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THE BELIEF IN THE PRINCIPLE (OR MYTH) OF JUDICIAL IMPARTIALITY

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ABSTRACT

This paper aims to discuss the principle of judicial impartiality and its dilemmas, based on empirical research conducted at the State Court of Rio de Janeiro between the years of 2008 and 2012. It is a description of the meanings and representations that the professionals within the Brazilian Justice System, especially judges, attribute to the concept of impartiality. The trigger for the resumption of the theme in this paper stems from the divergence that has taken place in the legal field regarding the posture of former judge Sergio Moro while conducting the proceedings of the "Lava Jato" (Car Wash) Operation in Brazil, especially after the repercussions of his conversations with Deltan Dallagnol, the prosecutor who was in charge of conducting the task force, being leaked. These conversations have been published by The Intercept since June 2019. The research explains that judicial practices and decisions are guided by subjective perceptions and particular senses of justice, which are revealed in the judges' personal interpretations of the meanings of the law, the facts and the evidence produced in the judicial process. The research also demonstrates that between the duty to appear to be impartial and the fact that law operators are human, judges transit in a belief system of their own impartiality, discursively constructed by the field of law. This works as a structuring category of the judicial system, which displaces and centralizes in the judge the power to interpret and decide – in the present case, what it means to "do justice."

KEYWORDS: judicial impartiality; empirical research; Car Wash Operation; Lava Jato Operation.

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1. INTRODUCTION[1]

This paper is inserted in the context of a specific dossier aiming to discuss issues of interest regarding the fields of Anthropology and Law. Hence, it is about considering the theme of judicial impartiality from an empirical perspective, that is, a non dogmatic one, distanced, therefore, away from value judgments and opinions, usually present in traditional legal texts. In this regard, this empirical point of view privileges the focus on the reality of judicial practices, the way they present themselves in the forensic daily life, based on the premise that Law is not limited to the normative field.

In Lévi-Strauss terms (1976), observation level conducted me during this research and served as the main rule for the approach I intend to articulate. In his words, "all facts must be accurately observed and described, without allowing theoretical prejudices to alter their nature and importance" (Lévi-Strauss, 1976, p. 14)[2].

Judicial impartiality, which is the theme of this paper, can be roughly conceptualized as a principle of procedural law[3] whose materiality lies in the absence of subjective links between the judge and the case. The judge, in this context, is characterized by their duty to remain distant from and disinterested in the case in a sufficient way to conduct it with exemption, not favoring any of the parties. Judicial impartiality is seen as a principle, raised to the category of procedural guarantee of justice for the parties.

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[1] The use of parentheses in the text aims to highlight the bibliographic references. Brackets, in turn, are used with a didactic and explanatory purpose and occasionally they are also used to stress omissions in some quotes.

[2] Free translation based on the Portuguese reference consulted in this work.

[3] In the field of Law, principles work as guidance or commandments. They are norms of open content, directed at the Judge when exercising the interpretation of laws. “From our point of view, general law principles are normative statements of generic value which condition and guide the understanding of the legal system, either for its application and integration or for the elaboration of new norms. Thus, they cover both Law’s field of pure research and its practical updating [...] they are effective regardless of the legal text [...]. (Reale, 2004, p. 304-305).” [...] The general principles of Law are canons which were not dictated, explicitly, by the norm’s elaborator, but they are contained, in an immanent way, in the legal system [...] the principles do not have a proper existence, they are inserted in the system, but the judge is the one who, upon discovering them, gives them force and life. (Diniz, 1994, p. 419).

Along this line, this text intends to discuss the principle of judicial impartiality and its dilemmas, based on empirical research of ethnographic nature carried out at the State Court of Rio de Janeiro, in Brazil, between 2008 and 2012, at the time of my PhD in Law (Lupetti Baptista, 2013).

In that circumstance – during the preparation of my doctoral thesis – I observed civil trials and hearings; I analysed legal proceedings involving the removal of judges for reasons of impediment or suspicion in conducting cases under their responsibility; I also interviewed, formally and informally, lawyers, civil servants, judges, prosecutors, public defenders and people subject to jurisdiction.

In order to write this paper I had to make a clipping of the broader research, which was carried out for my doctoral thesis.

My intention here is to address just one of the distinct aspects of the theme of judicial impartiality, which is related to its meanings and representations, drawn from the interviews I could carry out during fieldwork. In these interviews, I was repeatedly told that one of the greatest dilemmas of the judges' performance lies in the difficult balance of living between the duty to appear impartial and the fact of being human. Therefore, the attention is to try to describe the "natives' point of view" on judicial impartiality – in this case, primarily, the view of the judges themselves, about the meanings, representations and dramas [as they themselves sometimes described to me] of their duty of impartiality, read as a necessary distancing from the parties to avoid contamination of subjectivities that required their impediment and to prevent them from judging cases based on their personal convictions, straying from the content of the law.

In Geertz terms (1998, p.86), I tried to think and problematize: "how is it possible to get to know the way a native thinks, feels and perceives the world?"[4] and, based on this assumption, to understand what it is like, for the judges themselves, to experience the duty of having to be impartial; and the paradoxes and dilemmas that arise from this ambiguity. And here I point out, in the terms of Geertz (1998) himself, when mentioning the anthropologist's proposal, that he does

[4] Free translation based on the Portuguese reference consulted in this work.

want, from that, to say that, effectively, one can know the way a native thinks, feels and perceives the world. That would be almost impossible, at least for the intellect – rather, one can understand what they say and think about what they do and how they represent and give meaning to their practices.

I must say that, at this point, rescuing [or even resuscitating] the ["old"] theme of my doctoral thesis for this dossier was an idea that came from the intensity with which the subject has been treated and debated in society and also in the field of Law. Especially due to the "Lava Jato" (Car Wash) Operation, which began in mid-2014 and was portrayed as the largest investigation of corruption and money laundering in Brazil. The operation had numerous differentiated and unique repercussions, among them, the imprisonment of Brazilian former president Luís Inácio Lula da Silva, followed by the so-called "Vaza-Jato" event, represented by conversations leaked published by Glenn Greenwald, an American journalist of the online newspaper The Intercept, as of June 2019, showing the intimate relationship between former judge Sérgio Moro and prosecutor Deltan Dallagnol, within the scope of the "Lava Jato" (Car Wash) Operation.

Therefore, I decided to resume the topic of my doctoral thesis, because, after all, the issue had never been so popular in the media and in social debates as it is nowadays [although it is long known to those who are familiar with Brazilian judicial practices]. Moreover, it also seemed opportune to reanimate it, as I have been amazed at the astonishment of Brazilian citizens and, even more, of fellow researchers who seem to see, bewildered and for the first time, situations in our justice system that [though archaic] turned out to be so commonplace and so characteristic during my research.

The perplexed reactions to the behavior of former judge Sérgio Moro mistakenly suggest that his activist performance – and, therefore, committed to his particular sense of justice – would be unprecedented. Despite these perceptions, the empirical data I intend to share demonstrate a certain regularity in this *modus operandi* of "doing justice." To illustrate my point, one of the judges I interviewed – this one, retired – once told me: "I always wanted to be a human judge and, for that,

I had no attachment to the Law. When necessary, I left the Law aside. When my intuition of what was 'fair' motivated me, I did justice."

In this context, the main trigger that led me to resume this subject, in addition to what I said above, was precisely to observe the full exercise of disagreement which characterizes the world of jurists, confined in the logic of the adversarial principle[5] (Amorim, 2006; Duarte & Iorio Filho, 2015; Kant de Lima, 2010) particularly in reference to the performance of former judge Sergio Moro as soon as his conversations with prosecutor Deltan Dallagnol were leaked.

The divergence that came about regarding the former judge's behavior in the case and the question that everyone was forced to answer, taking a stand against or in favor of the former judge's behavior and asking if he was partial or impartial, made me think that the issue of judicial impartiality deserved to be revived.

Among the manifestations of those who understood or opined that the former judge was clearly partial and those who did not see anything compromising in the talks leaked and in the relation between the former Judge and the case's prosecutor, I personally put myself in a position of reflection. My proposal was to think about how it could be interesting to relive my field research and map the clues I found in the past to try to understand a little of what is happening in the

[5] Kant de Lima (2010), Amorim (2006) and Duarte and Iorio Filho (2015) have been highlighting this issue and expressing that the origin of the contradictory logic, which is reflected by the adversarial principle, as much as it records the history of legal knowledge, was already found in the *contradicta* exercises made in the first universities that provided legal education during the Middle Ages, particularly in Italy, the European birthplace of this teaching area (Berman, 2006). As it consists of infinite argumentation, the adversarial logic requires the manifestation of an authority that interrupts it so that judicial proceedings in the Brazilian courts can be continued. That authority is the judge. And in the absence of a formally constituted authority, the adversarial/contradictory logic proceeds, always ruling out the possibility of communication becoming consensual. The essential feature of this logic, despite its open structure, is the suppression of the possibility for participants to reach an agreement, whether they are parties of the conflict, legal professionals or scholars. This impossibility indicates the absence of an internal consensus regarding the knowledge produced in the field itself. Ultimately, this also indicates a lack of external consensus, which is manifested in the unequal distribution of justice among those who are subject to the same laws applied to them and the same courts that offer them jurisdictional provision. In the field of Law, once we are socialized in the contradictory/adversarial scholastic logic – whether in the case or in the production of legal dogmatics –, we are not very fond of the logic of argumentation, which builds provisional and successive consensuses.

present. And these are some of the different views on judicial impartiality that I intend to describe here. The paper is not intended to answer the question that triggered me about the partial or impartial behavior of the former judge. Nor do I intend to portray or problematize the "Lava Jato" (Car Wash) Operation itself. This is definitely not the purpose of this text, which is not intended to be a case study. The proposal here is simply to problematize – out of this case – the different meanings attributed by my interlocutors to the concept of impartiality.

Thus, the paper is systematized as follows: first, to deal with the normative discourse on the subject of judicial impartiality. Then, the text describes the speeches and representations of the interviewees on the theme. Finally, based on the "Vaza-Jato" event, the text problematizes the meanings attributed by the justice system professionals to the duty of impartiality of the judges.

2. THE *MUST-BE* SPEECH: JUDICIAL IMPARTIALITY IN LEGISLATION

Judicial impartiality is incorporated by the procedural doctrine, both civil and criminal, as a condition for the legitimate exercise of the jurisdictional function. It is, as a result, the "essence of jurisdiction" (Galdino, 2011,p.540).

The discursive meaning of the principle of judicial impartiality is linked to the idea that the parties are entitled to the judgment of the dispute by an impartial judge, who conducts the process in a disinterested way. That is, that judges cannot have a personal interest in the outcome of the case.

Leonardo Greco, a Brazilian civil proceduralist, states that "the right of access to justice is the right to a trial conducted by an impartial judge, that is, a judge who is equidistant from the parties and interests submitted to them, who will examine the filing of the action for the sole purpose of protecting the interest of those who are right" (Greco, 2005, p.231)[6].

[6] Free translation based on the Portuguese reference consulted in this work.

Aury Lopes Júnior (2016, p. 88), a Brazilian criminal proceduralist, mentions that impartiality is a "supreme principle of the case." For this reason, it is essential for its normal development and for obtaining fair social distribution.

In the Brazilian Civil Procedure Code (Brasil, 2015), the guarantee of impartiality is provided for in articles 144 to 148; and in the Brazilian Code of Criminal Procedure (Brasil, 1940), in articles 252 to 256, which deal with the causes of impediment and suspicion that authorize the removal of the judge from conducting the case.

In the Universal Declaration on Human Rights (UDHR) (UN, 1948), the principle of impartiality is provided for in article X: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any charge against him."

In the American Convention on Human Rights – Pact of San José, Costa Rica (OAS, 1969), the provision of an impartial judge is found in article 8, which deals with judicial guarantees, no. 1:

> Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. (OAS, 1969)

In the Code of Ethics of the National Bench (CNJ – National Council of Justice, 2008), approved at the 68th Ordinary Session of the National Council of Justice, on August 6, 2008, impartiality is provided for in article 8.

> The impartial judge is the one who seeks in the evidence the truth of the facts, with objectivity and reasoning, keeping an equivalent distance from

the parties throughout the case and avoiding any kind of behavior that may reflect favoritism, predisposition or prejudice. (CNJ, 2008)[7]

That is, in the doctrinal view, the central idea of impartiality corresponds to the desire for the judge's equidistance [in the sense of distancing] in relation to the parties. This is translated into the idealization of procedural equality insofar as judges cannot prefer or privilege one party over the other.

3. THE VARIOUS MEANINGS AND REPRESENTATIONS ATTRIBUTED TO JUDICIAL IMPARTIALITY: "IMPARTIALITY IS AN EXERCISE OF BEHAVIOR...IT IS A MYTH"

One of the biggest annoyances of my professional activity as a lawyer, even before entering the academic world, has always been the abyss that separates the world of legal discourse and that of judicial practices. In the most diverse fields of professional activity, we often do not see a correspondence between the must-be that appears in law manuals and what actually happens in the world of procedural practices. To act as lawyers, we need to have empirical knowledge that is not available in books. An empirical knowledge, a know-how, which is not taught to us, but is required of us in order to make the process happen.

That was the reason why I approached cultural anthropology and this circumstance allowed me to undertake empirical research on Law with the aim of trying to better understand the world of judicial practices, without restricting myself, however, to normative idealizations about the justice system.

The research on judicial impartiality, therefore, followed this path: of problematizing and looking strangely at the normative discourse.

The discourse on judicial impartiality as a procedural guarantee and as a prerequisite for the validity of the process is as recurrent as the criticisms about its impossibility and lack of concreteness.

[7] Free translation based on the Portuguese reference consulted in this work.

For this reason, one of the research instruments I carried out in the fieldwork for my doctoral thesis – and which I will highlight in this paper – was to interview law professionals, especially judges, to understand what was the point of view of these actors on the burden of impartiality in their jurisdictional activity.

I interviewed about 80 interlocutors. Most of the interviews were open [without prior structure or script] and recorded.

I would simply schedule the interview or arrive without a prior notice, informing my research interest, identifying myself and explaining that the work would lead to my doctoral thesis and that the interlocutors would not be identified.

My questioning to the interlocutors, especially the judges, was as broad as possible, normally materialized in the narrative that I was studying the principle of judicial impartiality and curious to understand their point of view on the topic as well as, in practice, how they dealt with the duty of "having to be impartial". If possible, I asked them to tell me anecdotes, stories or their personal memories about situations that had bothered them or required them to be removed from the case under the justification of controlling their eventual partiality.

It's curious that, very often, my interlocutors would express right at the beginning of the interviews: "I don't believe in impartiality" or "you do know that impartiality is something that doesn't exist, right?". And they also categorized it as being a "myth," "chimera," "fable," "utopia," "fantasy." At the same time, at the end of the interviews, they would say that, although impartiality "does not exist," it is necessary to support the belief that it actually exists, because "if the judiciary assumes that the judge cannot be impartial, the system will collapse. The system will end." "People have to believe that there is an impartial judge there, otherwise no one will call the judiciary to solve their problems; they will solve everything by themselves."

This dichotomy caught my attention. In my view, it seems to make a lot of sense when we look at the case of former judge Sérgio Moro and his role in the "Lava Jato" Operation. It also seems to make sense when we look at how his behavior was received by the civil society and the professional and academic field of law.

What the empirical data revealed is that, more than actually existing, impartiality is constituted as a belief. And there is an ambiguity in it: on the one hand, keeping the discourse of impartiality alive serves to hide its eventual non-existence; on the other hand, keeping this speech alive produces effects for the recipients of the justice system.

It is a belief constructed discursively by the field of Law [made up by legislators, doctrinators and professionals], which is configured as a structuring category of the system. Without it, the judiciary would "close its doors," as I was told by more than one judge during the research.

And, regardless of whether it is attainable or not, impartiality survives as a belief. As a result, it does not depend on concrete reality. Impartiality exists and is legitimated as a discourse, being satisfied with reproducing itself more as a discourse than as a practice. This is important to legitimize the justice system and to make citizens believe in its effectiveness.

Impartiality is a duty inherent to its function. At the same time, it is also a myth, a chimera, a fable or a utopia that judges [and the justice system professionals] must strive to keep alive.

I did one of the interviews with a female judge who told me a sentence I chose for the title of this article. She told me: "Impartiality is an exercise in behavior, something you train over time. It's very hard! And it's a myth...".

On another occasion, a female lawyer told me: "Impartiality is the certainty that the citizen has that the case they are submitting to the judge will not be decided because of their social class, their skin color, their political ideology. The judge who is going to judge has no interest in this. The judge is impartial".

Quite often I've heard the belief that: "Impartiality has to exist because without it, people will no longer come to the judiciary. They will solve their problems alone, with their own hands." Or: "People need to believe that their lives will be judged by impartial judges. This has to do with the reliability of the system."

And it has to do with what Pierre Bourdieu says in his book "Sur le pouvoir symbolique" (the original title in French)[8] (1989). He describes the belief and power of words as force of action[9]:

> [...] the symbolic power as a power to build the data by enunciation, as a power to make people see and believe, as a power to confirm or transform the worldview, and thus the action on the world, and therefore the world itself; symbolic power is an almost magical power. It allows people who wield power to obtain from those who are subject the equivalent of what is gained by force. And this happens within the very structure of the field in which belief is produced and reproduced. What makes the power of words and slogans, the power to maintain order or subvert order, is the belief in the legitimacy of words and the one who pronounces them, a belief whose production is not within the competence of words. (Bourdieu, 1989, p. 14 e 15)[10]

When it comes to impartiality, the power of discourse draws attention.

My interlocutors clearly expressed the ambiguity of impartiality: it exists and does not exist at the same time.

> I don't believe in impartiality, but I can't say that. Because believing that it exists gives comfort... it gives security. It's false security, but still, it's necessary. Everyone has to believe that their case will be tried by someone who is impartial, who will comply with the law. Otherwise it's the end of the

[8] In English, the title of the book would be something like "The symbolic power" (free translation).
[9] Foucault (2005), in turn, also pointed out that discourse interferes with reality; in fact, speech is in the order of laws. The intention here is not to deepen the discussion, but to point out that the discourse would be constitutive of reality and would produce, like power, countless types of knowledge. Discourses and practices are therefore mutually implied. And, in this sense, the belief consolidated in the reverberation of the discourse on impartiality produces practical effects.
[10] Free translation based on the Portuguese reference consulted in this work.

judiciary. If people stop believing that they will be on a trial according to the law, to the process and with an impartial judge, this is all over.

Hence the commotion caused when one raises, in the case of the "Vaza Jato" leaking event, an extremely close relationship between the judge and the prosecutor, revealing how impartiality is called into question, causing procedural invalidity.

The mere distrust of its inexistence also provokes distrust in the justice system. The dilution of belief dilutes the system itself, so keeping it alive is keeping the justice system itself alive.

Once, an interlocutor, an experienced lawyer, told me:

I can only see impartiality as dogma. Or as a belief. As something real, I just can't. But I don't think it's bad to know that impartiality only exists as a dogma, that the judge is a human being and, therefore, they will make a mistake, they will occasionally make a prejudgment, they will let themselves be influenced. I don't think any of this is bad. I think that's just how things work.

An appellate judge told me:

Our decision will only be respected if we are impartial. That's what holds the system together. You cannot empty out this discourse. That's what sustains it all. If you study the concept of jurisdiction, you will see that what sustains the existence of the judiciary is impartiality, which is linked to the trust of people to come to us and transfer to us the power to decide their lives. Without that, what are we going to do? That's our job. Without this, the system has no legitimacy and doesn't sustain itself.

Jeveaux (1999), talking about the belief in impartiality, says that it fulfills the symbolic role of offering security and giving guarantees to the parties:

> [...] within the scope of the case, what really matters is that the participants believe (trust) that they have the same opportunities to influence the judge's persuasion, and that the judge does not offer reasons or distrust to which side they will lean towards [...]. The belief is also valid for non-participants facing the expectation that, if they happen to be in the same situation, they will have the same chances. But this does not apply exclusively to the case, but also, and mainly, for everyone in the community to believe that all that apparatus is really there, at their disposal, along with so many others, so to speak, that stabilize their expectations and force the illusion that, ideally considered, they will come to their rescue if necessary. (Jeveaux, 1999, p. 83-84)[11]

Bourdieu (1983) speaks of a linguistic market in the text “Ce que parler veut dire” ("What it means to speak" in English, “O que falar quer dizer” in Portuguese). When approaching the topic, he points out that in this speech market, the speaker puts his linguistic products on sale for someone to buy. That is, the one who creates the discourse has to consider the conditions of acceptability of that discourse. In the case of judicial impartiality, judges build the belief and the believers feed it [when they submit their conflicts to the justice system]. Thus, favorable conditions are created for the belief to establish itself as “truth.”

Foucault also explains this in his order of discourse, as already mentioned in this paper (Foucault, 2005). The legitimacy of the discourse and the pronounced thing is given by those who build it, but also by those to whom the speech is addressed, to such a degree that throughout society the production of discourse is controlled, selected, organized and redistributed.

Speech and truth are not necessarily linked. Foucault (2005) shows that the discourse does not need to be true in itself, because it is the discourse that produces the truth. Speech creates truth. It is performed as it is said.

[11] Free translation based on the Portuguese reference consulted in this work.

In the case of the judiciary, saying and reproducing that impartiality exists is a way of trying to make it exist. Preserving impartiality as a dogma is necessary, after all, the effect of the discourse is what produces its materiality.

Certainly, in the case of the justice system, keeping a firm belief in impartiality and nurturing it is more essential for professionals than for the citizens themselves. In any case, without their legitimacy, belief loses its power.

In another work that deals with language, Foucault (1971) also says that what matters is not what the discourse says or what it thinks it says, but what it does. In other words, the most important thing is the knowledge it is able to produce.

In this sense, it seemed interesting to me to bring the subject not because of the individual fact that impartiality reproduces itself as a belief, but to explain that sustaining this belief is also sustaining something [the power of the justice system]. That is, there is always something that has been said before. As Foucault (1971) mentions, all manifest speech rests secretly on something that has already been said. The formulated speech is already articulated in a half-silence that is prior to it (Foucault, 1971). The belief in impartiality [fostered by the professionals of the justice system] sustains [or feeds], in some way, [citizens'] belief in the Judiciary. Or perhaps it is better to say: it produces the indispensable confidence for the existence of the jurisdictional system and, in this sense, it structures it.

A lawyer I interviewed told me:

> [...] the judiciary depends directly on impartiality. That's why I always say that it's not enough for the judge to be impartial, they have to act impartially, to show this, because this is what will generate and maintain the confidence of those under jurisdiction in the impartiality of the judiciary. It is imperative that people see an impartial performance.

And I ratify the speech of belief in the words of a judge, who was very blunt:

> So when I say there is no such thing as impartiality, it is because there is no way, but there always has to be a discourse to provide legal certainty for

> society. For people to feel safe. Society has to know, it has to believe that it will find an impartial judge, because otherwise this puts social tranquility at risk. If you know you're going to trial with a judge who's not impartial, you won't want him to judge the case. You're not going to leave your life in that judge's hands, and then you're going to want to solve your problem in another way, you're going to solve the situation in your own way. What about pacification? It's a matter of legal security. It will be the law of the strongest. The judge has to be exempt in relation to you and in relation to the other party, in relation to the two of you. If that's not the case, I'll go there and decide right away by shooting the guy in the face. I do my own justice. If I feel that the judge is going to side with the other party, why would I be willing to submit my case to him? I will not.

The judiciary, therefore, to keep alive the belief of impartiality, hides reality and builds a myth. Perhaps for this reason it was so common to hear from my interlocutors that "impartiality is a goal, an exercise." "We work to achieve it."

4. THE SUPEREGO[12] OF THE BENCH: BETWEEN "BEING" AND "SEEMING TO BE" IMPARTIAL

The need to discursively sustain the belief in judicial impartiality, therefore, results in the effort to make it visible, to make it apparent.

In the interviews I conducted, I heard from many interlocutors that: "just as it happens with Cesar's wife, it is not enough to be impartial, it is necessary to appear impartial."[13]

[12] The superego is a structural element of the psychic apparatus. It is responsible for imposing sanctions, norms and standards. It is considered to be the moral and critical agency of the mind. The superego would be "a ruthless judge who often has the power to dominate, control and destroy the ego with fierce reproaches and derogatory criticisms" (Homrich, 2008, p. 12).

[13] Marcel Mauss (2009, p. 325-335), French sociologist and anthropologist, wrote a very interesting text – entitled "The obligatory expression of feelings (Australian funeral oral rituals)." This text inspired me to think about issues that appear in this paper, but which, for now, I chose not to face. But, just to point out, he treats feelings as social phenomena, not exclusively individual and subjective; not

For the field of Law, the legitimacy of the system is based on "appearing impartial."

Perhaps for this very reason, that is, for having questioned the belief in the myth of impartiality, the episode of "Vaza Jato" has caused so much excitement [beyond, of course, the fact itself, that is, of having revealed the intimate and complicit relationship between the Prosecution Office and the judiciary during the "Lava Jato" operation, which resonated in imprisonment, on the eve of the 2018 election of former President of the Republic, Luiz Inácio Lula da Silva].

Anyway, what interests me to point out here [not minimizing in any way the effects of the performance of former Judge Sergio Moro] is precisely that the intensity of the perplexity with the fact that occurred is directly related to the proportion of the belief.

That is, to make explicit [or treat] as absurd, unusual, unprecedented or extraordinary the conduct of the judge who conducted the "Lava Jato" operation case is, on the one hand, to disregard the Brazilian procedural reality and, on the other hand, to keep alive the belief in a concept of impartiality that does not exist [nor corresponds to reality].

On the occasion of my doctoral research, I interviewed a curious judge. He seemed to be very pleased to receive me and was quite available to talk about topics of interest to the bench. At the time he said to me: "Actually, deep down the thing works a bit like a mask theater... it's kind of a *persona* that you create, because you need to convey confidence to those people."

Another judge, this one retired, wrote an essay that became a book. The title of the book is "The partiality of judges," in which, while explaining his lack of belief in judicial impartiality, he describes the need to keep it apparent: "[...] impartiality is

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spontaneous, but obligatory, ritualized, predictable. According to him, there are certain feelings that need to be expressed in Australian funeral rites. There are mandatory sensitive manifestations, expressed by people in charge of expressing grief. The text is especially curious because it shows that the feelings manifested in these rituals, being obligatory, are not necessarily genuine, but to an external gaze, they need to be expressed. According to Mauss, these rituals do not necessarily exclude sincerity, but provide, for example, a "conventional amount of cries and screams" (2009, p. 330). The reading of this text helps to understand the forms of social interaction in that group and, tangentially, allows for a parallel with the feelings of the Judiciary and its mandatory expression by judges.

not enough by itself, but it needs to show itself in its appearance as well. Impartiality is pretty much all that justice is able to offer to gain the trust and credibility of people under jurisdiction" (Araújo, 2002, p.21).

An experienced attorney I interviewed also stated that: "impartiality serves as a veil of an apparent honesty intrinsic to its structure."

Khalil (2011, p. 130), author of a very interesting book about the personality of judges and the importance of their profile in the conduction of the case, cites an audience he was able to follow, when the judge, who was a woman, had been treated by "you" and expressed that she preferred to be treated like "ma'am." She would have expressly said: “after all, we are not friends, I am a judge.” Afterwards, according to the author, the judge would have justified herself, saying: “the formality exists in Justice and has a meaning, which can be translated into impartiality. Of course there are other meanings, but for me the main one is impartiality, keeping an apparent distance from the parties.”

Once an appellate judge, who was a woman, told me an interesting anecdote:

> I was once a judge in Volta Redonda, a long time ago. The case was a search and seizure of a child. The door to the courtroom was open [...]. I had been a bank lawyer before becoming a judge. And this bank where I worked had several accredited lawyers in countryside cities and this lawyer, which I'll tell you about, was accredited in Angra dos Reis, nearby. So I knew him. He was outside the audience room and he knew I was a judge there. Then he saw me: 'Hi [and called me by my name]. Are you okay? Is everything alright? I haven't seen you in a while, etc, etc...'. He greeted me warmly. We looked like close friends. Then he finished speaking and left. Fine. I said hello to him too. Anyway, everything was ok. Then, when I call up the child's custody hearing, guess what? He was a lawyer for one of the parties. Then, when everyone sat down, I waited and said: 'Look, when the door here from the hearing room was open, Mr. Lawyer greeted me excitedly, amusingly, and I want to clarify where I know him from. I knew him like this and that and that... He was an

> external lawyer at the bank where I worked and he used to go there to render accounts of the work, etc. I had no personal friendship with him and I want to make that clear.' And really, think about it? The way the person talks, sometimes it sounds like that, right? That you are very close friends... And that was not the case. We weren't old friends... So I always get these things straightened out. I do this with the intention that people see clearly what is happening. And I think that's what makes it all clear. To show impartiality's transparency. I always have this concern not only to be impartial, but also to appear impartial. This is very important when it comes from the judiciary.

In this sense, the duty to "keep the appearance of impartiality" emerged in the speeches of respondents as an obligation that is both necessary and oppressive. This obligation functions as a kind of "superego", which domes or represses [in order to control] the "instincts" of judges.

In the speeches, it was common for me to hear that "whether in the sentence, whether at the hearing, opinions and emotions of the judge are stored content."

Khalil (2011, 293), in his research, interviewed a judge who spoke literally on the shielding that the bench imposes. At the time, Khalil said the interviewee had told him the judge must be very "reserved" and this would be a factor that causes inhibition. "The judge is a being naturally circumspect, discreet, reserved, as if that released him from having personal conflicts, which he has, in each case."

During the fieldwork I repeatedly heard the following sentence: "We are human beings," as if this system that works as a "superego" restricted their own human condition (afflicting them).

I interviewed a very young substitute judge who told me how he feels this self-containment:

> When I first started on the bench I was very frightened with the expectation that people created around me... That I have a huge knowledge, that I know everything, that I do not make any mistakes. I became apprehensive with all

> this. And this issue of impartiality oppressed me too, because I would have to be almost from another planet to achieve that. But we are not heroes, nor are we from another planet. We make mistakes, we are afraid, we are insecure, we feel pity, we feel everything that everyone feels. But these questions were in my head, pressuring me. It was horrible at first. I suffered... Then, over time, you see that things are not exactly that way.

Another judge told me: "It's impossible not to dive into yourself when it comes to deciding. Impossible."

Another judge I interviewed told me: "Every judgment absorbs the emotional aspect of those who enter it. We are human. There are causes in which the emotional burden is huge, but that burden can not get into conflict with the law and can not even be wide open."

I realized, during the fieldwork for my PhD, that the judges, during the interviews and in public manifestations, trials and hearings I watched back then tried to demonstrate that the judicial process is rational and objective. And that judicial impartiality is what prevents them from accessing their subjectivism and human side in order to avoid "contamination" during the analysis of the case records. It was also clear to me the perception that this end was very painful and difficult to access for them, because whether they wanted to or not, "as human beings" they ended up making use of their emotions and acting in a way not always rational.

A female judge told me once: "Here's the biggest dilemma: you cannot judge with your heart. Your reference is the law. But you have a heart. So, what to do with it?".

5. BETWEEN NEUTRALITY AND IMPARTIALITY

At this point, during the field work, a reaction of the interviewees to a very rhetorical doctrinal concept emerged, which tries to distinguish the concepts of

neutrality and impartiality. In the interviews it did not hold. This distinction was not sustained in the interviews.

The distinction, little palatable, seemed more discursive than empirical. Here's the doctrinal speech:

> [...] One must not understand, however, that the requirement of impartiality is linked to a supposed requirement of neutrality of the judge. First, such neutrality is absolutely impossible, since the judge, like any human being, exercises their work based on reason and emotion. The judge's reasoning necessarily contains premises that only they know entirely, which have ideological, cultural, economic, religious nature, etc. In addition, the judge, like any human being, may be tempted to favor the one that is friendlier or weaker. The impartiality that is required, however, has nothing to do with these obviousness [...]. The judge must be impartial without being neutral [...]. The impartiality expected from the judge is the one that results from the absence of any personal interest of the judge in the settlement of the claim before them. It can not be accepted that a case is submitted to a judge connected to any of the parties by ties of kinship or friendship (or even by enmity). It is also not possible that a judge has economic, legal or interest of any kind in the victory of any of the parties. The judge must be strange to the parties [...]. (Câmara, 2006, p.45-46)[14].

> In fact, there is a widespread inclinity to identify two concepts: *impartiality* and *neutrality*. In my point of view, this is a serious misconception. Stating that the judge should be impartial means that they must conduct the trial without leaning the balance, along the itinerary, towards any of the parties [...]. Another thing is to pretend that the judge is neutral, in the sense of indifferent to the success of the lawsuit. The zealous judge cannot be

[14] Free translation based on the Portuguese reference consulted in this work.

> disinterested in achieving a fair outcome at the end of the trial. (Barbosa Moreira, 2001, p.29).

This is the premise that guides: impartiality does not require the judge to be neutral. According to Martins (2007):

> [...] The judge is not a being alien to the world [...]. In their daily life, they hear rumors about the cases they will judge. They have pre-formed views on certain scopes of reality that may come to constitute the object of their judgment [...]. However, they do not become partial [...]. On the contrary, in order for the judge to be impartial, they must be attentive to the world around them [...]. Dehumanization would be a requirement of neutrality, but not of impartiality. (Martins, 2007, p. 64-65)

In the interviews, however, this distinction was very complex to be reached by the actors of the justice system. "[...] It is very comfortable, this speech of hiding behind a supposed neutrality." "This discussion is rhetoric. In practice, it does not make any sense."

> Jurists love this rhetorical distinction: "Oh, because we are human we are all impartial, but never neutral." Now, exactly because we are human is that we can not even be neutral or impartial. This is a tricky word game that does not work. It serves to keep jurists calm, but in the real world it does not explain anything. We can not be neither neutral nor impartial.

According to the empirical data I have found, neutrality would be unthinkable because it would constitute the absence of values. Some interlocutors told me: "Nobody is neutral. It is impossible to be."

I spoke to a female judge whose speech also expresses this view (and also confusion [and the absence of clear conceptual distinction] that my interlocutors usually made between the categories impartiality and neutrality): "Speaking of

impartiality is very complicated because you are not a person who has no previous opinion. You are not a blank canvas, which decides only with the argumentation that the parties inform during the case. This is not true."

There was a judicial judgement I consulted, in a suspicion exception of the judge, that also confuses the terms impartiality and neutrality: "The judge's impartiality is one of the greatest guarantees that stems from the Democratic Rule of Law and the legal due process. There should be no doubt about the judge's performance with regard to their neutrality."[15]

Sewing the field data takes this theme [related to a merely rhetorical distinction between the concepts of neutrality and impartiality] to the next point – and the last one I intend to discuss in this paper: the perception that the distinction between neutrality and impartiality becomes meaningless in a justice system that accommodates the adversary proceeding of legal interpretations and that does not control equality when dealing with concrete cases. This ends up allowing the system to judge identical cases differently and also allows laws to be interpreted without any consensual criteria, authorizing the judge to issue a court decision "as they wish" [or in line with the interpretive guidance they choose for the purpose of "doing justice"].

6. "DO MAGIC" TO "DO JUSTICE"

Sometimes “we do magic” to “do justice”. I've heard this sentence more than once in the interviews I've done.

An example of what I mention here can also be seen in the speech of a female judge I interviewed, who works in the criminal court. She had been a civil judge for a long period of her career and ended up being held in criminal court. And that's what she told me:

[15] These are excerpts extracted from the case files of the Exception of Civil Suspicion Procedure n° 1,0000.08.487137-5/0001, with a trial court decision issued on March 5, 2009. Published on March 24, 2009. TJMG. Congonhas' County. Retrieved November 16, 2019, from https://tj-mg.jusbrasil.com.br/jurisprudencia/5980203/10000084871375000 1-mg-1000008487137-5-000-1.

> [...] I remember a remarkable situation in a criminal case. I didn't want to arrest the guy. I didn't want him to go back to serving a sentence. He had already served his first trial sentence. He had even responded to the case and had been arrested for a long time. And I didn't want him to go back to serving a sentence. I didn't want, didn't want him to come back. Then the whole question of the judge's values, how you think, your opinions, your beliefs, all this stuff comes into play. Because there are judges who think that the more rigorous the application of the penalty is, the better [...]. Or you can have a judge like me, who doesn't really believe in imprisonment and then when possible, in what's possible, tries to keep people out of jail [...]. I did a huge exercise to be able to replace this unfortunate man's penalty. I did a whole argumentation exercise. I didn't want to arrest the guy.

I interviewed a female appellate judge who worked in the civil area. She was talking to me about a trial court decision that granted free transportation to a citizen so that he could carry out his health treatment. This situation constitutes an exception to the legal hypotheses of gratuity in Brazil. She told me the following:

> That day, we did magic to give that citizen what he was asking for. There are now many precedents on the subject and the issue is settled here in the Court of Justice. But when we decided on the topic for the first time, we created a thesis based on the fundamental right to health, based on the principle of human dignity. So we gave him what he asked and what we wanted. He had cancer.

I spoke with a civil prosecutor who explained to me that the judge can only work with what “is in the case.” Even if they have to "walk away from their conviction," the most important thing is that they "comply with the law, even if they disagree with it." She said it was common that "the judge's feeling indicates that justice is in one place, but the law points to another." In these cases they have to

"comply with the law." However, as she told me, despite this being the "rule," "it is always possible for the judge to close their eyes to one formality or another." Everything, in her words, "for the greater good of justice."

She told me that being "legalistic" is an increasingly scarce trend, which, in her view, is a very "good" thing. She said that in certain situations it is possible "to depart a little bit from the law here and there to do justice."

When I asked for concrete examples, she told me:

> Law is not dynamic like reality. So, to follow the reality of life, judges have to be creative, they have to build new ways of interpreting the law. The law stands there, stagnant, not following society. So, for example, let's think about joint custody[16]. Joint custody arose out of practice. It was invented by the judges. And now there is the law [Law no. 11,698/2008] that came to regulate what the judges were deciding on a daily basis. This situation was constructed by them when they were faced with situations they had to judge. There was no law. If you think about it, they were issuing trial decisions against the law. Now the law exists. But before, it didn't exist. **In Family Court, in general, we see judges tearing up the Civil Code all the time. And they do have to tear it up! You need to see, in the specific case, what is the child's interest, what is best for this child.** For example, when we talk about stepfather visitation....this is not in the law. Stepgrandma's visitation... And I've seen it granted. So it's all very subjective. It's really subjective. That's why this impartiality... hm... you can't always follow that. The right thing to do is: do what is in the law and according to the evidence in the case records. But that is not always possible. We find a way, depart from the law here and there, in order to do justice. (the bold part was underlined by me).

[16] Joint custody is distinct from sole custody. Sole custody is assigned to only one parent after separation. Joint custody, on the other hand, means joint responsibility and the exercise of rights and duties of the father and mother who do not live under the same roof, concerning the parental power of children in common.

Way later, when I was about to leave, the prosecutor told me about a case she had experienced.

> Well, we joke that the Public Prosecutor in the Civil area is a taleteller on duty, isn't it? It is because we give our opinion! Because we issue an opinion, so we suggest that the judge gives a decision in one direction or another. There was one case that went like this. The daughter filed a lawsuit to claim against the health insurer regarding the home care service that was provided to her father. According to her, the nurses sent by the company were terrible, unprepared and insensitive. When I read it, I almost cried. Her father was elderly, he was ninety years old... Then, in the complaint, she said that the nurses were bad. In the answer, the insurance company said that it was her – the daughter – who was a very difficult person, bad in terms of treatment, and rude. Well, in the contract it doesn't say that the insurance company has to offer sensitive and kind nurses, does it? The contract determines that the home care service is provided, period. And that the insurance company did. Then my judge scheduled the hearing [it is common for the prosecutor to refer to the judge of the court where they are incumbent as "my judge".] On the day the hearing took place, we saw that the daughter was something! Unbearable... Those people who think they're getting things done by shouting at anyone, y'know? Even I got mad at her. Then I ask you: is the prosecutor impartial? Being honest with you, I almost issued my opinion against her. I got mad at her! And it was easier to issue my legal opinion against her, because the contract didn't say that the insurance company had to send kind nurses. The contract states that the contractor has to provide the service by sending trained nurses. And that determination the company fulfilled. So it was even easier to speak out against her. But then I thought. Wow, it's her father. He has nothing to do with that... And then, we stretched the interpretation of the law here and there, my judge and I talked, we thought together... We decided a little against the contract – because I issued my opinion and he accepted –, in order to compel the insurer to

> provide caring nurses. Anyway, this is not in the contract, nor in the law, but what about true justice? Will the court keep this madness that we did? I don't know. But this kind of thing happens...

"In my opinion the judge is never impartial. They are going to use whatever they want to decide the way they want to", a public defender told me.

Khalil (2011, p. 160) also interviewed judges who expressed this possibility. One of them, admitting that the legal system is extremely open, told him: "The judge can decide however they want, somehow they will find support in the legal system." And exemplifies: "The Superior Court of Justice invented that prison was applicable in the event of non payment on the last three alimonies. I never followed it, because it's huge nonsense."

Another judge told him that, in certain cases, when he reads the complaint, he thinks the plaintiff is right. Afterwards, however, when reading the answer, he is in doubt and ends up doing what he "wants" (Khalil, 2011, p. 303): "Then you will adopt your own premises [...] and you do what you want."

And another judge confirmed the same (Khalil, 2011, p. 314): "I always said: 'the judge does what they want, the judge does what they want' [...]".

José Renato Nalini (2019), in his essay on the "Humility of the Judge"[17], also expresses:

> The judge knows they decide as they please. It is easy to find arguments against or in favor of any of the theses. Their profound intellectual honesty becomes fundamental, fostered by intellectual humility, so that, in the act of deciding, idiosyncrasies, prejudices, self-indulgence or any other

[17] Retrieved April 22, 2020 from https://emeron.tjro.jus.br/images/biblioteca/revistas/emeron/revista-emeron-2005-13.pdf.

subjectivism on the mission of doing justice do not prevail. (Nalini, 2019, p.11-12).[18]

It is frequent, during Law School, to hear that "when it comes to law, in 99% of cases you find ground to decide in favor of either side".

We are shaped by the logic that "you always find an answer to your question." In this scenario, the freedom to decide what is fair or not is practically absolute and uncontrollable: "you decide what is fair and go after the grounds for it. You'll find it," a judge told me.

A prosecutor who works in the civil area told me: "Having this elasticity in the law is very good, because you pull it from here, pull it from there, strain the law and put everything you want in there. Everything fits in."

The absence of official consensus on the content of the law allows judges – or rather, demands of them – to fill in the blanks. And our system is full of consensus loopholes. Thus, it is also full of different meanings for similar situations.

Therefore, the judge, all the time, when conducting the case and when deciding, is faced with the need to fill and occupy these empty spaces created by a system grounded not on consensus, but on abstractions, contradictions and ambiguities.

When I state and demonstrate through ethnographic data that, when faced with a concrete situation, judges "do what they want," I don't intend to stigmatize, harass or confront them. I make my statement simply because I understand (and I intend to make it explicit) that the system does not provide them with other outlets. Therefore, in Duarte terms (2010, p. 93), "judges are not organized in a plot against society. They just exercise their powers which, in turn, come from a system that transforms them into central and absolute characters, even at the moment of expressing their will."

[18] Free translation based on the Portuguese reference consulted in this work.

An attorney told me: "I don't see any other way for judges to act in this system than choosing the side that will win according to their own subjectivities. A system operated by humans cannot be impartial or neutral."

The statement that "judges do what they want" also has another meaning in this thesis: that they make their choices according to their personal perception of what is fair. And, therefore, to think of a neutral or impartial system is to idealize and sublimate what the empiricism reveals to be unfeasible. It is to transform into belief a speech that finds no empirical correspondence.

"Doing what you want" means deciding according to a personal conviction about what seems to be the most fair in a given situation.

And this is allowed because the system is not permeated by standards, protocols and consensus. It is up to each one, individually and contradictorily, to fill with meanings and representations the content of the law, the proof, the facts, the doctrine, the process, the truth.

During my fieldwork, it was common to hear statements like this, coming from a judge:

> I think that in some cases the judge can tend to one side or the other, aiming to do justice, as there are many divergent decisions. So, if the party has a right, or if we feel that they do, but sometimes their attorney is not handling the case in a good way, in this sense we sometimes act with a certain partiality. We do this in the sense of seeking a decision within the law, within the limits of the law, if there are grounds in another direction that could really benefit this party. Because then, personally, we can see that the party is right, got it? And it's a matter of justice. And so, in this sense, we can actually tend to one side rather than the other, in the sense of seeking a favorable decision. If the party involved has not demonstrated the right, but we realize that they have the right, we give them a favorable decision, using the jurisprudence for that.

"Each interpreter of the law affirms the meaning of the legal norm that seems appropriate to them according to their own values and starting from their personal vision of the world. Thus, one cannot consider that a given interpretation is right or wrong" (Câmara, 2007, p. 86).

And a female judge I interviewed confirms:

> It's all about our perception of the law. In my view, the law is only put in the world as a norm when the judge interprets it and applies it to a specific case. In this situation the law applies this way. In that situation in another way and so on. And this is according to each person's perception. You can give a different interpretation. And this will never end, neither with a binding precedent nor anything. There will never be an equal perception among those who are deciding. And this pluralism of ideas is good. This mixture of things, divergences of thought, all this is very good because it does not allow the stratification of a dogma. And each situation is a unique situation [...]. This is part of the system. And it's like this... One loses today, another wins tomorrow... It's impossible for people to think the same way.

A prosecutor told me that she has seen several times that: "the same case allows the judge to decide either side. I issue my opinions and I see it happening every time. The same case allows you to walk either way: on the complainant's side or the defendant's side. Interpreting one way or another is up to you."

Araújo (2002, p. 61) states: "it is known that many claims can either be deemed as granted or denied, providing reasonable grounds for both hypotheses."

Throughout my PhD period, I've heard from many interlocutors of mine that, in almost all cases taken to the Judiciary, it is possible, rationally, to judge the same case as granted or denied. And, when I asked – what changes this result? – they said that "although the system has to be impartial," what changes "is the perception of those who decide." Therefore, what changes is the particular sense of justice of those who decide.

7. FINAL CONSIDERATIONS

In this sense, the performance of former judge Sergio Moro was compromised by his personal convictions and particularized sense of justice [I am neither absolving him nor condemning him] for his behavior in handling and conducting the "Lava Jato" Operation. Along these lines, I am merely pointing out that his personal relationship with the Public Prosecutor's Office is neither unprecedented nor special; it is recurrent in the justice system.

Trial decisions issued by judges compromised by moralities and particular intentions that interfere with the jurisdiction provided are handed down daily in our justice system. This occurs because these moralities and intentions are permeated by uncontrollable interpretative possibilities.

And what the clipping of the research that supported my doctoral thesis – and which I presented here – explains is that judicial practices and judicial decisions are guided by the subjective perceptions of professionals and by their personal interpretations of the law, facts and evidence produced in the course of the judicial case.

Between the duty to appear impartial and the fact that they are human, my study reveals that judges move through a belief system in their own impartiality. This belief is constructed discursively by the field of law and works as a structuring category of the judiciary system.

In this system, it is the absence of consensus on the meaning of the laws is what allows and reinforces the arbitrary exercise of the power to decide conflicts based on casuistic criteria. This shifts to the judge the power to interpret and decide, in a specific case, which is the best or “fairest” solution for the dispute. Thus, the data reveal that the results of legal cases are compromised and intertwined with the particular senses of justice of the legal professionals who are in charge of conducting them.

The data collected in the field work demonstrate, still and finally, that judges conduct and decide judicial cases based on moralities that serve more to justify the partiality they exercise than to properly reinforce their role as an impartial judge.

In this level, the behavior of former judge Sergio Moro in conducting the processes of the “Lava Jato” operation is not special or unusual. Rather, his behavior reveals a logic and a legal culture that centralizes the judge's choices about facts, evidence, truths, laws, interpretations and particularized senses of justice. Former judge Sergio Moro and the "Lava Jato" Operation are, therefore, the purest explanation of the Brazilian justice system.

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