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**MEASURE FOR MEASURE? JUDICIAL PROTAGONISM IN
BRAZIL, BECCARIA’S FEAR, AND THE CRIMINAL PROCEDURE
AS CONSTITUTIONAL INSTRUMENTALITY**

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ABSTRACT: This paper’s main objective is to present, based on the Shakespearean play *Measure for Measure*, and the hermeneutical observations of Cesare Beccaria, the necessity of rethinking the role of the court in the criminal procedure. In order to do so, a qualitative research was adopted, as well as a bibliographical-documentary analysis, insofar as it dealt with scientific articles and doctrinal texts, as well as legislative documents and judicial decisions, using the deductive method. The undeniable contribution of literature to the juridical science is thus made visible, as it makes possible a strong critical subversion, besides portraying cultures and also working with interpretation. In this sense, after the synthesis of the Shakespearean plot, two models of judgments, objectivist and subjectivist, were visualized, which facilitates the debate about the magistrate’s role in the criminal process. This same logic was applied by Beccaria in *On Crimes and Punishments*, in which the author dismissed any kind of judicial voluntarism, and attributed to the judge the obedient execution of the written law. Thus, it was found that, since the constitutional reading of the criminal process is intrinsic to democracy, it is incumbent upon the magistrate to construct and maintain the process as a space for effecting guarantees and rights of the accused, so as to be a true spectator. Finally, the excessive emphasis on court decision results in a real disassociation with the accusatory system, as, by ignoring the semantic limits of the legal text, except in the case of constitutionality / conventionality control or in favor of the defendant, it performs a vulgar arbitration, which undermines the constitutional instrumentality.

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1 INTRODUCTION

In the first century B.C., the Roman general Pompey encouraged his most fearful sailors, shouting “navigare necesse, vivere non est necesse”, that is, in a free translation, “to sail is necessary, to live is not necessary”.

In *post-positivist* times, when it is still necessary to defend obvious ideas, such as the presumption of innocence, the due process of law, and the impartiality of the magistrate, it must be said, similarly to the epigraph, that resisting is necessary.

In *Measure for measure*, Shakespeare demonstrates the abrupt transformation of a magistrate’s profile, which starts from an unshakable objectivism to a vulgar subjectivism. In this sense, it is worth noting the concern of Cesare Bonesana (1738-1794), better known by the honorific title of Marquis of Beccaria, who devoted a whole specific chapter to the interpretation of the laws in *On crimes and punishments*.

In Brazil, the state of art is marked by a considerable judicial leading role, to the point of considering the existence of a “Supremocracy” (Vieira, 2008), which affects legal security and separation of the powers of the Republic, which is more serious in the criminal process, in which human and fundamental rights are at stake.

Thus, by analyzing the Shakespearean play and the hermeneutic reflection of Beccaria, this paper aims at presenting the need to study the problematic of the judicial leading role in the criminal process and, specifically, to design the profiles of the judge in the Shakespearean play, to discuss the hermeneutic contribution of Beccaria, to conceptualize the accusatory system and the principle of impartiality, besides presenting the thesis of the criminal procedure as a form of constitutional instrumentality.

For that, a qualitative research was adopted, with regard to the approach. It is a bibliographical study, as it dealt with scientific articles and legal text pieces.

Finally, the deductive method was used, since the (in)applicability of the judicial leading role in the criminal procedure constitutes the theoretical framework from which formal conclusions were reached (Mezzaroba; Monteiro, 2009, p. 65).

Thus, in the first moment, the synthesis of *Measure for measure* and the relevance of the confluence between Law and Literature, and, more specifically, of Shakespeare, are explored. Subsequently, it presents the hermeneutic contribution of Beccaria, the accusatory system and the reading of the criminal procedure according to the Constitution. Finally, the problem of the judicial leading role and the interpretative office of the judges are drawn.

2 MEASURE FOR MEASURE? THE DIALOGUE BETWEEN LAW AND LITERATURE, THE MODELS OF JUDGES, AND BECCARIA'S FEAR

In the arduous task of thinking about the role of the judge (specifically, in the criminal procedure), the dialogue of Literature with the Law appears relevant, which is why, in the first moment, this paper explores to what extent fiction may help the jurists.

That said, a synopsis of the play by *Measure for Measure*, as well as some characteristics of its author, William Shakespeare (1564-1616) is outlined. In it, the model of the magistrate's approach is analyzed, so that, together with the considerations by the Marquis of Beccaria (1738-1794), the debate proposed by the present work is revealed, whose background is the judicial leading role and its (in)adequacy to the accusatory system.

2.1 The dialogue between Law and Literature, considerations about the author and the synthesis of the work *Measure for measure*

In *Von der Poesie im Recht – The poetry in Law*, Jacob Grimm (1785-1863), one of the exponents of Germanic literature, sentenced, categorically and precisely, as well Streck and Karam Trindade in the present days (2013, p. 3), that “Law and poetry have risen together from the same bed”.

In this sense, it can be said that Law and Literature converge, precipitously, for two reasons: i) “Literature is a mighty source of culture. Through it, the patterns that sustain society are absorbed”; ii) the importance of interpretation, after all, who draws the correct meaning of a

novel, will do the same with a law or a contract (Neves, 2015, p. 33-34).

Haberle and Bofill then explain that:

[...] poetry is a means of interpreting constitutional concepts. Interpretation is drawn from a systematics of the different parts (preamble, content of rights and aims or constitutional purposes) in relation to the poetic word that established them (2017, p. 16).

It is not by chance that Silva (1991b, p. 24) recommends reading, whenever in court, literature and poetry, “because it is necessary to stock up for the decisive moment”.

All this is due to another function, besides those mentioned above, of extreme importance, as Trindade and Gubert (2008, p. 15) point out, which is critical subversion. Literature provides a privileged mode of philosophical reflection, surpassing the milestones of other scientific disciplines, which results in the paradoxically simultaneous study of immanently primary and complex themes.

For example, in Albert Camus’ novel *The Stranger*, it is possible to question the broad defense principle (which protects the defendant, as well as technical defense, and self-defense), because the protagonist is disturbed when he is in a position of alienation, as if his destination was previously set, without at least consulting his opinion (Camus, 2012, p. 102).

By commemorating the relevance of the dialogue between Themis and Calliope³, the prelude to the present work begins with the theatrical work *Measure for Measure* of William Shakespeare.

Incredible as it may seem, little is known about “Gulielmus, *filius* Johanes Shakspear”, that is, William, the son of John Shakespeare: a citizen baptized on April 26, 1564, with the birthdate shortly before that day, and deceased in 1616, at the age of 52, on April 23. Many of these unknown aspects are due to precarious records left, such as epistles or journals, apt to better detail his life and work (Franco, Farnam, 2009, p. 15).

Perhaps because of this, everything about Shakespeare is controversial, such as his identity, the correct chronology of his work, the

³ In Hellenic culture, the goddess of justice and the Muse of Poetry, respectively.

actual latest versions, the existence of lost plays, his best interpreters, his sexual orientation and his diet, as Neves states (2016, p. 40).

The most exaggerate assumption is to deny his existence, and some people question how a man without even visiting universities and being the son of illiterate parents, could generate around 1,800 neologisms, in addition to flawless notions of Geography, Latin, Philosophy and Law? (Neves, 2016, p. 38).

In spite of the occasional contradictions, what is certain is the relevance and the depth of his literary contribution, within which is inserted *Measure for measure*, most probably written in 1604, and considered “one of three *dark comedies* or *problem-plays*” (Helier, 2015, p. 7).

It should be noted that the present analysis is, of course, one of many possible in this correlation, explored by Shakespeare, between human conduct and the legal and *extra-judicial* consequences⁴.

The plot takes place in Vienna, where the Duke, because he believes that the Law is crooked⁵, orders the presence of Angelo, considered synonymous to a straight, righteous man, in order to delegate to him all his power, so that it is then “death and mercy here in Vienna” (Shakespeare, 2015, p. 11-13).

Subsequently, rumors appear in the streets of the Austrian capital that Claudius had been taken to jail and that within three days they would behead him in response to the crime typified by the defendant himself in the following verses:

Thus stands it with me: upon a true contract
I got possession of Juliet's bed:
You know the lady; she is fast my wife,
Save that we do the denunciation lack
Of outward order: this we came not to,
Only for propagation of a dower,
Remaining in the coffer of her friends
From whom we thought it meet to hide our love
Till time had made them for us. But it chances.
The stealth of our most mutual entertainment
With character too gross is writ on Juliet (Shakespeare,
2015, p. 21).

⁴ Fleichman (2017), for example, with another approach, discusses the difference between divine justice, law and justice of men.

⁵ The use of the expression is on purpose. As the Nascimento (2004, p. 7) teaches, the word “law”, in Portuguese “Direito”, derives, etymologically, from *directum*, which means “very straight” or “very fair”. Note, however, that such an expression “is from popular Latin or Vulgar Latin. In classical Latin, ‘law’ is *ius* (or *jus*), connected to “fairness”, “justice”.

In short, Juliet's pregnancy, although derived from sexual intercourse with Claudius, contravened a "drowsy and neglected"⁶ act, whose sentence was attributed with the capital punishment. Claudius asks that his sister Isabella, about to make her vows in the convent, be informed of the whole situation, so that she implores her pardon to Angelo, which, in fact, occurs.

Before the supplication, at first, the judge answers her that: "It is the law, not I condemn your brother: were he my kinsman, brother, or my son, it should be thus with him: he must die tomorrow" (Shakespeare, 2015, p. 47).

Then, attracted by the beauty of Isabella, he offers her an alternative to the death penalty, and asks her: "[...]Which had you rather, that the most just law Now took your brother's life; or, to redeem him, Give up your body to such sweet uncleanness. As she that he hath stain'd?" (Shakespeare, 2015, p. 61).

It is from this perspective that we analyze the role of the magistrate in the criminal process, addressing the two models of judge, presented by Shakespeare, the one which denotes extreme objectivism and the other mismatched by genuine subjectivism. After that, this article works on the role of the magistrate in criminal proceedings and legal hermeneutics.

2.2 Beccaria's fear and his view on legal interpretation

The Marquis of Beccaria, Cesare Bonesana (1738-1794), in his most notorious work, *From Crimes and Penalties* (2014) dedicated his own chapter to the interpretation of the laws. In such chapter, he emphasized the interpretative legitimacy of the legal text to the *sovereign*, the owner of the public will, so that the judge in court should only:

[...] make a perfect *syllogism*. The *major* premise must be the general law; the *minor*, the action conforming or not to the law; the *consequence*, the freedom or the penalty. If the judge is compelled to elaborate further reasoning, or if he does it on his own, everything becomes uncertain and obscure.

There is nothing more dangerous than the common axiom, that it is necessary to consult the spirit of the law. To adopt this axiom is to break all dikes and abandon laws to the torrent of opinions (Beccaria, 2014, p. 20).

⁶ Claudius, at the moment of his arrest, complains that "this new governor | Awakes me all the enrolled penalties| Which have, like unscour'd armour, hung by the wall, | So long that nineteen zodiacs have gone round, | And none of them been worn; and, for a name, | Now puts the drowsy and neglected act| reshly on me: 'tis surely for a name" (Shakespeare, 2015, p. 22).

The Italian thinker understands that, as the laws rise from the necessity of conducting private interests for the common good, the oath, expressed or tacit, voluntarily signed by all citizens with the monarch, gives him such *legitimacy hermeneutics*.

This contained view of this type of lawsuit analysis derives from the cognitive peculiarities of each human being, and this is because Beccaria (2014) interweaves the objective interpretation, in which normative *ratio essendi* is sought, to judicial voluntarism. He states as follows:

Every man has his way of seeing; and the same man, at different times, sees the same objects differently. The spirit of a law would therefore be the result of the good or bad logic of a judge, of easy or painful digestion, of the weakness of the accused, of the violence of the magistrate's passions, of his relations with the offended, a meeting of all small causes that modify appearances and transmute the nature of objects into the changing spirit of man (Beccaria, 2014, p. 20).

He warns that the ontological interpretation, forged in a heterogeneous way, would lead to legal insecurity, affecting the security of isonomy, inasmuch as the same criminal facts would be given several punitive responses:

We would thus see the fate of a citizen change if moved to another court, and the life of the unfortunate would be at the mercy of an erroneous reasoning or the bile of a judge. We would find that the judge hurriedly interprets the laws according to the vague and obscure ideas that were at the moment in his mind. We would see the same crimes punished differently at different times by the same court, because instead of listening to the constant and invariable voice of the laws, he would indulge in the misleading instability of occasional interpretations (Beccaria, 2014, p. 21).

In this way, it is preferable to submit to strict legality than to the despicable reasoning of despots. Then, at the end of the chapter, he remembers the discontent of the "tyrants" in reading and understanding his ideas, yet, in a jocular tone, he remembers that tyrants do not read, which is why he has nothing to fear.

In the same sense of the Shakespearean play, Beccaria's fear (2014) fosters the discussion of the present work, whose background is the judicial protagonism causing the silence of the accusatory system and becoming unrelated to the juridical interpretation.

First of all, there is no intention to depreciate the Judiciary, which in an inattentive reading could be concluded. The aim is precisely the opposite, to recall the honorable function of the magistrate to watch over the constitutionality of legal acts and, in this light, to explain the harm caused by the phenomenon of what is known as “decisionism”.

3 THE ACCUSTIVE SYSTEM AND JURIDICAL INTERPRETATION IN THE FACE OF JUDICIAL PROTAGONISM

At first, it should be remembered that the mere initiation of criminal proceedings per se affects in an indelible way the *status dignitatis* of the human person to whom the crime is imputed (Jardim, 2000, p. 93), especially as a result of the spectacle which surrounds it.

By way of illustration, at a certain moment of the mentioned play *Measure for measure*, the protagonist, wrapped in the hands of the State, pleads for imprisonment in order not to face the public embarrassment⁷. That is, the defendant himself prefers the anticipation of heavy penalty, even without any trials, than to be submitted to public shame.

On the basis of this, in questioning the basis for the existence of criminal proceedings, Lopes Jr. (2017a, p. 29) argues for the study through the constitutional perspective, according to which the Law serves as authentic instrument for the realization of constitutional guarantees.

After all, as Oliveira (2014, p. 100-101) recalls, “the social costs of absolving a guilty person are really very high; but those (costs) arising from the conviction of an innocent are priceless”.

Thus, Lopes Jr. (2017a, p. 29) understands more than mere legality, a strict criminal procedure is necessary to the constitutional rules of the game (due process) in a formal and, above all, substantial dimension. This is because, as he already pointed out, at the judgment of *Habeas Corpus* 126,292 / SP, the Minister of the Supreme Federal Court Celso de Melo, “[...] the majesty of the Constitution can never be subordinated to the power of the State” (Brazil, 2016).

⁷ Shakespeare (2015, p. 20): “Fellow, why dost thou show me thus to the world? Bear me to prison, where I am committed.”.

Having said that, it is important to note that, since the offense violated the primary precept of the incriminating criminal law, the State, in turn, reacts through a punitive claim to restore the legal order. The public *status* of the jurisdictional function is then fulfilled, which is accomplished through the due process of law (Jardim, Amorim, 2016, p. 66-71).

In the meantime, the figure of the magistrate who exercises, mainly, the control of constitutionality and legality of the various juridical acts that make up the procedural rite, so that, in the end, he can decide, reasonably, whether or not the accusatory claim. That is because:

[...] independence does not mean full (arbitrary) freedom, because its decision is limited by the evidence produced in the process, fully observing the fundamental guarantees (including the prohibition of illegal evidence) and duly substantiated (motivation as a legitimating factor of power). It does not mean *decisionism* (Lopes Jr., 2017a, p. 61).

To paraphrase the Roman Cicero, according to Comparato (2011, p. 16-17), it is the lawyer's job to prove (*probare*) and convince (*conciliare*) – there was a third role as to move (*movere*), but as said by Silva (1991b, p. 21), “one must want to convince and not seduce”.

In order to do so, it is necessary for the parties⁸ to be granted a fair hearing and ample defense, so as not only to manifest themselves, but also to be able to prove what had been alleged, but above all there is a fair trial by an impartial judge, which makes it possible to reach conviction⁹.

All this is what constitutes the accusatory system, based on the *due process of law*. It is antonym to the inquisitor process of law, common to despots, which presents / displays a clear division of functions. In this regard:

[...] the judge is an impartial law enforcement agency, which only manifests himself when duly provoked; the perpetrator makes the accusation (criminal charge +

⁸ The term “parties” is used by utility, although the relevance of the terminological critique, presented by Oliveira (2014), to which the reader is referred, according to which, in short, due to the absence of a typical legal relationship, visible subjective rights attributed to holders of legally recognized enjoyment, use and exercise.

⁹ Similarly, Dell’Orto (2017, p. 118) states that, in the postulator phase, it is for the judge to “submit his objection and his defense to the same degree of intensity and that he be deprived of prior concepts in order to be aware of reasons of the parties without which decision is previously resting in their mind”.

request), assuming, according to our position, all the burden of the prosecution, and the defendant exercises all the rights inherent to their personality, and must defend himself using all the means and resources inherent in their defense. Thus, in the accusatory system, the *actum trium personarum* is created, that is, the act of three characters: judge, author and defendant (Rangel, 2015, p. 49).

It is worth saying that – contrarily to what happens in *The Trial*, the novel by Kafka – the principle of legality must rule in the judicial process. This means that the trial is not an act of will. Being a power of duty (*jus puniendi*) capable of curtailing individual guarantees, great caution is needed in criminal prosecution, which is precisely strict observance of legality as guarantor of justice and rationality (Oliveira, 2017).

Therefore, he argues to the magistrate the condition of spectator of the whole lawsuit, so that are granted “the dialectical structure of the criminal process, the contradictory one, the equality of treatment and of opportunities and, finally, the impartiality” (Silva, 2003a, p. 109).

In this lies the glory and tragedy of the judge, according to Carnelutti (2017, p. 32), since “the judge is a man and, if he is a man, he is also a party. This, of being at the same time a party and not a party, is the contradiction, in which the concept of the judge is agitated. The fact that the judge is a man, and of having to be more than a man, is his drama”.

Such rights and warranties seen as fundamental nowadays were conquered by means of cruel and historical quarrels, as Ihering (2009, p. 14-15) states: “The idea of law contains an antithesis that originates from this idea, but it is not only the law itself, from which one can never absolutely separate: struggle and peace; peace is the term of law, fighting is the way to get it”, even if its holder does not realize it.

Then, considering that “no mortal of fame or power escapes criticism” (Shakespeare, 2015, p. 81), the following topic draws the problem of decisionism and presents the authentic role of the criminal judge in a democratic state of law.

3.1 Notes on legal hermeneutics

In one of his earliest tragedies, *The Lamentable Tragedy of Titus Andronicus*, the playwright William Shakespeare dissected, through the

character Saturninus, the distinction between law and power, with the speech: “Traitor, if Rome have law or we have power” (Neves, 2016, p. 74).

The representatives of the people elaborate rules from which the magistrates, in interpreting, create legal norms. We can see that all absolute power is tyrannical, as the modern theorist Johannes Althusius (1557-1638) used to say, stating that all state power should not be considered as unlimited and absolute in the hands of the monarch, because sovereignty belongs to the people (Mascaro, 2016, p. 137). That is why the use of the power to decide totally free of the technique is, in fact, abusive. Moreover, because the State does it, it is an official abusive practice.

It should be noted that the limitation of government authority, according to Bonavides (2004, p. 36), since modernity, has embodied the fundamental idea of the Rule of Law, spurred by the division of powers and declaration of rights, among them, the legality, impartiality and due process of law.

Montesquieu (1996, p. 168) had already spoken of the absence of freedom, when the power to judge is not separate from the legislative and executive powers.

After all, interference by the Judiciary in the life and liberty of individuals would be arbitrary when tied to the legislative power, since the magistrate would, in fact, be a legislator. In turn, if united with the executive power, the judge could detain the coercive force of an oppressor. In short, “everything would be lost if the same man, or the same body of principals, or nobles, or the people, exercised the three powers: that of making laws, of executing public resolutions, and of judging crimes or the quarrels between individuals” (Montesquieu, 1996, p. 168).

It is not by chance that the Federal Constitution crystallizes, in its second article, that “the Powers of the Union, independent and harmonious among themselves, are the Legislative, the Executive and the Judiciary” (Brazil, 1988). Concerning this harmony between the powers of the Republic, Silva (2013, p. 112) records that:

[...] it is first and foremost the rules of courtesy in reciprocal treatment and respect for the prerogatives and faculties to which everyone is entitled. On the other hand, it should be noted that neither the division of functions between the organs of power nor their independence are absolute. There are interferences, which seek to establish a system of checks and balances, the search for the

balance necessary to achieve the good of the community and indispensable to avoid arbitrariness and the dismantling of one to the detriment of the other and especially of the governed (Silva, 2013, p. 112).

Therefore, it is essential to read the hermeneutic studies in order to analyze the phenomena of protagonism and its repercussions in the accusatory system.

The hermeneutic expression is associated as “the interpretation of the sense of the words”¹⁰, to the Greek demigod Hermes, and is seen as the intermediary between the deities and the human beings, so that:

Hermes translated the language of the gods. Hermes became powerful because he told mortals what the gods said. True. The “big thing” is that *no-one-ever-if-knew-what-the-gods-said*. One only knew what Hermes said that the gods had said (Streck, 2014, p. 19).

As Streck (2014) suggests, metaphorically, interpreting is like a map, insofar as it also represents something. It turns out that if a map is completely perfect, showing exactly the things in the scale it should represent, it is no longer a map, but the thing itself.

For this reason, according to Grau (2017, p. 39), “it is an intellectual process through which, from the *linguistic formulas* contained in the *texts, statements, precepts, dispositions*, we reach the determination of a *normative content*”.

According to Gadamer, as interpreted by Soares (2015, p. 25-26), the interpreter, immersed in the hermeneutical circle, fuses his horizon with that of the norm in dialogue with the text, in a kind of dialectic whose vector is the understanding cognitive being already in the object (pre-comprehension).

Abboud (2017, p. 252-253) recalls Hart’s lesson, for which the whole linguistic expression has a hard core and a penumbra zone. The first is made up of cases of easy interpretation, that is, those in which all hermeneutics would agree with the expression applied to the case in question, whether it be object or social fact. Even in difficult cases, the discretion of the trial would be admitted.

¹⁰ However, the distinction adopted by some, such as Maximiliano (2011, p. 01), according to which hermeneutics would be the scientific theory of the art of interpreting, is precisely its object of study.

Controversy lies in the second point. Full discretion departs from the accusatory system and hurts the Democratic Rule of Law. After all, as Hungria and Fragoso (1976, p. 32-33) taught, a criminal law beyond or outside the laws is a serious retreat from legal civilization:

It would be a countermarch to the dark medieval times, in which the indefinite *judicial arbitrariness* wrote pages that still shame humanity today. Instead of the legal texts, there would be free opportunity for personal prejudices, unilateralism of opinion, heterogeneity of criteria, sectarianism, *guesses* of each judge in the formation of law, partialism of justice. Instead of the safety of previous criminal “molds”, errors of appreciation, the diversity of judgments, personal or partisan hatreds, the caprices of arrogance, the incubus of the passions of the moment, the sentences inspired by cowardice or servility towards rulers or, what is worse, in the face of the disoriented public opinion (Hungary, Fragoso, 1976, p. 32-33).

Considering this, next, the authors deal with the question of judicial activism, outlining a critique to the necessity of the decision to be coupled, in harmony, to all juridical order by means of scarce application of the hermeneutical techniques.

First of all, it should be pointed out that the regression to the School of Exegesis, which subordinates the self-sufficiency of the Codes, is not proposed, as it would constitute an authentic legal dogmatism, given the necessary implication of the *ratio legis* to the *ratio iuris*¹¹ (Betoli, 2013, p. 421).

It is intended to discuss the repercussions of judicial protagonism in the accusatory system and in the Democratic State of Law itself, when the criminal court acts in disregard of the legal norms.

3.2 The phenomenon of judicial protagonism

Even though one cannot speak of a single Positivist Theory, because there is a flagrant multiplicity of them, in Brazil, the one that prevailed was the one by Kelsen. It is connected to the idea that the legal norm is assimilated to the legal text, “such norm is abstract and will allow the solution of the concrete case through mechanisms of adequacy” (Ahmed, 2017, p. 219).

¹¹ From the legal norm, to go to the sense of the system’s own fundamental concepts.

In this respect, exegetical positivism (or primitive positivism) encompasses law and morality, thus confusing text and norm, laws and the Law, which goes back to the old belief about the prohibition to interpret, a corollary of the old rupture between fact and law, which is peculiar to the post-French Revolution period. After that, normativity and positivism emerged, “followed by the most varied forms and formulas that – by (arbitrarily) identifying the impossibility of a ‘semantic closure’ of law – relegated the problem of legal interpretation to a ‘minor issue’ [...]” (Streck, 2014, p. 50).

In this perspective, the second wave (normativist positivism) discredits, observing polysemic questions, the methods of interpretation, insofar as all those formulated at the time ended in a “possible, never a single fair result” (Kelsen, 2013, p. 152).

Therefore, for Kelsen (2013, p. 154), the judge, as well as creator of the law that is, would be relatively free, since the elaboration of the individual norm, during the elaboration of the sentence, provided that it fulfills the frame of the general rule, it would be a function of will. It is also worth recording:

The question as to which of the various possibilities in the framework of a norm is “just” is – according to the exposition – not an inquiry directed to the knowledge of positive law, not a legal-theoretical problem, but political-judicial problem. The task: to obtain from the law the just judicial sentence or the just administrative act, is essentially the same as creating, within the framework of the Constitution, the just laws. In the Constitution one cannot obtain just laws through interpretation, and in the law, one cannot obtain just judicial sentences through interpretation (Kelsen, 2013, p. 154).

In view of the horrors of Nazism, the juridical order began to “defray fundamental rights and the Constitutions to provide them with normativity. These Constitutions came to play an important role of limiting Powers” (Ahmed, 2017, p. 219), with the importance of the jurisprudence of values and the argumentation theory of Alexy. It occurred that:

This introduction, on the one hand, tried to overcome the obstacles that had arisen from the application of the cold letter of the law and also directed the constitutional jurisdiction to a more “protective” bias; on the other hand it opened a dangerous path to judicial discretion (Ahmed, 2017, p. 219).

The so-called *Supremocracy*, an expression created by Vieira (2008), in which “law is what the Supreme Courts say it is”¹², attentive to the idea of legal certainty that “involves the perception that participants in the democratic process know clearly, previously, the rules of the game and are able to evaluate that they derive from their conduct” (Abboud, 2017, p. 249).

Judicial activism¹³ is visible in the removal of “formalist and minimalist positions from the Judiciary, replacing them with decisions that are often controversial and which seek constitutional values” (Bottino, 2017, p. 1010).

Sarmiento (2009, p. 14) believes that, since it is the responsibility of the Judiciary to carry out the constitutional will, due to the repeated and systematic violation of the rights of certain segments of the population, the institutional arrangements established by the Constitution of 1988 and the unfortunate crisis of representativeness of the legislative, activism in Brazil is justified in certain fields, such as the protection of fundamental rights and the protection of minorities, as well as the preservation of democracy itself.

All the examples listed, as well as the motivation outlined above, trigger the preservation of minority groups of possible tyranny of the masses, as well as in the zeal and, even, in the expansion of rights and guarantees, in order to favor the common good and especially, the subject, to the detriment of the state power.

An example of this is the implementation of the custody hearing, in order to comply with what has been agreed in international agreements (that of San José of Costa Rica and of Civil and Political Rights), by the National Council of Justice in partnership with the Ministry of Justice and

¹² As an illustration, in AgRgEDivREsp 279889-AL, Min. Humberto Gomes de Barros supported in his vote that: “I do not care what the doctrinators think. As Minister of the Superior Court of Justice, I assume the authority of my jurisdiction. The thinking of those who are not Ministers of this Court matters as guidance. I do not submit to them. It is interesting to know the doctrine of Barbosa Moreira or Athos Carneiro. I decide, however, according to my conscience” (Brazil, 2003).

¹³ In spite of emphasizing that judicial activism can often result in a blockage of the Judiciary Power to the important changes promoted by the other powers for the benefit of the excluded, under the rhetoric of fundamental rights, defending the *status quo* (Sarmiento, 2009, p. 12).

the Court of Justice of the State of São Paulo, as a result of legislative inertia, in the year 2015.

It should be noted that, notwithstanding the fact that the judge, according to Friede (2006), is in a superior condition to the conventional one of the public authority in general, because he exercises directly the state power, through the jurisdiction (hypothesis in which he acts like the State in the name of the same State), under no circumstances, “[...] does the magistrate have authority and power that are not clearly foreseen and limited by the Federal Constitution and the infra-constitutional laws that converge for it” (Friede, 2006, p. 44).

In the criminal procedural field, where the judicial movement, under the guise of “ethical purification” of national life, undertakes police and persecutory initiatives and, when self-committed (such mission) by the judges, it neglects the constitutional duty assigned to the judiciary, and individual guarantees and rights are repulsed by arbitrary initiatives (Bottino, 2017, p. 1013).

Certainly, an overly *active* figure of the judge affects and impairs the accusatory system, because it radically blurs the *partial* punishment, in addition to that the actor-judge does not hold the privileged locus, which the constitutional order allocates him, to supervise the compliance with the procedural rite consonant with the guaranties and rights of the defendant.

This is the lesson by Lopes Jr. (2017b, p. 62): “impartiality corresponds exactly to this position of third party that the State occupies in the process, by means of a judge, acting as a superordinate body to the active and passive parts”, until more than that, a position of *terzietà* below the interests of the parties in the cause.

The present critique of the protagonism, which is certainly repeated, does not result in any discredit to the magistrates, given the honorable and indispensable office attributed to them, that is, to *concretize the law*, because “to interpret the law is to move from one point to the other, from the universal to the singular, through the individual, conferring the burden of contingency that was lacking in order to make the universal fully effective on the plane of this singularity” (Grau, 2017, p. 22).

Thus, as Streck points out (2014, p. 328), insinuations in the sense that this factor means a prohibition to interpret or an attempt to diminish the Judiciary, because:

[...] the Judiciary has a strategic role in contemporary constitutional democracies – concretizing fundamental rights, therefore intervening almost always in the delicate relationship between law and politics – that it is necessary to think of hermeneutical elements that can generate legitimacy for judicial decisions, effective control of the meaning articulated in them. That is to say, hermeneutics enables participants in the political community to question the motivation of decisions in order to generate, in these same motivations, a much higher degree of legitimacy (Streck, 2014, p. 328).

Impartiality comes from the condition of estrangement, by which the tried distances himself from the cries of the crowds, that sound like the rhythm of their truncheons¹⁴, and seeks the voice of the Law.

Something very close to what Rui Barbosa (2016, p. 29) already recited: “When I am required to solve a legal or moral case, I do not pause to probe the direction of the chains that surround me: I turn to myself and freely give my opinion, to please or dislike minorities or majorities”.

It is necessary to stress, however, that textual semantics is the interpretative floor, because any “interpretation begins with a text, because, as Gadamer says, if you want to say something about a text, first let the text tell you something” (Streck, 2007, p. 42).

Therefore, in view of the allographic character of legal hermeneutics, that is, the dependence of a third party (interpreter) for the completeness of the authorial work (as is also the case, for example, the theater), it is natural that, sculptors in charge of producing, from blocks of marble, a Venus of Milo, each of which will present “one of the Venuses of Milo that can be produced within the frame of the Greek work” (Grau, 2017, p. 37-48). After all:

¹⁴ Expression adopted by Min. Eros Grau, at the time of the judgment of *Habeas Corpus* No. 84.078-7 / MG, provisional *execution* based on the conviction of the second instance, although there is no *res judicata*: “[...] to prevail reasons against the text of the Constitution, it will be better to leave the room and go around, each with his truncheon, breaking the spine and head of those who oppose us. Each one with his truncheon!” (Brazil, 2008, p. 15).

The law does not exhaust the Law, as the score does not exhaust the music. To interpret and recreate, since the musical notes, like the texts of law, are technical processes of expression, and not inexpressible means of expressing. There are piano virtuosos who are real keyboard typists. Infidels to music, by excessive fidelity to notes, are instrumentalists to be listened to, not interpreters to be understood. The same applies to the exegesis of the legal law. To apply it is to express it, not as a discipline limited in itself, but as a direction that flexes itself to the suggestions of life (Porto, 2011, n.p.).

It can be seen that, as a result, they produced different statues, even though they had the same object in hand. This is what also occurs with interpretation, for, despite the unflagging dissimilarities, the fruit of it (the norm) still fits into the frame (rule).

Just as the sculptor, aiming at the reproduction of the Venus of Milo, did not perfect the Christ Redeemer of Rio de Janeiro or the musician, in front of a score of Mozart, did not present the 9th Symphony, it is inconceivable, in a State of Law, that the jurist flee to the preexisting in the envelope of the rule.

In other words, reasonably, even the magistrate can go beyond the rule, with the purpose of protecting and maximizing fundamental rights and guarantees, but never behind it, ignoring the textual semantics, which is the interpretative floor. The normative enunciation contemplates the prelude (rule), in such a way that to ignore it or means vulgar lack of technique or crude arbitrariness.

Thus, it should be borne in mind that, in a democratic regime, the magistrate, in order to promote alleged *justice*, save in the case of diffuse control of constitutionality or convention, decides under or out of rule by subjectivism. In this sense:

[...] Judges cannot – as the less well-advised suppose – err on the assumption that *justice*, in a broad, subjective and absolute manner, is conventionally conceived, considering that the true and sole power legitimately and traditionally granted to magistrates – since the advent of the functional tripartition of powers – is the *provision of judicial protection*, with the consequent power of interpretation and application of the current legal system, mostly created – in its fundamental aspect – by the Legislative Branch, strictly limited to the absolute observance of its own specific rules. These force and restrict the final result of what is called by convention as justice to its most basic meaning, objective and concrete

and, thus, dependent of the effective preexistence of a certain Just Law (Friede, 2006, p. 45).

In this way, in the judicial protagonism, the literary passage originated from the creative genius of Guimarães Rosa – “everyone, whatever they want, they approve, you know: it’s a question of opinions...” (2015, p. 19), while the judiciary prescribes different solutions to identical cases with no legal basis relevant to it, which hurts death to the primacy of isonomy.

However, the judge is not even the mouth of the law, nor is the law limited to the judge’s mouth. Otherwise, the scenario is that of Caetano Veloso’s lyricism, “my love, all is right as two plus two is five”¹⁵.

4 FINAL CONSIDERATIONS

According to the above, we can see the undeniable contribution of literature to legal science, while allowing the aforementioned critical subversion, as well as portraying cultures and also operate with interpretation.

In this sense, after drawing the synthesis of the Shakespearean plot, it is possible to see the two models of judgments, objectivist and subjectivist, which propitiates the study of the magistrate’s role in the criminal process.

As does Beccaria’s concern, to the point of denying any kind of judicial voluntarism, attributing to the magistrate the faithful execution of legal commands.

Thus, the constitutional reading of the criminal procedure, in keeping with the democratic regime and the accusatory system itself, is outlined, consubstantiating the office of the magistrate in the zeal to the guarantees and rights of the accused, forming a true spectator of the whole process.

After necessary considerations on legal interpretation, we analyzed the phenomenon of judicial protagonism, which, ignoring the semantics of the text, dissociates from the Democratic State of Law, making the accusatory system unfeasible by a strong bias of the judge.

¹⁵ Excerpt from the composition *Como dois e dois*. Full lyrics: <https://www.lettras.mus.br/caetano-veloso/44712/>. Accessed on: April 24, 2018.

It is concluded, as described above, that ignoring the semantic limits of the legal text, except in the case of control of constitutionality / conventionality or in favor of the defendant, and it constitutes vulgarity or arbitration, which harms the constitutional instrumentality that is the criminal process.

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