THE STF'S DECISION IN HC JUDGMENT No. 154.248/DF: DISAGreements IN LAW AND CONSTRUCTIVE INTERPRETATION FROM DWORKIN'S PERSPECTIVE

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ABSTRACT

Objective: The objective of this study is to investigate the STF's decision in the judgment of HC no. 154.248/DF, with the aim of understanding disagreements in law and the application of constructive interpretation from the perspective of Ronald Dworkin.

Theoretical Framework: In this topic, the main concepts and theories that underpin the research are presented. Ronald Dworkin's theories of interpretation of law, the idea of integrity in law and the theory of interpretative disagreements stand out, providing a solid basis for understanding the context of the investigation.

Method: The methodology adopted for this research comprises a qualitative approach, using documentary analysis of court decisions and a bibliographic review of Dworkin's works. Data collection was carried out through the analysis of votes from STF ministers and specialized legal literature.

Results and Discussion: The results obtained revealed a diversity of interpretations among the STF ministers in the judgment of HC no. 154.248/DF, highlighting the different understandings of constitutional principles and fundamental rights. In the discussion section, these results are contextualized in light of Dworkin's theoretical framework, highlighting the implications of the theory of constructive interpretation and the challenges faced by courts in maintaining the integrity of the law. Possible discrepancies and limitations of the study are also considered in this section.

Research Implications: The practical and theoretical implications of this research are discussed, providing insights into how the results can be applied or influence practices in the field of constitutional law and jurisprudence. These implications may encompass the training of jurists, judicial practice and legal theory.

Originality/Value: This study contributes to the literature by approaching the STF decision from the perspective of Ronald Dworkin's theory, offering an innovative analysis of constructive interpretation and disagreements in law. The relevance and value of this research are evidenced by its ability to deepen understanding of the practical application of Dworkin's theories in complex judicial decisions.

Keywords: Constructive Interpretation, Disagreements in Law, STF, Ronald Dworkin, HC 154.248/DF, Constitutional Law.

A DECISÃO DO STF NO JULGAMENTO DO HC N.º 154.248/DF: DESACORDOS NO DIREITO E A INTERPRETAÇÃO CONSTRUTIVA NA PERSPECTIVA DE DWORKIN

RESUMO

Objetivo: O objetivo deste estudo é investigar a decisão do STF no julgamento do HC n.º 154.248/DF, com o intuito de compreender os desacordos no direito e a aplicação da interpretação construtiva na perspectiva de Ronald Dworkin.

Referencial Teórico: Neste tópico, são apresentados os principais conceitos e teorias que fundamentam a pesquisa. Destacam-se as teorias de interpretação do direito de Ronald Dworkin, a ideia de integridade no direito.
e a teoria dos desacordos interpretativos, fornecendo uma base sólida para a compreensão do contexto da investigação.

Método: A metodologia adotada para esta pesquisa compreende uma abordagem qualitativa, utilizando análise documental das decisões judiciais e revisão bibliográfica das obras de Dworkin. A coleta de dados foi realizada por meio da análise de votos dos ministros do STF e literatura jurídica especializada.

Resultados e Discussão: Os resultados obtidos revelaram uma diversidade de interpretações entre os ministros do STF no julgamento do HC n.º 154.248/DF, destacando-se os diferentes entendimentos sobre princípios constitucionais e direitos fundamentais. Na seção de discussão, esses resultados são contextualizados à luz do referencial teórico de Dworkin, destacando-se as implicações da teoria da interpretação construtiva e os desafios enfrentados pelos tribunais em manter a integridade do direito. Possíveis discrepâncias e limitações do estudo também são consideradas nesta seção.

Implicações da Pesquisa: As implicações práticas e teóricas desta pesquisa são discutidas, fornecendo insights sobre como os resultados podem ser aplicados ou influenciar práticas no campo do direito constitucional e jurisprudência. Essas implicações podem abranger a formação de juristas, a prática judicial e a teoria do direito.

Originalidade/Valor: Este estudo contribui para a literatura ao abordar a decisão do STF sobre a ótica da teoria de Ronald Dworkin, oferecendo uma análise inovadora sobre a interpretação construtiva e os desacordos no direito. A relevância e o valor desta pesquisa são evidenciados por sua capacidade de abordar e compreender a aplicação prática das teorias de Dworkin em decisões judiciais complexas.


DECISIÓN DEL STF EN LA SENTENCIA HC N° 154.248/DF: DESACUERDOS EN LA LEY E INTERPRETACIÓN CONSTRUCTIVA DESDE LA PERSPECTIVA DE DWORKIN

RESUMEN

Objetivo: El objetivo de este estudio es investigar la decisión del STF en el juicio de HC n.º 154.248/DF, con el objetivo de comprender los desacuerdos en la ley y la aplicación de la interpretación constructiva desde la perspectiva de Ronald Dworkin.

Marco teórico: En este tema se presentan los principales conceptos y teorías que sustentan la investigación. Destacan las teorías de interpretación del derecho de Ronald Dworkin, la idea de integridad en el derecho y la teoría de los desacuerdos interpretativos, proporcionando una base sólida para comprender el contexto de la investigación.

Método: La metodología adoptada para esta investigación comprende un enfoque cualitativo, utilizando el análisis documental de las decisiones judiciales y una revisión bibliográfica de los trabajos de Dworkin. La recopilación de datos se llevó a cabo mediante el análisis de los votos de los ministros del STF y la literatura legal especializada.

Resultados y Discusión: Los resultados obtenidos revelaron una diversidad de interpretaciones entre los ministros del STF en la sentencia del HC n.º 154.248/DF, destacando los diferentes entendimientos de los principios constitucionales y derechos fundamentales. En la sección de discusión, estos resultados se contextualizan a la luz del marco teórico de Dworkin, destacando las implicaciones de la teoría de la interpretación constructiva y los desafíos que enfrentan los tribunales para mantener la integridad de la ley. Las posibles discrepancias y limitaciones del estudio también se consideran en esta sección.

Implicaciones de la investigación: Se discuten las implicaciones prácticas y teóricas de esta investigación, proporcionando información sobre cómo se pueden aplicar los resultados o influir en las prácticas en el campo del derecho constitucional y la jurisprudencia. Estas implicaciones pueden abarcar la formación de juristas, la práctica judicial y la teoría jurídica.

Originalidad/Valor: Este estudio contribuye a la literatura al abordar la decisión del STF desde la perspectiva de la teoría de Ronald Dworkin, ofreciendo un análisis innovador de la interpretación constructiva y los desacuerdos en la ley. La relevancia y el valor de esta investigación se evidencian por su capacidad para profundizar en la comprensión de la aplicación práctica de las teorias de Dworkin en decisiones judiciales complejas.
1 INTRODUCTION

The decision of the Supreme Federal Court (STF) in the judgment of Habeas Corpus (HC) No. 154.248/DF represents a significant milestone in the Brazilian legal interpretation, especially when analyzed from the perspective of the law theory of Ronald Dworkin. The constructive interpretation, proposed by Dworkin, suggests that judges should interpret the law in such a way that the decision to be taken results in the best possible construction of the moral and legal principles of society. However, this judgment of the Supreme Court evidenced notable disagreements among ministers, raising critical questions about the practical application of Dworkin's interpretative theories.

This study focuses on the analysis of the judgment of HC No. 154.248/DF by the STF, exploring how ministers interpreted and applied constitutional principles and fundamental rights in light of Dworkin's theory. The research problem that guides this work is: how does the STF's decision in the judgment of HC No. 154.248/DF exemplify disagreements in law and constructive interpretation from the perspective of Ronald Dworkin?

The general objective of this research is to understand how the theory of constructive interpretation of Ronald Dworkin can be applied to analyze the disagreements in law, evidenced by the decision of the Supreme Court in the judgment of HC No. 154.248/DF. To achieve this objective, the following specific objectives were established: analyze the votes of the STF ministers in the judgment of HC No. 154.248/DF to identify the main points of disagreement; investigate how constitutional principles were interpreted in accordance with Dworkin's theories; assess the implications of this decision for legal practice and the training of jurists; and discuss the limitations and challenges of applying the theory of constructive interpretation in the Brazilian judicial context.

The methodology adopted for this research is qualitative, based on documentary analysis and bibliographic review. The documentary analysis includes the study of the votes of the ministers of the Supreme Court in the judgment of HC No. 154.248/DF, while the bibliographic review covers the main works of Ronald Dworkin on legal interpretation and
integrity in law. In addition, secondary legal sources will be used to put the analysis in context and further develop.

The relevance of studying this topic lies in the opportunity to deepen understanding about how philosophical theories of law can be applied in judicial practice. The judgment of HC No. 154.248/DF by the STF is a paradigmatic case that illustrates the challenges and complexities of legal interpretation in Brazil. By investigating this decision from Dworkin's perspective, this study seeks to contribute to the legal literature by offering new insights into the application of constructive interpretation and its impacts on precedent-setting and judicial practice. Thus, the present research not only enriches the academic debate on the theory of law, but also provides input for legal practice, enabling a critical reflection on the integrity of law and the challenges faced by higher courts in contexts of interpretative disagreement.

2 THE TRIAL OF HABEAS CORPUS No. 154.248/DF BY THE STF

The case under review reached the Supreme Court for the prosecution of Habeas Corpus in favor of patient, seeking recognition of the extinction of the punishability of the latter by the expiry of the limitation period, in view of the quantum of penalty applied, in the conviction for crime of racial injury. According to the case file, an 80-year-old elderly woman was sentenced for the crime of racial injury to a sentence of one year imprisonment and ten days-fine, by the Judgment of the 1st Criminal Court of Brasilia/DF, for having insulted a front man from a gas station, calling her "disgusting, ignorant and sassy little black".

The defense of the elderly pleaded the recognition of the extinction of the punishability, taking into consideration the rule of Article 115 of the Penal Code, which states that the limitation periods are reduced by half when the agent is, at the date of the sentence, greater than 70 (seventy) years. The Superior Court of Justice, in assessing ARESP 734236/DF, denied the defense's request because it considered the offense to be unscripted. Irresignor with this decision, the defense of the patient joined the Supreme Court with Habeas Corpus, which was distributed to the Rapporteur Minister Luiz Edson Fachin.

2.1 DRIVING VOTE FOR MINISTER LUIZ EDSON FACHIN

Rapporteur Minister Luiz Edson Fachin gave his vote in the plenary session on 26 November 2020, and the trial was suspended due to the request of Minister Nunes Marques for a visit. In the leading vote, there was a harsh social criticism at the outset. The recognition that Brazil has
not yet learned to deal with the traumatic post-slavery events that the black population is obliged
to face every day. Said the Rapporteur "There is racism in Brazil. It is an infamous wound that
marks the interface between yesterday and tomorrow"3.

The Rapporteur of the case recalled that the Constitution of 1988 incorporated a
complex system of guardianship that provides for the promotion of the good of all, without
prejudice of origin, race, sex, color, age and any other forms of discrimination, as one of the
fundamental objectives of the Federative Republic of Brazil (art. 3, IV), besides enunciating as
guiding principle of the sovereign entity in its international relations the repudiation of terrorism
and racism (art. 4, VIII). The constitutional text also brought a mandate to incriminate racist
conduct, as unbailable and imprescriptible (Art. 5, XLII). At the infraconstitutional level, the
lead vote clarified4

In the year following the 1988 Constitution, Law No. 7716/89 was approved, which
defined crimes resulting from prejudice against race or color. Supplementing the
infraconstitutional legislation for the fight against racism, Law No. 9.459/97, amended the Penal Code to add to Article 140, Paragraph 3, and typify racial injury. Law No. 12,288/10 establishes the Statute of Racial Equality, celebrated for its first decade of existence and implementation of some public policies to eliminate inequalities of economic, social and legal status, based on race. The institution of affirmative actions for access to higher education and public service (Law 12.990/14), were conquests of this recent period.

To demonstrate the importance of the topic under discussion, the Minister Rapporteur
recalled an important international milestone in the international community's commitment
against racism and all forms of discrimination. This is the International Convention on the
Elimination of All Forms of Racial Discrimination of 1966, ratified by Brazil, through Decree
No. 65,810, of December 8, 1969, through which the country explicitly committed to condemn
racist practices and to carry out public policies to eliminate such conduct5.

It also noted that Brazil has mobilized to carry out activities planned for the so-called
"International Decade of African Descent", proclaimed by the General Assembly of the United

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3. Vote of Minister Luiz Edson Fachin, in the case file of HC 154.248/DF, given on 26.11.2020. Available at http://www.stf.jus.br. Accessed: Oct. 30, 2021. To paraphrase Marieta de Moraes Ferreira, the Minister made a point of recognizing that, if on the one hand, the marked processes of a past not so distant from subjection and exploitation cannot be forgotten, on the other, the existence of countless difficulties in the daily work of constructing the history of the present time, of which we are all active personages and participants, cannot be denied.


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Nations (Resolution No. 68/237), to be observed between 2015 and 2024\(^6\). The adoption of these objectives, principles and commitments at the international level and in the provisions of the Magna Carta, said the Rapporteur, highlights the need for actions of the Public Power and of all those who live in this country to combat racism, and recognizes, on the other hand, that besides the verbal and physical racial violence perpetrated by individuals, there is also an institutional dimension, all resulting from the structural racism that marks relations within Brazilian society.

Going further, the lead vote pointed out that the Court itself, in the judgment of the ADC n.º 41, which had as Rapporteur the Minister Luís Roberto Barroso, recognized the constitutionality of the policy of reserving vacancies in public tenders because of the existence of a kind of racism à la Brazil, racism also recognized in the judgment of HC n.º 82.424, Rapporteur for the judgment of Minister Maurício Corrêa\(^8\).

The argument used by Minister Fachin that the circulation of negative racial stigmas, as well as micro-aggressions, jeopardize the equality of status between social groups, distances itself, above all, from the conception hitherto shaped by traditional doctrines that preach the distinction between the criminal conduct of racial injury (Art. 140, § 3, of the CP), which is the conduct directed against a specific person, and the crime of racism (Law No. 7.716/89), which is practiced against an entire social group.

For the Rapporteur, it remained clear that it is impossible to dissociate the individual who suffers the aggression that reverberates certain differences, such as race, color, ethnicity, religion or origin, from the social group to which he belongs on account of race. In other words, every offense against an individual of a racist stamp will undeniably amount to violence against the social group of which he is a part\(^9\).

The argument that prevailed in the discussion was that there is no ontological distinction between the behaviors provided for in Law No. 7.716/1989 and that contained in Article 140, § 3, of the CP, because in both cases there is a differentiated treatment, based on race, as to equal respect for the dignity of individuals, with the condon of violating and assaulting their fundamental rights.

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The criminal conduct of racial slur affronts the whole set of civilizing commitments undertaken by Brazil, in various spheres and by various institutions, which, according to Fachin, "makes it possible to frame it both in the concept of racial discrimination provided for in the international law and in the definition of racism already employed by the Federal Supreme Court in the vote that led the judgment of HC 82,424" 10.

The lesson from this judgment is that racism can manifest itself in various ways and this reason has led the legislator to create different types of criminal law to curb the most varied behaviors representative of this practice. This understanding led the Court to recognize that the crime of racial injury is a kind of racism, and therefore it is unbailable and imprescriptible, subject to the penalty of imprisonment.

2.2 DIVERGENT VOTE BY MINISTER NUNES MARQUES

In turn, Minister Kassio Nunes Marques, in the session of 02.12.2020, opened the disagreement in the judgment of the alluded HC, under the argument that the conduct of the crimes are different and that the unimpeachability of racial injury could only be implemented by means of law. For him, "in the crime of injury, the protected juridical good is subjective honor, and offensive conduct is directed at it. In the crime of racism, the legal good protected is the dignity of the human person, which must be protected regardless of race, color, ethnicity, religion or national origin"11.

According to the dissenting vote, it is not possible to interpret the limitation extensively, since it is an exception made by the constituent. The seriousness of the offense cannot be used by the Judiciary to extend the hypotheses of impossibility provided for by the legislature or to alter the time limit provided for in the criminal12 law. The divergent vote adopted the traditional conceptions that highlight the main characteristics of legal positivism, as a doctrine that still occupies a privileged place among the practical and theorists of law, despite its numerous contradictions, many of which were enumerated by Dworkin himself.

For the Minister, the 1988 Constitution established verbatim that "the practice of racism constitutes a crime that cannot be bailed out and is not subject to imprisonment under the law"

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(Article 5, paragraph XLII), so that this exception can only be applied to offenses defined in Law No. 7.716/1989. Thus, the divergence was limited to arguing that it was legally impossible to extend, by means of a judicial decision, the impermissibility, which is a peculiar element of the crime of racism, to the crime of racial injury (Art. 140, § 3 of the CP), and according to that conception, it was not possible to apply a broad interpretation in order to transversely extend the constitutional exception.

3 DWORKIN AND ITS CONCEPT OF LAW

Lawyers often do not wonder what conception of law they adopt in their daily lives to provide answers to the most varied cases that come to their attention. This inquiry, however, is of paramount importance for understanding the reason why a judge, for example, decides a question one way or another. The way in which magistrates interpret legal texts and produce their justifications for the legal solutions given to controversies is significantly more about the interpreter himself than about the text of the law or the intention of the legislator.

Assimilating this particularity, the intention is to analyze the neuralgic points of the theory of law that adopts the positivist conception and to point out the criticisms accepted by Dworkin to demonstrate the main flaws of this model. However, it is not intended to present an exhaustive catalog of the propositions of this author, because of the epistemological clipping that guides this research.

3.1 THE MODEL RULES AND THE FIRST CRITICISMS OF LEGAL POSITIVISM

Dworkin's first offensive against legal positivism came with the publication of "Taking Rights Seriously", which is nothing more than an expansion of the texts "The Rule Model I", originally published in the University of Chicago Law Review in 1967, and "The Rule Model II", published in the Yale Law Journal in 1972, as he himself clarifies. In these two articles - "Rule Model I" and "Rule Model II" - Dworkin attacks legal positivism, openly criticizing Austin's and Hart's works, as well as conventionalism, and the more refined version of legal

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14 That is why it is said that the way of interpreting the legal texts has a lot to do with the person's vision of the world; with the political vision of the judge; with what a given Judge understands to be the right.

realism, pragmatism. Dworkin’s criticisms focused on several points of the law theories that had prevailed in Western legal culture until then, but this study, for methodological reasons, will only address the two considered most important.

3.1.1 The concept of law in Hart: relationship between primary and secondary rules

According to Hart, there are two possible sources for the authority of a rule: (i) when a social group adopts certain rules, members of that community accept them and use them as guides to the conduct of life in society, whose disobedience will follow a hostile reaction, but that does not mean that there is a right, because there is no way to distinguish legal rules from other social rules; and (ii) a rule may also become obligatory if it originates according to a particular procedure and observes a specific way of production stipulated by another rule, which he calls a secondary rule, in which will be considered valid.

Drawing from this distinction between rules merely accepted by a specific community and rules whose authority stems from the validity that a hypothetical rule confers on them, Hart elaborates a refined conception of law, according to which only valid rules can form part of the legal system. He then builds his argument by justifying that the valid rules can be of two types: primary rules and secondary rules, and that there is a need for interaction between them so that the latter can confer on the primary rules the nature of legal rules and thereby grant them binding force, with binding effects enforceable against all.

Primary rules are identified as a specific set of legal rules that impose obligations, commitments, responsibilities and sanctions on citizens, thereby emerging the very prescriptive

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16 For conventionalism, legal practice boils down to obedience to the laws, which are previously established conventions, and in the case of loopholes, the judge must use his discretion to resolve cases. This attitude ignores the gradual changes that occur over time in the way that the operators of the Law appropriate these conventions. In contrast, for pragmatism, judges should not be tied to the conventions of the past, but rather concern themselves with the justice of the decision, so as to link this ideal to a question of general well-being, turning to a utilitarian perspective of the law (PEDRON, Flávio Quinaud. Is a correct answer possible for controversial cases? An analysis of Robert Alexy’s interpretation of the Dworkiana thesis. Review of the Regional Labor Court of the 3rd Region. Belo Horizonte, v. 40, no. 70, Jul./Dec. 43).

17 Hart notes “the rules by which the group lives will not form a system, but will simply be a set of separate patterns, without any common identification or mark, except, of course, that they are rules accepted by a particular group of human beings. To that extent, the rules will resemble our own rules of etiquette” (HART, H. L. A. *The concept of law*. Trad. A. Ribeiro Mendes. 3. ed. Lisbon: Calouste Gulbenkian Foundation, 2001, pp. 100-102).


19 Just as the fundamental hypothetical norm is situated at the apex of the normative pyramid in Kelsen's well-known aphorism, the demonstration that a particular rule has its basis of validity in another rule hierarchically superior to it supports Hart's concept of right.

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notion of "should be". Secondary rules, on the other hand, according to this concept, also called "recognition rules", are types of rules justifying the validity of other legal rules, that is, they constitute higher-ranking rules and condition the validity of the rules imposing the "duty to be" on compliance with certain formal requirements of legislative\(^{21}\) production.

According to Hart, law, and the legal system as a whole, only arises when a community develops a fundamental secondary rule that stipulates how primary legal rules are to be identified, giving them criteria for verification of validity\(^{22}\).

In the view of Merryman and Pérez-Perdomo, the prevailing ideology is that this integrated grouping of rules gives clarity, completeness and coherence to the legal system, leading the popular imagination to believe in the illusion that the law is self-applicable and reduces the function of the judge to merely apply the law to the facts\(^{23}\). However, this dominant theory of law did not relieve itself of its argumentative burden of explaining precisely how judges decide "difficult cases", which are those issues for which legal texts present no solution or do so in an obscure or imprecise\(^{24}\) manner.

3.1.2 Judicial discretion to resolve difficult cases

In the case of difficult cases, which arise because of the open texture of the law, Hart argues, judges must exercise their discretion to decide, creating new rules\(^{25}\) that will apply retroactively to concrete\(^{26}\) cases. This argument, however, is not convincing, because

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\(^{21}\) Hart emphasizes that secondary rules "specify the ways in which primary rules can be determined conclusively, or be created, eliminated and changed, and the fact that their infringement is determined beyond doubt" (HART, H. L. A. *The concept of law*. Trad. A. Ribeiro Mendes. 3. ed. Lisbon: Calouste Gulbenkian Foundation, 2001, p. 104).


\(^{24}\) This topic can also be discussed from the perspective of the existence or not of gaps in law (DWORKIN, Ronald. *A matter of principle*. Trad. Louis Carlos Borges. 3. ed. São Paulo: Martins Fontes, 2019, p. 175).

\(^{25}\) In this respect, Azevedo and Coura explain: "The theory proposed by legal positivism, especially in difficult cases, refers to a discretionary power on the part of judges that says nothing and nowhere leads, because, in the absence of a clear rule, does not discuss the role and importance of standards other than new rules. To say that judges can create new rules, in their absence, is to confer on them legislative powers, whose reasoning can be based on illegitimate standards and outside the law" (AZEVEDO, Silvagner Andrade de; COURA, Alexandre de Castro. *Indeterminacy of law and judicial discretion*: thinking the crisis of legal positivism from Kelsen, Hart and Dworkin. In: BUSSINGUER, Elda Coelho de Azevedo; COURA, Alexandre de Castro. *Law, politics and constitution*: reflections on the tension between constitutionalism and democracy in the light of the paradigm of the democratic rule of law. Curitiba: CRV, 2014, p. 125).

\(^{26}\) Hart says, "The discretionary power thus left to him by language can be very broad; so that if he applies the rule, the conclusion is in fact a choice, even if it may not be arbitrary or irrational" (HART, H. L. A. *The concept of law*. Trad. A. Ribeiro Mendes. 3. ed. Lisbon: Calouste Gulbenkian Foundation, 2001, p. 140). Merryman and Pérez-Perdomo explain that the positivist doctrine "seeks to demonstrate that judicial interpretation is not really in
positivism and the conceptions derived from it do not present a clear justification for the problem, since the use of discretion brings with it the undeniable risk of submitting the question of right to an undeniable load of subjectivism of the judge, who, depending on his personal experiences, religious options, his degree of emotional maturation, can draw different conclusions. From there, Dworkin will develop his criticisms. For him, when jurists reason or debate about difficult cases, they resort to standards of fairness and justice that influence the behavior and social practices inherent to the traditions that prevail and are shared in a given community, with the objective of revealing the best solution, the most adequate answer for the case. The judge, according to this model illustrated in "Taking Rights Seriously", when faced with a difficult case, does not have the freedom to decide it according to his personal preferences, according to the understanding of the positivist doctrines. The magistrate, as a member of a community of principles, will always be bound to the limits of the above standards.

Such observance of the standards of fairness and justice will lend coherence and integrity to the legal system, contributing to the consolidation of the judicial reputation within a given society. The error of positivist conceptions consists in denying the existence of these principles, or at least denying them deontological nature. The interpreter must consider that rules and principles are kind of legal norms, and as such they express commands of "ought to be", that is, they are able to bind behavior and produce coercive results.


27 One of Dworkin's critics, the pragmatist school representative Richard Posner, acknowledged, half a century after the publication of the text "The Model of Rules I", that "it is apparent that judicial decisions are influenced, often decisively, by the individual experiences of political, ethical, emotional order, here included career and family, of the judges themselves when they adopt the discourse of strict professional neutrality. Swirls of passion go unnoticed, hidden under a frozen surface of conventional legal language, driving the decision not in all cases, but in many cases. However, when the decision that may have been forming for months is finally made public, it is seen as clothed in a rhetoric of cold rationality" (POSNER, Richard A. The federal judiciary: strengths and weaknesses. Cambridge: Harvard University Press, 2017, p. 377).

28 The identification of a community of principles presupposes that the members of a given society accept that their destinies are strongly linked not only by the legal rules coming from formally and legitimately constituted legislative bodies, but also that it is governed by common principles, so that they accept that persons have rights and obligations even if not written into any legal provision, which will have a strong impact on the whole of the practices and traditions of that community.

29 Judicial reputation is closely related to their ability to make the other actors in the democratic process observe and abide by their decisions, so that the greater their reputation, the less likely they are to fail to comply with their decisions. As Garoupa and Ginsburg well illustrate, "The concern with judicial reputation has two important functions, namely, the transmission of information to the general public about the quality of the Judiciary, and the good judicial reputation favors the perception of a Court and magistrates as qualified and respected. In addition, judicial reputation exerts influence over the Executive and Legislative Powers, as well as the way civil society groups will conceive of the decisions taken, and the extent to which they will follow them" (GAROUPA, Nuno; GINSBURG, Tom. Judicial reputation: a comparative theory. Chicago: The University of Chicago Press, 2015, p. 16).
They differ, however, because the rules are applicable in the "all-or-nothing" manner, while the principles present a "dimension of weight or importance", so that when they intersect, the one who will resolve the conflict has to take into account the relative strength of each. This sense of law represents a head-on shock to positivist traditions by casting suspicion on the very existence of the rule of recognition, which is the central element of Hart's theory for identifying the validity of legal norms.

By predicting what principles are normative species, Dworkin has caused a break in the general paradigm of the theory of law and demonstrated that secondary rules, also called recognition rules, are not suitable for dealing with this specific normative spectrum, because there is no way of specifying the validity of principles in another norm that is hierarchically superior to it. The American author refers to the recognition rule, not without the refined sarcasm peculiar to it, as being "a pedigree test that does not work for the principles".

Dworkin demonstrated that the failure of positivist conceptions consists in the fact that it is a model aimed exclusively at a system of rules, whose complex chain of validity, which is part of a specific rule to find justification in another higher hierarchy, completely ignores the important role played by principles in the legal system.

There is no superlative rule that stipulates the justification of the validity of the principles, and even if it could be said that the recognition rule is the complete set of all the principles in force, it would be impossible to identify them, since the principles are endless, volatile and undergo profound changes over time.

A principle, such as that "no one can benefit from their own turpitude", mentioned in Riggs v. Palmer 115 N.Y. 506, 22 N.E. 188 (1889), for example, spells out a reason that drives the argument in a certain direction, as if it were a circumstance that inclines judgment to a...
specific sense. The positivist conception is weakened when one observes that the recognition rule, which gives validity to the whole legal system, is entirely useless for identifying it.

3.2 THE EMPIRE OF LAW STRIKES BACK: THE SECOND ROUND OF DISPUTE

In "The Empire of Law", Dworkin takes up the arguments he expounded in his books "Taking Rights Seriously" and "A Question of Principle", even repeating, in a deliberate manner, examples already mentioned in these works, as he himself makes a point of mentioning verbatim in the preface to the book. It is no coincidence that Ronaldo Porto Macedo Júnior states that Império do Direito is a counterattack or a sort of second round, making a clear allusion to a boxing fight. But in what sense can this counterattack be understood?

The Empire of Law is Dworkin's second offensive against legal positivism. It is a response to the harsh criticism he received from Hart himself and many of his disciples, among them Joseph Raz and Rolf Sartorius. The main resignation against his thesis consists in the argument that if he had intended to break with positivism, he did not go so far as to do so, because his critical theory employs the same concepts as the positivist conception.

In Hart's post-writing, there is an expressive passage in which he mentions "whatever differences remain between the rules and the 'pre-understandings', 'consensus' and 'paradigms' of which Dworkin speaks, his explanation of the judicial identification of sources of law is substantially the same as mine".

This passage is quite significant, as Hart reaffirms his conception of law by arguing that the categories mentioned by Dworkin, having the denomination they have, are all contemplated by the theory of law he professed. Moreover, it commends the recognition rule and states that it remains effective and performs its function of sustaining the validity of the legal system as a whole. Dworkin then went to the second round of the contest, and this time his goal is to attack

35 This title makes an explicit reference to item 4.3, from the work of MACEDO JÚNIOR, Ronaldo Porto. From chess to courtesy: Dworkin and contemporary law theory. São Paulo: Saraiva, 2013.
the opponent, in this case legal positivism, in what is more dear to him. His offensive, in this counter-coup, has as its target the premises and fundamentals of this conception.

Questioning the premises of positivism means investing precisely against the point where this doctrine justifies the likely sources of authority of law in a given society, and this is extremely serious, as the acceptance of Dworkin's arguments would mean the destruction of the foundations that underpin the whole conception of law as a general theory of legal rules. The "Empire of Law" begins with the phrase "it is important how judges decide cases"\(^{40}\), and this is due to the fact that the theory of law, at least the theory that was considered dominant at the time, paid no attention to the content of court decisions. They treated it as a point of little relevance for the construction of their conception of law, as if the role of the courts were a problem that only mattered to the law\(^{41}\)'s lawyers and to the other legal practitioners.

Dworkin identified the existence of an undeniable and profound force that lent itself to separating the theory of law from the everyday practical reality of court\(^{42}\) proceedings, and realized that it could not justify what was happening in the world. He then goes on to reflect on how judges can disagree and his concern centers on the questioning that these disagreements between judges testify much against the very notion of law, especially if one considers that both started from the same legal text.

He states that philosophers of law merely answer that these disagreements are illusions, that lawyers and judges are in agreement on the fundamentals of the law, and that discussion is usually waged in relation to the factual issues inherent in a particular\(^{43}\) demand. In this view, which can be classified as positivist, but which equally reaches conventionalists and pragmatists, the disagreements are explained in theory as problems that do not exist; as merely procedural problems; problems properly of practice and not of the theory of law\(^{44}\).


\(^{41}\) On this and other issues Dworkin was a revolutionary. Until then, legal theorists did not interfere in the activity of analyzing how the courts decide cases and Dworkin, on realizing this, was the first to find that the intellectual production of the magistrates distanced himself entirely from the lessons of the Law Theory, emerging from this situation a serious and profound problem to which the juridical positivism had no answer.

\(^{42}\) In the exercise of identifying possible reasons to justify the distance between the academic world and judicial practice, says Posner, "the judges had close to two thousand years of experience trying, with considerable success, to marvel the laity, to project an aura of self-congratulation, to hide their failures and inadequacies (...) and one of the causes of the coldness that some judges feel towards the academics stem from the criticisms. They resent not only being a personal affront, but weakening the judiciary itself in relation to other competing branches of government. Some judges think, in their heart, that any criticism leveled at a judge undermines respect for the law itself." (POSNER, Richard A. *Divergent paths*: the academy and the judiciary. Cambridge: Harvard University Press, 2016, p. 23).


\(^{44}\) Posner's pragmatism, for example, makes him state that "the complexity of the law is an invention. Law is basically dispute resolution. Dispute resolution requires mastery of the facts in dispute and common sense. It does
Dworkin maintains the exact opposite. He states that disagreements in law are eminently theoretical disagreements. The discussions, the contrasting points of view that take place during the trial of the causes are derived from different theoretical postures and not from a problem of interpretation of the case, of interpretation of evidence, for example. In this line of reasoning, the divergence between Minister Nunes Marques and the other members of the Supreme Court in the judgment of HC No. 154.248/DF under consideration constitutes a dissension between conceptions about what the law is.

3.2.1 The semantic sting and the necessary interpretative attitude

The term stinging refers to the sting, which can be snakes, spiders, scorpions and other venomous animals. It is something extremely negative, painful, which can even be poisonous, pernicious. Dworkin certainly didn't pick that term by accident. It is as if he were to say that all the graduates who have gone through a Law School are affected by this evil, because they were bitten by some poisonous animal that obscured their vision, preventing them from contemplating the semantic problem of law. This poisonous animal that stung the theory of law and, as a consequence, all those who venture to study legal sciences, is legal positivism.

When confronting the semantic question from the point of view of the positivists, two distinct situations can occur: either the jurists accept that there are very clear criteria for deciding when a claim is true, a hypothesis in which there will be no dissent at all, and, if there is, it will be a little relevant disagreement about the facts of the demand; or there can be no genuine agreements or disagreements about the law, because the jurists only pronounce the same terms and expressions to mean different things, "as in a discussion about banks in which one person has in mind the investment banks and the other, the banks of one square"45.

And what is more interesting is that Dworkin is going to bet precisely on this second alternative, no matter how absurd it may seem, because, according to him, "the jurists are talking without understanding each other"46. They read, interpret or receive the proposals as they want and go on arguing with themselves. This is the problem that needs to be faced, and it is a theoretical problem because it concerns the understanding of law. So this semantic sting is,

not require analytic complexity, distinct from an understanding of factual complexity, if the dispute to be resolved involves complex facts" (POSNER, Richard A. The federal judiciary: strengths and weaknesses. Cambridge: Harvard University Press, 2017, p. 53).

in truth, the difficulty of managing to understand what a divergence in the law is, this that the positivists prefer to treat as mere illusions and that the philosophers prefer to ignore. These peculiarities, rather than subtleties or exercise of rhetorical or eristic argumentation, will have great repercussions when taken to the courts and employed to resolve judicial controversies.

But, starting from this observation, the question that can be formulated is how should one work with these disagreements? The starting point for getting out of this common place is the adoption of an interpretative attitude, which presupposes understanding that the interpretation must be creative and constructive, and that, in fact, this action can not even be dissociated from each other, that is, the creative interpretation will always be constructive. Generally speaking, the author explains, "constructive interpretation is a question of imposing a purpose on an object or practice, in order to make it the best possible example of the form or genre to which they are supposed to belong." 48

This modality of interpretation, necessarily, takes into consideration the practice, the day to day, something that was always so reneged on and despised by the theoreticians of law of those days. Dworkin resorts to art. Reflects on social practices to demonstrate how the interpretative attitude can function outside of the law, but the main objective is to explain that to carry out this activity, it is necessary to participate in something, to be inserted in a context, to be a member of some community, to share a notion of belonging. 49 This is also yet another scathing criticism of Hart’s notion of "outside observer."

3.2.2 Intentions and practices: the discovery of the purpose of the rule and the interpretative attitude to extend its meaning

When referring to constructive interpretation, what Dworkin intends is to say that the law cannot be understood as synonymous with the legal order. The right is not simply given to

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49 Menelick de Carvalho Netto writes that "in the field of discourses of normative application, justice is done not only to the extent that the judge is able to make a decision consistent with the current law, but for this he has to be equally capable of putting himself in the place of each one of those involved, of seeking to see the question from all possible angles and thus proceed rationally or fundamentally to the choice of the only norm fully suited to the complexity and uniqueness of the situation of application that presents itself" (CARVALHO NETTO, Menelick de. Pragmatic requirements of legal interpretation under the paradigm of the Democratic State of Law. Comparative Law Magazine. Belo Horizonte: Commandments, v. 03, 2000, p. 483).
the people by constitutionally legitimized bodies. It is something constructed and this is done argumentatively, by way of interpretation. Only in this way can we offer the best reasons, the best justifications of all our practices. Therefore, when one adopts an interpretative attitude, which has creation and construction at its core, one must develop social practice as best it can be. He says "it's seeing a certain phenomenon "in its best light".

Dworkin does not exempt himself from the responsibility of demonstrating argumentatively that the product of constructive interpretation can always be questioned, and, obviously, that this leads to disagreements, which must be taken in a natural way by virtue of the plurality of ideas and projects that each member of society nourishes, but thus acting the interpreter has the opportunity to face this problem without concealing, creating the image that it is a mere illusion, as the positivists do.

What this critic of law is proposing is precisely that the jurists recognize that these disagreements, which, in truth, are theoretical disagreements, can be re-signified as opportunities for each member of a community of free and equal to contribute with his version, with his vision of the world, in this case, his best version "in his best light", with a view to reaching, at the end of the process, argumentative answers that represent the best solution to the problem.

Social intentions and practices therefore interrelate, so that one will exert influence on the other and vice versa. That is why Dworkin will say that when the interpretative attitude develops fully, the interpretation resonates and enters into the social practice, changing its form.

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51 Clarifies Dworkin “the choice of each interpreter must reflect the interpretation that, from his point of view, attaches the maximum value to the practice” (DWORKIN, Ronald. The rule of law. Trad. Jefferson Luiz Camargo. 3. ed. São Paulo: Martins Fontes, 2014, p. 64).


53 Note that in this concept, the interpreter, who is necessarily a practical one, because otherwise he will be talking about something that he does not experience, that he does not know, needs to strive to give always his best so that the object he studies is the best.

54 To explain this point of his theory, Dworkin resorts to the metaphor of a hypothetical community whose members attach great importance to courtesy rules. He uses the following model: "Courtesy requires peasants to take their hat off before the nobles”. This practice is normalized for some time almost like a dogma, because the rules are laid down and no member questions them or tries to modify them. However, over time, all this changes, because it is natural that the members of this community develop an interpretative attitude towards these rules of courtesy. This attitude will focus on the characteristic that the practice of taking off the hat before the nobles is a sign of respect, that is, it has a value, serves some interest or purpose. Moreover, when they realize the existence of this purpose, the members of this supposed society will realize that the rule of courtesy that they so presume is not imprisoned exclusively in the reverential behavior of taking their hat off before the nobles, but on the contrary, the purpose, which is the demonstration of respect, can be achieved in countless other different ways, such as, for example, taking off their hat for people who are of the same social class as the peasant, or, if this reverence is a sign of respect, and in this hypothetical society everyone respects themselves, then why not take off their hat for everyone? (DWORKIN, Ronald. The rule of law. Trad. Jefferson Luiz Camargo. 3. ed. São Paulo: Martins Fontes, 2014, pp. 57-58).
with the objective of better adapting it to its purpose, in such a way that "the strict rules must be understood, applied, extended, modified, toned down or limited according to that purpose."\(^{55}\)

However, when he mentions that it is necessary to understand the purpose of the rule, it must be made clear that there is no question about the intentions or the will of the legislator. This is something broader than that notion. The creative and constructive interpretation takes into account the fusion of horizons between the past and the present of which Gadamer\(^{56}\) spoke. The idea that the understanding takes place from the experiences experienced and the knowledge learned from generation to generation shapes the perspective of someone about the world, and these circumstances will have great repercussion in the hermeneutic\(^{57}\) process.

With law, which is nonetheless a social practice, it does not occur in any other way. The interpreter, who is necessarily part of a certain community of principles\(^{58}\), will put his impressions and perceptions of the world at the service of seeking the best possible interpretation to solve a difficult case and will do so in an argumentative manner, demonstrating that his decision corresponds to the narrative that highlights all the best legal practices. When the jurist adopts this interpretative attitude, the application of the rules ceases to be a mere exercise of subsuming the fact to the legal text or a mere mechanical repetition of behaviors, as the positivists\(^{59}\) intended, and the need becomes essential to impose a meaning that better explains a given specific rule - "to see it in its best light - and then to restructure it in the light of this meaning."\(^{60}\)


\(^{56}\) The works of Heidegger and Gadamer exerted great influence on Dworkin's thought. The ideas of hermeneutic circle and fusion of horizons are fully accepted and worked out as propelling elements of the interpretative attitude, which presents itself as an alternative to the model of classical syllogism illustrated by legal positivism.

\(^{57}\) According to Menelick de Carvalho Netto "The central idea is precisely not to give up the knowledge we can now have because of our own practical experience and accumulated historical experience" (CARVALHO NETTO, Menelick de. Rationalization of the legal order and democracy. Brazilian Journal of Political Studies. Belo Horizonte, n. 88, Dec 2003, p. 36).

\(^{58}\) Menelick de Carvalho Netto states that the ability of the judge to take into account the factual reconstruction of all those affected by the procedure and thus to seek the norm that best suits the peculiarities of the case, is that it promotes justice for the parties, without leaving residues of injustices arising from blindness to the situation of application (CARVALHO NETTO, Menelick de. Pragmatic requirements of legal interpretation under the paradigm of the Democratic State of Law. Comparative Law Magazine. Belo Horizonte: Commandments, v. 03, 2000, pp. 483-484).

\(^{59}\) Coura points out "Legal Hermeneutics, in turn, opposes the positivist model of the decision taken as a subsumption of a case to the pertinent rule and, as Habermas points out, has the merit of having revived the Aristotelian intuition that no rule is capable of regulating its own application" (COURA, Alexandre Castro. Legal hermeneutics and (in) constitutional jurisdiction: for critical analysis of the "jurisprudence" of values in light of Habermas' discursive theory. Belo Horizonte: Commandments, 2009, p. 213).

3.3 LAW AS AN INTEGRITY

The principle of integrity imposes on judges the duty to identify rights and obligations from research into the history and traditions of the legislative and jurisdictional practices of a personified community, which expresses a coherent conception of justice, fairness and due process. Dworkin's proposal is the guardianship of integrity as an ideal to be achieved for the purpose of guiding the political and legal practices of a community of principles.

The law as integrity can be understood as a process that contemplates both the results of the comprehensive interpretations of the legal and political practices that have already been carried out in the past and make up the legacy of a given society, and the notion of continuity that must be imprinted to the activity of interpretation, seeking, with this, the best solution, or, as Dworkin points out, the "only correct answer". In this regard, Bedê Júnior and Coura note that:

The search for the correct answer is the search to give meaning to the idea of integrity in the law, that is, this answer will only be possible if it is based on a careful analysis of the current legislation and of the precedents and the first and last reasons for deciding on the past cases.

Thus, no matter how perplexed a case may be, the judge has the responsibility to offer the best interpretative practice that seeks to integrate the decision to be rendered into a coherent model composed of legislation, political traditions, behaviors adopted by the institutions, as well as judicial precedents in the matter. To illustrate this explanation, Dworkin presents the allegory of the novel in chain, adducing that there must be a sort of thread-conductor that can...
not only inspire and praise the figures of the past, but determine that the new chapter of history to be written in the present keeps coherence with this complex system and with the project of society that is aimed at reaching in the future.

From this perspective, he clarifies that each judge will be like a novelist in the current, so that he must interpret everything that was written in the past by other judges and parties in their respective cases, seeking to discover what they said, as well as the state of mind when they said, aiming to come to an opinion of what they did collectively. Thus, far from being free to decide at his discretion, the judge, as a member of a chain-linked venture, will always be limited by history and has the duty to continue it with his eyes turned to the future.

History, therefore, is an important trait for this conception of law as integrity, but it is not the only one. According to Dworkin, "Law begins in the present and only turns to the past to the extent that its contemporary approach so determines." Integrity imposes on the legal reasoning to be developed the duty to take into account constructive and creative interpretations that have as their compass a coherent complex of principles about justice, fairness and due process of law, so that the judge can present solutions to the new cases that are equally fair and equitable as were the responses applied in other cases.

and so on. Each one must write his chapter in such a way as to create in the best possible way the novel in preparation, and the complexity of this task reproduces the complexity of deciding a difficult case of law as integrity. The fictional literary project is fantastic, but not unrecognizable" (DWORKIN, Ronald. The rule of law. Trad. Jefferson Luiz Camargo. 3. ed. São Paulo: Martins Fontes, 2014, p. 276).

According to Pedron, the judge "should interpret what happened in the past and not leave in a new direction. This is because the duty of the judge consists, for Dworkin, in interpreting the legal history that he finds and not in inventing a better story, as is proposed by the adepts of pragmatism. In this way, the magistrate cannot break with the past, because the choice of which of the various senses the legal text may have cannot be left to the intention of anyone" (PEDRON, Flávio Quinaud. Is a correct answer possible for controversial cases? An analysis of Robert Alexy's interpretation of the Dworkiana thesis. Review of the Regional Labor Court of the 3rd Region. Belo Horizonte, v. 40, no. 70, Jul./Dec. 2004, p.

For Dworkin "History is important because this system of principles must justify both the status and the content of these previous decisions" (DWORKIN, Ronald. The rule of law. Trad. Jefferson Luiz Camargo. 3. ed. São Paulo: Martins Fontes, 2014, p. 274).

To overcome the thesis defended by the positivists according to which the magistrate must seek the "will of the legislator" in the activity of interpreting the law, Dworkin resorts to a new artifice to complement the metaphor of the novel in jail. He proposes the myth of Judge Hercules, a jurist of superhuman ability, wisdom, patience and wit, who dedicates himself to the ceaseless task of selecting the hypotheses for interpreting concrete cases from the filter of integrity. This epic figure, like the demigod of Greek mythology, who is obliged to carry out twelve strenuous works to redeem himself from the murder of his own children and to prove himself worthy of divinity, reveals that the judge, as a member of the community of principles, has not only the obligation, but the arduous duty, to strive to continue the work of those who preceded him in the process of constructive interpretation of institutional history.
That duty stems from the principle of isonomy, which is the way in which the legal system acquires coherence by requiring the judge, when facing difficult cases, to act in such a way as to always observe that all members of the community are entitled to be treated with equal respect and consideration\textsuperscript{71}.

In this regard, in the search for the ideal of the correct\textsuperscript{72} answer, one can say that this warning is a kind of filter, through which the judges must submit their interpretations to the test of integrity. The interpreter must then be led to another more advanced stage of this argumentative process. He must "make a choice between acceptable interpretations, wondering which one presents in its best light, from the point of view of political morality, the structure of the institutions and decisions of the community - its public norms as a whole"\textsuperscript{73}.

In that context, the duty to justify each argument in judicial decisions is of great importance. Although they do not have binding effect in our legal system, since they do not integrate the concept of something judged material, it is the reasons for deciding that they will justify the decisions and make possible intersubjective control by the whole of society.

4 THE DISAGREEMENT IN THE DECISION OF THE STF IN THE TRIAL OF HC NO. 154.248/DF

After covering all these theoretical elements with respect to the conception of law in Dworkin's work, there remains the critical analysis of the divergence explained in HC n° 154.248/DF, which resulted from the confrontation between two different visions and postures of the world, shaped in the votes of the members of the Brazilian Supreme Court. The purpose of this study is to show that the hypothesis raised in this study, which concerns the nature of the divergence between ministers, is correct and to show how the different views on what law is influenced us, especially when we cast our votes. Far from being a disagreement merely on evidence of how the facts came about in the process, the question is eminently theoretical.

Once again, the examination will be restricted to the arguments of the leading vote, which managed to obtain the support of all the other Ministers of the Court except for the only


\textsuperscript{72} Bedê Júnior and Coura add "It really is an unrealizable dream to find the content of the correct answer, but this impossibility does not eliminate the obligation to seek it, and, aware of this limitation, the interpreter has a much greater burden, which is to justify the content of the decision" (BEDÊ JÚNIOR, Américo; COURA, Alexandre Castro. \textit{Is there a correct answer to the problem of the correct answer in law?} Revista de Derecho de la Pontificia Universidad Católica de Valparaíso, Valparaíso, Chile, 2013, p. 691).

contrary voice expressed in plenary, marrying dissenting understanding, and to verify if in that particular case the answer presented by the Court managed to pass through the sieve of the proof of integrity.

4.1 THE ARGUMENTS OF DRIVING VOTING AND RIGHT AS INTEGRITY

In the lead vote in the trial of HC, we see Minister Fachin's concern to demonstrate, in an argumentative manner, how he used constructive and creative interpretation when examining the text of Article 5, XLII, of the CF/1988, to arrive at the conclusion that racial injury (Article 140, § 3, of the CP) must be considered a type of racism (Law No. 7.716/1989), and must therefore be considered as an inbailable and imprescriptible crime, subject to the penalty of imprisonment.

The rapporteur has developed a careful line of thought with a view to offering society a vision of the practice of combating racism in the best way it could be, that is, 'in its best light'. In this trial, the Supreme Court promoted the arduous and strenuous task of analyzing the treatment given to the fight against racism in Brazil, taking into consideration not only the legal order, but the set of our political and legal traditions, as well as the standards of justice and equity that permeate the set of our institutional practices.

The Tribunal positioned itself as an integral part of the community of principles to offer Brazilian society not an extensive interpretation, as mentioned in the dissenting vote, but a justification that reveals itself capable of integrating the decision taken in the case under examination into the coherent set of our social practices, as if it were writing an extra chapter in history against racism, which preserves coherence with the past, without forgetting the objectives to be achieved in the future.

The Constitution of 1988 represents a historical landmark against racism, because it has as its fundamental objective the promotion of the good of all, without prejudice of origin, race, sex, color, age and any other forms of discrimination (Art. 3, IV). Despite this, even today the country has not learned to deal with the painful events that occurred because of the slavery of black people. The joking speeches, for example, broadcast in the form of simple anecdotes, almost always seeking to ridicule the black presence in society, translate a disguised modality

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74 This finding comes about, not only when one comes across the history of Brazil, but when one examines the set of social practices that, unfortunately, still persist and reverberate very strongly in the ambit of Brazilian society.
of racism, what Adilson José Moreira calls "recreational racism"\textsuperscript{75}, and present a double bias. On the one hand, it is possible to perceive its aversive character, which expresses the revulsion that whites feel towards blacks, and, on the other, the symbolic character, in the sense of sharing the idea according to which there is a harmonious coexistence between races in Brazil\textsuperscript{76}.

The position that prevailed in the judgment of that HC did not overlook that situation. The 	extit{decisum} observed the complex Brazilian infraconstitutional system, in addition to the behavior adopted by the Nation in the international context, mentioning treaties and covenants to which Brazil is a signatory, as well as the behavior of the Court itself in judging similar cases, making clear the commitment made to combat all forms of racial discrimination.

The Supreme Court pointed out a new path, a new direction for fighting racism in Brazil, by stating that there is no way to distinguish the conduct perpetrated against an individual on account of differences such as race, color, ethnicity, religion or origin, from the action that offends an entire segment of society without distinction, because the offense against a member of a social group also represents an undeniable affront against the collectivities of people who share the same characteristics.

This paradigmatic decision succeeded in breaking with the semantic sting of legal positivism when it recognized that racist practices can manifest themselves in various ways, and precisely with the purpose of avoiding the violation of fundamental rights, the legislator created different types of criminal penalties, species of the same genre, to better combat them. In this way, the decision of the Supreme Court recognized the integrity of the law and presented, as a result of its hermeneutic activity, the best interpretation of the set of our practices in order to make more effective the fight against racism in Brazil.

\textsuperscript{75} According to Adilson Moreira, recreational racism must be understood as "a cultural policy characteristic of a society that formulated a specific narrative about racial relations between blacks and whites: racial transcendence. This discourse allows white people to use humor to express their hostility to racial minorities and still affirm that they are not racist, thus reproducing the notion that we build a public morality based on racial cordiality" (MOREIRA, Adilson José. \textit{Recreational racism}. São Paulo: Pollen, 2019, p. 63).

\textsuperscript{76} Moreira, Adilson José. \textit{Recreational racism}. São Paulo: Pollen, 2019, p. 63. In this first republican period, according to Ommat, "an ideology that revealed itself as perverse when masking Brazilian racism was born: the ideology adopted by Brazilian literary, political and academic men and that afterwards remained for a long time, in the sense that in Brazil, contrary to the United States, there had been an apparently tranquil coexistence between whites and blacks, including permitting the social ascension of various blacks while still in the slave period, which would demonstrate that Brazilian racism would be much smoother than the American one, and that such a system of exclusion was eliminated with the abolition of slavery in our country, leading to the construction of a true racial democracy starting of the proclamation of the Republic” (OMMATI, José Emílio Meduauar. \textit{Freedom of speech and hate speech in the 1988 Constitution}. Belo Horizonte: Knowledge, 2021, p. 145).
4.2 THE DIVERGENT VOTE AND THE POSITIVIST SHACKLES

The dissident vote, for its part, showed itself imprisoned in the shackles and restraints enclosed in the positivist conception of the law, considering that the Judiciary cannot expand the hypotheses of imcriticality provided for in the Constitution, which, according to Minister Nunes Marques, could only be done by way of law. This is a rather hermetic view of the legal system, understanding it as a mere set of valid rules, in the sense advocated by Hart in his conception of law, in which it is for the magistrate merely to adhere to the old Aristotelian syllogism to decide legal controversies.

This theory of law recommends that the judge apply the mechanical law blindly, disregarding the peculiarities of the concrete case, as well as those involved in it, which will be directly affected by the provisions, allowing that black Brazilians, heirs who are from an inglorious legacy of violation of fundamental rights and suffering, continue to be obliged to live with the most diverse forms of aggression and racist practices rooted in Brazilian culture.

This attitude ignores the important function of principles in our legal system to prevent judicial decisions from incurring situations that lead to injustices in the specific case.

The divergent vote in the judgment of the case in question is an emblematic example of how the strictly positivist conception can lead the interpreter to allow hypotheses like this one - the dissemination of different forms of racism in the Brazilian social fabric - to perpetuate themselves without the due guardianship that the law can offer, affronting the principle of equal respect and equal consideration that all people should enjoy in a democratic state of law.

5 CONCLUSION

Dworkin's thesis of law as integrity leads to deep reflections on how judges decide concrete cases and this undeniably underlines the value that must be attached to examining the reasons and arguments employed by each judge in order to justify his position in a given difficult case. This case study makes clear the correctness of the hypothesis according to which the disagreements between judges are situated in a space that involves the theoretical disputes between different conceptions about what the law is, and, as a consequence, how the law should be applied to solve the judicial controversies.

Of course, the acceptance of that proposition shows how judges, with opposing views on the world and on the law, can present dissonant and even, in some cases, antagonistic behavior when faced with a difficult case that requires them to adopt a differentiated
interpretative attitude. On the other hand, the concept of law as integrity does not allow the magistrate to be completely detached from the reality of the community of which he or she is a member, and, from any point of his or her reasoning, to be able to create a new version of it. The law is not something given by the legal order. Rather, it is constructed, day by day, arguably, by means of interpretation that offers the best reasons for the set of our practices.

It was precisely this hermeneutic effort that led to the decision of the Supreme Court in the trial under review, because, in the search for the correct answer to solve this difficult case, the Court presented the best justifications of all our political and legal practices to combat racism, in coherence with the principles about justice, equity and due process, producing the solution that allows the right to protect this situation of violation of fundamental rights more effectively.

Thus, it can be said that the outcome of the present judgment better interpreted and applied the notion of equal respect and equal consideration, understanding that it must prevail even in those cases in which racist practices present themselves in the mode of racial injury (Art. 140, § 3, CP), and, on the basis of the integrity filter, succeeded in demonstrating why this crime must be considered unbailable and imprescriptible, subject to the penalty of imprisonment, in accordance with the constructive and creative interpretation that the Court gave to the text of Art. 5, XLII, of CF/1988.

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