seemed to recognize people by their voices, but not by their faces. He accessed the world by hearing, not by sight, although he was not blind. Everything indicated that dr. P. had lost the ability to recognize faces and happened to see them where they did not exist. "He stroked the top of hydrants and parking meters thinking they

¹⁰ This story by Oliver Sacks was discussed in the "Law & Literature" show, on Brazilian channel TV Justiça, under the theme "Judicial Mistakes" and the participation of professors Adriano de Brito Naves, Angela Espindola, Draiton Gonzaga de Souza. (Streck, 2018c). It was also analyzed in the column "Senso Incomum", of Consultor Jurídico, by Lênio Streck (Streck, 2018d).

¹¹ Agnosias, in the medical literature, constitute cognitive functions of recognition, are related to the perceptive processes, which allow the individual to recognize or not everything that is in the environment. In this regard, consult Doretto, 2002.

¹² According to Sacks (1997), damage in the right hemisphere of the brain is related to neurological disorders that affect the individual's essence and their emotional and psychological sensitivity.

were children's heads; he went cordially to the carved handles of furniture and was astonished when they did not respond" (Sacks, 1997, p. 22). Imagining it could be a vision problem from diabetes, he had consulted an ophthalmologist who referred him to a neurologist.

In neurological anamnesis, the character-narrator dismissed any trait of dementia or ophthalmological problem, although he identified something odd, as if the patient were looking at him with his ears rather than his eyes. Asked if he recognized a visual problem, the patient replied, "No, not directly, but every now and then I make mistakes" (Sacks, 1997, p. 23). It was during the neurological examination that the first bizarre experiment happened: after a successful reflex test on the patient's feet, the doctor found that putting on the shoes, the patient confused the foot with the shoe and the shoe with the foot, seeing one in the other. Dr. P, the patient, could not see the whole, just details, which he located like the beeps of a radar screen. "He had no idea of landscape or background". (Sacks, 1997, p. 24). As if seeing the text, without context; the man, without his historicity; the law without its normativity. As if interpretation and application were different things.

In another examination, the doctor showed him the cover of a magazine and asked the patient to describe the image. In the description, looking away from the magazine, he mentioned non-existent features, as if the absence of features in the real figure had led him to imagine beyond the image (Sacks, 1997). He described the world according to his conscience, disconnected from reality.

Convinced that he had done very well at the examinations and concluded his appointment, he looked solipsistically around for his hat, reached out and grabbed the wife's head, trying to lift it up and take it to put on his head, mistaking her head with a hat. "She looked like she was accustomed to things like that." (Sacks, 1997, p. 24-25). Dr. Sacks was unable to make a neurological or neuropsychological diagnosis. It intrigued him how one could be preserved in some respects and so incomprehensible and utterly ruined in others.

In a second appointment, performed at home, new tests were applied. Dr. P. perceived reality at times by smell, and especially by hearing, but not by sight, though there was nothing wrong with his eyes.

He was able to recognize a rose by smell, had difficulty recognizing a glove like a glove, even looking and touching it. Visually, he was lost in a world of lifeless abstractions. He could talk about things, but he did not see them face to face. He worked just like a machine, built the world as a computer builds it, through its essential characteristics and schematic relationships. And none of this disrupted his daily life, except when he noticed the error, but he usually did not. “The scheme could be identified [...] without reality being perceived” (Sacks, 1997, p. 29). All sense of reality was destroyed. But he seemed to have adapted to that interpretive deficit. To do something, he had to turn it into a song. Music had taken the place of the image¹³ (Sacks, 1997, p. 31).

For Sacks (1997, p. 33), this patient represented a rare, extraordinary case. It would be the only case like that, if not for a similar one reported in the medical literature in 1956. Doubtlessly, it was a challenge to neurology and psychology, for it was a case in which the patient had completely lost the world as a representation, preserving it entirely like music or will! He could not make a cognitive judgment, although he was fertile in the production of cognitive hypotheses. According to Sacks, the case of dr. P. would have fascinated Schopenhauer, for whom music was pure will (Schopenhauer, 2001).

Discernment, Sacks (1997, p. 34) asserts, is the most important faculty we possess. However, the loss of the ability to discern, which is the essence of numerous neuropsychological disorders, is not the object of neuropsychology (Sacks, 1997, p. 34-35).

The tale puts us before a particular inability to interpret. Two situations can be highlighted beyond the one that gives name to the tale, that is, the confusion between the hat and the head: (a) the man could not recognize a glove with a glove, (b) the man, looking at the cover of a magazine, described scenes that extrapolated reality. In fact, the man, living

¹³ In the story, Dr. Sacks failed to arrive at a precise diagnosis, but prescribed a life that consists entirely of music, since it was already in the core of the life of dr. P., so it should be part of his whole life (Sacks, 1997, p. 32).

and behaving as a solipsist, could not make a cognitive judgment of reality, but he did not care about it, except when somebody warned him of the error. In fact, it did not seem to be the error itself a nuisance, but the fact that he was warned about the error.

The story lends itself as a metaphor to talk about the decisionism problem¹⁴. Ernildo Stein, cited by Streck (2018a, p. 82), is right when he says that “it is not the reality that is contradictory; our discourses about reality are contradictory”. Reality is confused with the structure of reality and, therefore, one cannot make assertive statements (Streck, 2018b).

The short story represents in the form of narrative the importance of language and of the *linguist turn*. It is there, exactly there, that the importance of Literature lies (Karam, 2017, Karam and Alcântara, 2019), presenting itself as a possible alternative for the law to appropriate the contributions of the ontological-linguistic turn, from which the knowledge itself is transferred to language, since the subject is not the foundation of knowledge.

Sacks’ story could be illustrated by the revolutionary image of the surrealist René Magritte, *Ceci n’est pas une pipe* (1929). The work is a reaction against rationalism and also shows that between the object of thought and its representation there is a space (of reflection and interpretation). The representation of the pipe is not the pipe, just as the



René Magritte, *This is not a pipe* (1929).

representation of the hat is not the hat, and of course the head is not a hat, although one serves the other. The map is not the world, nor is the world in the map. Words do not reflect the essence of things; they lend themselves

¹⁴ The problem of decisionism has been explored for a long time, but especially in the last two decades. On the subject, consult Barroso (2009), Cittadino (2001), Streck (2009b), Tassinari (2013), Trindade and Morais (2011), Trindade and Neto (2017), Trindade and Rosenfield (2015).

so that we can refer to concrete things but not to represent their essence. And this is also why we cannot assign any meaning to words and therefore to things.¹⁵

Sacks' story and Magritte's picture somehow complement each other: from the first, we cannot attribute meaning to things, since from the second, words do not reflect the essence of things. In law, as will be explained in the following item, judicial decisions are not acts of will, making it necessary to overcome voluntarist positivism. And that is why the law is not what emanates in the courts, by itself. As well as it is not granted, an objective assumption from which the legal interpretation is given (Castanheira Neves, 2003; Dworkin and Rios, 1999). The law is the result of intersubjective context of reasoning (Streck, 2013), it is the result of judicial mediation between system and problem (Castanheira Neves, 2013).

Thus, activism is derived from a casuistry that ignores that the normative-concrete problem of the judgment does not only require the normative-judicial sense, determining in the norm a problematic-concrete adequacy. In fact, the normative-judicial problem requires the concrete normative sense that is legally founded, that is to say, it is valid based on the juridical normativity fundamentally constitutive of the legal validity (Castanheira Neves, 2003, p. 346) and, consequently, normative interpretation is the the very core of the concrete manifestation of law, and law is an interpretative practice, a normatively interpretive-judicial practice. Without this understanding, women may be confused with hats and decisions with personal will and every representation of the pipe will be the pipe itself. Without this care, lawyers will confuse the law with what they claim to be the law.

3 BUT THEN, WHAT ARE HATS AND LEGAL DECISIONS, AND WHAT IS THIS?

The interdisciplinarity that moves the approximation between Law and Literature¹⁶ is the same as the one that resizes the twenty-first century,

¹⁵ In this sense it is recommended to read Streck (1999, 2012, 2018c).

¹⁶ About the theme see Henriete Karam (2017).

the conceptions of science and of truth. In Brazil, we recently celebrated the Balzacian anniversary of our Constitution, and celebrated its cycle of Saturn. We survived the extreme and brief twentieth century, its wars and its conquests and we arrived at the (also) very interesting twenty-first century, with some learning and much to learn¹⁷.

Despite the fact that mankind has survived and gone beyond the Age of Extremes (Hobsbawm, 1995), and that it now lives an Interesting Time (Hobsbawm, 2002), Law seems not to have appropriated the contributions brought by the linguistic turn¹⁸ (Streck, 1999, 2017), high point of Western philosophy in the twentieth century and great target of attention in this twenty-first century.

It is above all from Gadamer (1997, p. 397-410) that we come to understand that the individual who wants to understand cannot immediately surrender to his own previous opinions, ignoring the meaning of the text. It is not a matter of asserting that the interpreter is neutral or must be annulled, but rather that he must account for his own anticipations of meaning and suspend his preconceptions and inauthentic prejudices.¹⁹

¹⁷ The expressions “brief”, “extreme” and “interesting” here assume the meaning given by the historian Eric Hobsbawm to define the twentieth century. A brief century, because its main events can be condensed in the period from 1914 to 1991, in three eras: era of catastrophes, era of gold and era of collapses. A century marked by extremes, as it was the most extraordinary and most terrible of humanity, with great achievements and great losses (Hobsbawm, 2002).

¹⁸ In fact, one of the most important aspects of the 20th century in Western philosophy was the *linguist turn*, baptized by Gustav Bergmann and, at the same time, Frege and Peirce (Rorty, 1990), when language comes to take center stage only in philosophy, but in the humanities. Unfortunately, in law, according to Streck and Stein, this phenomenon has not sufficiently echoed. For Donald Davidson, the overcoming of the subject-object duality, possible after the linguistic turn, is a path without a return. More and more language will be the focus of attention in the 21st century and its first two decades already prove this irrefutably.

¹⁹ An exploration of Gadamerian thought is vital to identify the premises of the central argument of this essay. However, it is not the purpose of this essay to explain it here, but rather to assume it by bringing some references. It is important to assume as a premise, in the light of philosophical hermeneutics, that “to understand is essentially a process of actual history” (Gadamer, 1997, p. 396), and therefore “consciousness of actual history is first and foremost consciousness of hermeneutical situation” (Gadamer, 1997, p. 399). For Gadamer (1997, p. 406), “interpretation is not a later act and occasionally complementary to understanding. Rather, understanding is always interpreting, and therefore interpretation is the explicit form of understanding. Related to this is also the fact that the language and conceptuality of the interpretation were recognized as an internal structural moment of understanding; with this, the problem of language occupying an occasional and marginal position takes up the center of philosophy”.



Marcel Duchamp, *Bicycle Wheel* (1951).

Just as a work of art cannot be seen in its isolation, disconnected from the time and place in which it is inserted, for there is a network of shared understanding between its horizon of meaning and the one who observes it, a case or a legal text is in the same situation. If we understand that the interpreter possesses a pre-comprehension and participates in the construction of the sense of the object, at the same time that this object also modifies the

interpreter's understanding²⁰ we are about to take account of the anticipations of meaning, approaching the adequate response to the problem of law (Streck, 2012) and, after all, the problem of the intentionality of law (Castanheira Neves, 1998).

Well, as stated by Castanheira²¹, (1995a, p. 370-371), since the production by Bülow and Radbuch it is known that "interpretation is the result of its result", that is, that interpretation is not an a priori determination, whether exegetical or analytical, of normativity in the abstract and in itself. Interpretation is constituted by the problematic-normative relationship between the norm and the concrete case. Thus, for Castanheira:

²⁰ Here is outlined a rather shallow understanding of what the complex concept of the hermeneutical circle in Gadamer is, in philosophical hermeneutics. It is recommended to deepen the concept in Gadamer (1997) and in the production of Streck (1999, 2017).

²¹ Castanheira Neves (2013) criticizes functionalism and normativism, presenting *jurisprudentialism*, which is structured from the (dialectical) relation between legal system (principles, norms, jurisprudence and doctrine) and legal problem (the case), and the right to assume as a task, that is, as a *constitute-constituent*, rather than a given, a finished, but constructed from a (always new) problematic normative experience. The legal system is problematically open, not intentionally self-sufficient and has an autonomous practical-normative rationality). On the subject, consult (Castanheira Neves, 2013). In jurisprudentialist thinking, every legal problem is unique and unrepeatable, which poses a question that is also unique and unrepeatable. From this perspective, there is no distinction, as Dworkin does, between easy cases and difficult cases.

[...] the normative-juridical content thus determined-constituted – in a dialectical process analogous to that of the “hermeneutic circle” – that ends up being imputed to the interpreting standard, and enriching it to the same extent.

To Castanheira Neves (1998, p. 2), the very appeal and importance given to jurisdiction today reveals, in the existing jurisdiction, the lack of jurisdiction for appealing. Hence the importance of the problem of meaning, which consists not only of internal problems, but also of structural (external) problems²². After all, what is the role of the judge, who is between the legislator and the society, accomplishing the judicial mediation? (Castanheira Neves, 1995, p. 9-50).

In Sacks’ tale, the way patient dr. P interprets the world is from a formal methodological distinction of interpretation and application, considering them discrete and distinct operations of each other which culminates in the identification of interpretation with an *a priori*, exegetical or analytical determination. The patient’s symptoms are a caricature of this discriminatory scheme.

Castanheira Neves (1995a, p. 374) rightly affirms, with support in Stammler and Heck, that “when a paragraph of a code is applied, not only does the entire code apply, but also the thought of Law intervenes on itself”. In this way, each concrete legal decision can act the global content of the legal order.

²² For Castanheira (1998, p. 2-3), the structure organizes, systematizes, allows the operation, “but only meaning builds and constitutively sustains things”. Therefore, a crisis (the crisis of the judge and justice) can only be overcome by a critique, that is, “by a re-thinking reflection of a new meaning”. For Castanheira, structural problems are: a) problems directly political-constitutional, in the form of an institutional problem (of organization, of government) or of a problem of decision-making legitimacy; b) The statutory problem, related to everything that concerns the norms and guarantees of the judiciary, its control and specific responsibilities; and c) the ad hoc functional problem, referring to how consumers of justice expect the courts to function, their cultural, political and technical expectations. These structural problems, Castanheira insists, are external to the exercise of the jurisdictional function, with which the media and journalists constantly occupy themselves. They are problems that consider the power, organization, responsibility, and mode of this exercise, but do not refer to the material intentionality of the jurisdiction itself as jurisdiction and the meaning it assumes and performs. The structural problems are conditions of possibility of the jurisdiction that is intended. However, it is only the intentional problem, the problem of meaning, that is decisive, that brings in itself constitutive of the jurisdiction, and touches the essence, not the form.

We assume here, in the wake of Castanheira Neves, as decisive the problem of the intentionality of law, of the sense of law and, therefore, of the jurisdiction and of the role of the judge. The structural (external) problems are here suspended, since they concern the *conditions of possibility of the jurisdiction*



Vincent Van Gogh, *A Pair of Boots* (1886).

that is sought and not to the *constitutive moment* of it (Castanheira Neves, 1998, p. 2). We are interested here in the internal problems, the problems of intentionality, the sense of law. Because thinking the meaning of the jurisdiction is thinking about its relation to the law (*juris-dictio*), consequently, a different sense of the law will imply correlatively a different sense of the jurisdiction called to apply it, re-signifying the whole system and, consequently, establishing, in the future, new relations with the legal problems to come²³. The system, therefore, is always affected when provoked by a legal problem, integrating a new intentionality with each new provocation. The sense of the law, and of the jurisdiction, is born, always of a praxis (Castanheira Neves, 2002, 2013; Espindola, 2016a). The law cannot be reduced to the perspective of strict legalism alone. To say this, of course, does not mean abandoning legality! But rather: (a) recovering the normative-intentional autonomy of the law before legality, as well as (b) (re) delineating the legal-juridical limits of the law from the actual realization of the law in the jurisdiction.

It is, therefore, necessary to defend the normative-intentional autonomy of the law before legality (the mere legality), in the terms pointed out by Castanheira Neves (1998, p. 5), through the recognition of the separation of rights (especially fundamental rights) in relation to the law, as well as the recognition of normative principles that transcend the law (legality), called as normative foundations of the jurisdiction to which the

²³ In this sense, see the thesis of the re-founding of jurisdiction in Espindola (2013).

law itself is to submit. In this perspective, it is not the law that gives legal validity to rights, but fundamental rights²⁴ that impose over the law and condition its legal validity (Castanheira Neves, 1998, p. 5-6)²⁵.

Regarding the limits of the jurisdictional action – necessary to overcome mere legality in order to protect the autonomy of the law, hindering voluntarism (Castanheira Neves, 1998, p. 8) – a distinction must be made between the normative-objective limits and the normative-intentional limits. These relate to social dynamics, that is, to the fact that legally positive law falls short of the historically and socially problematic domain to which legal-normative response has to answer. As for normative-intentional limits, they imply the overcoming of the logical-deductive and formal sense, recognizing the need to be concretely adequate to the problematic merit in *current* cases, since the law that is legally performed is itself a *continuum constituting* in normative dialectic function that articulates the principles with the legal merit of the concrete problem through the mediation of the legal norms (Castanheira Neves, 1998, p. 8-9).

The normative-intentional autonomy of the law before the legality, marked by normative-intentional limits in the concrete realization of the law in the jurisdiction constitute the axiological-normative sense of the law, of which Castanheira Neves speaks (1998, 2002). And it is this axiological-normative sense, a result constituted by the practice of its historical-social realization, which makes up the *general juridical consciousness*, in its values, principles and decisive normative criteria. Castanheira (1998, p. 10) similarly evokes the Gadamerian hermeneutic circle to better expose the constitution of *general legal consciousness* and the meaning of law.

²⁴ According to Castanheira (1998, p. 5-6), the authentic and ultimate meaning of these rights can be reached by two opposing perspectives: one is individualistic liberalism (radical liberalism), which still exists and may be in restoration, and the perspective of a community understanding, drawn from community integration, according to which rights have duties as correlates of meaning. For Castanheira, the sense of fundamental rights comes from the antithesis between *communitarianism and liberalism*, demanding the overcoming of the individual as the holder of rights by that of a subject who can only assume rights in the context of a binding citizenship as a person with *community responsibility*.

²⁵ The understanding of Castanheira Neves in this point, which culminates in what he calls *general juridical consciousness*, approaches the hermeneutic circle of Gadamer.

In this perspective, what do the law and the interpreter have to do? If law can only be as long as it is an axiological transcendent that bases and criticizes human relations in community life, if law only has meaning and autonomy as the axiological project of community life, it will evidently have no place in a society that agrees to submit to the totalitarianism of rational-technocratic reduction. At this point lies the fundamental role of the interpreter, who, through judicial decision, should not be reduced to the mere technician of the system's devices or to a bureaucrat of coercion, otherwise he will prove to be an anachronism to be surpassed by the technocrat. The interpreter (and therefore, the judicial decision) fulfills the role of assuming and realizing the idea of law, considering this not as "data", a "job" that the jurist has to perform, nor that the law may be in some moral judgment, but rather it is a "task" that calls it an effort and a responsibility (Castanheira Neves, 1995b, p. 46-47). Without this, we have the fracture between the law and the man.

Add to this the fact that the postulation of rights takes place through a complex narrative polyphony²⁶ of versions, as Calvo Gonzales (1998, 2008) states. Thus, in jurisdictional action there is a broad narrative spectrum of intricate versions and inversions about / of facts. The interpreter, like the neurologist in the metaphor of Sacks' tale, is also a narrator who brings his version on the facts, and who should intervene minimally and exceptionally, in order to accomplish a true *balance of accounts* (accounting, giving grounds), quoting Calvo Gonzales (1998, p. 12-14) again. This adjustment of accounts, of course, transforms judicial truth into a historical truth, the truth of facts counted, that is, what is thought to have happened, but within a narrative coherence, from the construction of a *ratio decidendi* as sufficient and reasonable justification (Calvo González, 1998, p. 7-38). Without this there is no way of knowing whether the man confused the woman with a hat, or if he did not exactly confuse her by pure chance.

This is, therefore, the therapeutic treatment for the diagnosis of legalism or voluntarism, both identified as serious lesions to the left or right

²⁶ On the theme "polyphony and truths in procedural narratives" it is recommended, in particular, Trindade and Karam (2018).

hemispheres in the brain of the Constitution's thirtieth year, and therefore responsible for the interpretive deficits.

4 FINAL CONSIDERATIONS

Women are not hats, although hats may be on women's heads. *Ceci n'est pas une pipe*, although the image may represent a pipe, or a historical, communal and cultural way of viewing it. The law is not what the courts say, although courts can say the law – *juris dictio*. Just as Sacks is amazed at his patient who confuses the woman with a hat, foot with shoe, children with hydrants and parking meters, doorknobs with faces, it is astonishing that, even after the turning provided by hermeneutic philosophy and philosophical hermeneutics for the interpretation of the law²⁷, we can still confuse the law with morality or reduce it to what the courts dictate.

Indeed, these “confusions” suggest that the privileged locus of the subject-object relationship (positivism) still subsists, resulting in the widening of subjectivist solipsism to the detriment of an intersubjective context of reasoning (Streck, 2011). All of this, combined with Picardi's (2008, p. 1-32) statement that we are in a century devoted to the judiciary, inevitably culminates in judicial activism²⁸. The judiciary, in spite of the enormous (and inescapable) political responsibility inherent to the jurisdictional provision, behaves just like the *car of Juggernaut*²⁹, losing control over circumstances and becoming the victim of his own works. In contemporary Brazilian constitutionalism we have already been closer to this paradigmatic rupture.

The role of the interpreter is to discover the question to which the text (system and problem) comes to give the answer. That is why understanding a text is, rather, understanding the question. In fact, if we affirm with Gadamer (1997, p. 565-568) that all understanding is interpreting, and all

²⁷ For an understanding of the symmetries and asymmetries between the *jurisprudentialism* by Castanheira Neves and the *hermeneutic critique of the law* by Lenio Streck, a topic not explored here, consult (Streck, 2011, p. 163-168).

²⁸ For a distinction between judicialization of politics and judicial activism, as well as for a broad understanding of how judicial activism undermines the autonomy of law, see Streck (2012), Tassinari (2013), Trindade and Morais (2011), Trindade and Rosenfield (2015).

²⁹ Car of Juggernaut is a metaphor used by Giddens (1991). Juggernaut is a Hindu deity who, in mystical cults, drives a car of errant trajectory under whose wheels the devotees are exposed to be run over (Giddens, 1991).

interpreting develops in the *medium* of a language that intends to let the object speak and is at the same time the very language of its interpreter, we also understand law as a *constitute constituent* (Castanheira Neves, 2013), just as we also accept that the search for adequate answers, as Streck (2017, 386) affirms, is a remedy against the core of the model that dialectically generated it: positivism and its strongest characteristics, voluntarism and arbitrariness.

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