http://dx.doi.org/10.18623/rvd.v13i27.860

COMMUNITY OF PRINCIPLES AND THE PRINCIPLE OF RESPONSABILITY: JUDGE HERCULES CONFUSED BEFORE A THREATENED NATURE

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ABSTRACT

This study begins from the legal theory of Ronald Dworkin, a thinker responsible for one of the strongest criticism against legal positivism and its claim for independence between Law and Morals. Then, the article highlights how the linkage between Law and Moral proposed by Dworkin is deeply dependent on political liberalism, questioning whether there would be room in the Dworkinian theory for the endorsement of an ethical approach that transcends the individualistic matrices of liberalism. As an example of ethical doctrine that goes beyond liberalism, Hans Jonas' "principle of responsibility" is brought to light. According to Jonas and under the present technological progress, humanity must assimilate a new ethics that is able to transcend the relationship between people who are close to each other and ensure the very future of the planet and the human being, threatened by the new technologies. The final objective is to proceed to a bibliographical research in which we discuss the possibility, or not, of the assimilation of Jonas theory within the "Law as Integrity" as developed by Dworkin, and, hence, its inclusion in the activity of his famous judge Hercules, notably little concerned about environmental protection issues, which are, under his view, matters of politics and not of principle.

Keywords: Law as Integrity; Community of Principles; Principle of Responsibility; Ronald Dworkin; Hans Jonas.

COMUNIDADE DE PRINCÍPIOS E PRINCÍPIO RESPONSABILIDADE: O JUIZ HÉRCULES CONFUSO DIANTE DE UMA NATUREZA AMEAÇADA

RESUMO

Partindo da teoria jurídica de Ronald Dworkin, pensador responsável por uma das mais contundentes e bem-acabadas críticas ao positivismo jurídico e sua pretensa independência entre Direito e Moral, o artigo lembra o quão dependente do liberalismo político é a proposta de reunião entre e Direito e Moral de Dworkin, para questionar se haveria espaço, na teoria dworkiniana, para o endosso de uma proposta ética que transcende as matrizes liberais tradicionais, de cunho individualista. Como exemplo dessa doutrina ética que vai além do liberalismo, é trazido à tona o "principle responsibility" de Hans Jonas. Segundo Jonas, na atual conjuntura de progresso tecnológico, a humanidade deve assimilar uma nova ética, capaz de transcender a relação entre pessoas próximas e garantir o próprio futuro do planeta e da humanidade, ameaçados por novas tecnologias. Assim, por meio de pesquisa bibliográfica, o artigo pretende debater a possibilidade, ou não, da assimilação de um principle responsibility dentro do "Law as Integrity" de Dworkin, e, consequentemente, dentro da atividade de seu famoso judge HErcules , conhecidamente pouco preocupado com questões de preservação ambiental, que, a seu ver, seriam questões políticas e não de principle.

Palavras-chave: *Law as Integrity; Community de principles; Principle Responsibility; Ronald Dworkin; Hans Jonas.*

INTRODUCTION

The short-term "time" of the economy, in the search for immediate profit, and the medium-term "time" of politcs, in the search for reelection or the election of a successor, have proven to be inefficient to protect humanity from effects that are felt in the long term, such as the effects of environmental degradation. It would be possible to think that Law, with its concern about what François Ost calls the "social time" that is able to connect the past, the present and the future, could introduce itself as a possible dimension of common life that is able to provide the environment with stronger protection, exactly because its operators are less subject to short-term imperatives such as profit and electoral success. It is not a coincidence that the environmental law field has had some prominence in that sense. Bearing that in mind, the text below recovers, by means of bibliographic research, the influent theorization of Ronald Dworkin's "law as integrity", to think, in theoretical terms, about the possibility of taking it as a base for a judicial practice that is concerned about environmental preservation. As it is going to be explained below, that perspective does not seem feasible within Dworkin's liberal individualist matrix. However, would it be possible, based on other thoughts such as Hans Jonas' insistence on the importance of a "Principle of responsibility", to enrich the idea of law as integrity, allowing us to think about the forum of principles idealized by Dworkin as also an environmental defense forum? The article below uses those theoretical thoughts to enlighten the issue and guide the practice not only in regards to judges and law operators that act under the inspiration of the famous "judge Hercules" created by Dworkin, but also the organized civil society, in view of the highlight received by the legal institutions before social movements and their fights for rights.

1 RONALD DWORKIN, JUDGE HÉRCULES AND THE COMMUNITY-ENDORSED PRINCIPLES

Judge Hercules is the epitome of the construction of Ronald Dworkin's Law as Integrity. It is an idealized judge who is able to shake, in the jurisdiction activity, the ambitious theoretical architecture developed along the North-American judge's career, guided by the criticism against the legal positivism with the objective of overcoming the tradition rule

model of the legal theory toward a model that aggregates principles in the development of a correct judicial decision. Before getting to Hercules himself, it is worth to roughly outline the notion of Dworkin's Law as Integrity and how it leads to the appearance of the mythologicaly-named judge.

Law as Integrity is based on what Dworkin calls the *political virtue of Integrity*. To clarify the importance of that virtue, the author highlights it among other political virtues directly connected to Law, that is: *equity, justice and due adjective legal process*. Through equity, Dworkin understands the virtue that requires procedures to be discovered – "methods to elect leaders and make their decisions sensitive for the electorate" – that appropriately distributes political power, which is currently usually redundant, into procedures and practices that attribute to all citizens about the same influence over the decisions that rule them. The author understands justice as the virtue that requires consecrated political institutions to be a result of equitable processes, or not, measures that distribute material resources and protect civil liberties so as to produce a result that is morally justifiable. Finally, Dworkin considers as adjective due legal process the virtue that requires correct procedures to be respected when judging citizens that may have violated some legal standard, which includes, among other, suitable ways to produce evidence, freedom convincing the judger and ways to review unfair decisions (DWORKIN, 2003, p. 200-201).

However, Dworkin says that those differences are an introduction to his most important point: according to him, the current politics usually add another ideal to those three ones. It is the ideal that is often described by the cliché that similar cases shall be addressed similarly, which requires the government to have one only voice, operating coherently and based on principles with all its citizens, extending to each one the fundamental justice and equity standards used for some (DWORKIN, 2003, p. 201).

Dworkin calls the specific requirement for political morality, not exactly depleted in that cliché, as the *political virtue of integrity* (DWORKIN, 2003, p. 202). And Dworkin does not go far beyond more immediate honesty intuitions to show how the political virtue of integrity is part of the best characterization of political institutions in the correct performance of their functions. On that purpose, be brings to light a series of examples of problem "conciliatory decisions", which not even the virtue of equity, the virtue of justice or the virtue of due adjective legal process

would be necessarily able avoid.

For example, it is part of the current conception of impartial treatment regarding the members of a community to avoid decisions such as allowing abortion only for women who were born in even years. The simple equitable distribution of power would not be able to avoid such decision, neither the application of the due adjective legal process, if that standard was already in force backed by equity. Likewise, if the community is split in what concerns the subject of abortion, justice could not condemn a standard that would equitably distribute the right to abortion according to the year when the woman was born. For those who are against abortion, that would be better than total release and, for those who are in favor of abortion, better than total ban (DWORKIN, 2003, p. 216). That does not prevent that kind of Solomon decision to be seen as a strong offense to political correctness. Thus, what makes that possibility to be rejected?

What happens, Dworkin says, is that the public order of a community cannot be treated as a kind of good to be distributed according to distributive justice. The intuitions about conciliatory decisions suggest another political ideal next to justice, to equity and to due process. That ideal is *integrity*. And in conciliatory decisions, a State would lack integrity because it is incoherent in regards to the principles it endorsed in part of its acts and, consequently, it should endorse the others. What integrity condemns is incoherence of principles between State acts (DWORKIN, 2003, p. 223). As Stephen Guest says, "the analogy touches the idea of personal integrity. The community shall be seen as the holder of a personality that is subject to the same kind of moral criticism offered to someone who has failed to behave with integrity" (GUEST, 2010, p. 79).

Thus, the principle of integrity applied to the Judiciary "teaches judges to identify legal rights and duties, to the point that is possible, from the assumption that all of them were created by one only author, the personified community, expressing a coherent conception of justice and equity". Thus, within the Law as Integrity conception, "the legal provisions are true if they are or result from the principles of justice, equity and due legal process that offer the best constructive interpretation of the community's legal practice" that can be considered a "community of principles" (DWORKIN, 2003, p. 271-272).

Thus, the Law as Integrity, besides being a specific interpretation of the legal practice, also works as an interpretative program. The Law

as Integrity is not just a fruit of interpretation, but it is also a source of inspiration for the interpretation itself; it asks its judges to continue interpreting in their practice the material that it has successfully interpreted and it introduces itself as the continuity and the origin of the more detailed interpretations it recommends (DWORKIN, 2003, p. 272).

Another important guideline in the characterization of the correct exercise of jurisdiction in the Law as Integrity regards the difference made by Dworkin between *arguments of principle* and *arguments of policy*, fundamental to differentiate to work of judges from the work of politicians or heads of the Executive branch. For Dworkin, the work of judges shall mainly be guided by arguments of principle, while legislators and heads of the Executive Power, although also conditioned by principles, would be free to work with political arguments not yet detailed by the law.

According to Dworkin, policy sets forth objectives to be reached, some improvements regarding economic, political or social aspects of the community. Principle in strict sense is related to a standard to be observed, not because it is promoting or insuring some desirable economic, political or social situation, but because it refers to a requirement of justice, equity or some dimension of morality (DWORKIN, 2002, p. 36). Thus, the arguments of principle are aimed at establishing an individual right, while the arguments of policy are aimed at establishing a collective objective. The principles are propositions that describe rights, while the policies are propositions that describe objectives (DWORKIN, 2002, p. 141).

Thus, the practice of the Judiciary Power should be based on arguments of principle, the arguments of policy for the parliamentary practice, clarifying the levels of political construction freedom – in the broad sense – in each one of the spheres. In the words of Dworkin himself:

> Judges should not be and are not delegate legislators, and the well-known assumption that they are legislating when they go beyond political decisions already made by other people is misleading. This assumption does not take into account the importance of a fundamental distinction in political theory which I am now briefly introducing. I refer to the distinction between arguments of principle on the one hand and arguments of policy on the other. Arguments of policy justify a political decision, showing that the decision fosters or protects some collective goal of the community as a whole. (...) The arguments of principle justify a political decision, showing that the decision respects or guarantees a right of an individual or a group. (...) Nevertheless, I defend

> the view that judicial decisions in civil cases, even in difficult cases (...), are and should be characteristically generated by principles, not by policies (DWORKIN, 2002, p. 129-132).

Dworkin says that the judiciary practice is an exercise of interpretation in a more general way that goes beyond the moment when jurists interpret documents or specific laws. That Law is deeply political and judges or jurists cannot avoid politics in the broad sense of the political theory. However the Law is not, according to him, an issue of personal or party politics, and a criticism of Law that fails to understand that difference is providing a poor understanding of Law and guidance to it even poorer (DWORKIN, 2005a, p. 217).

Thus, even in complex legal cases, the arguments lawyers propose and judges accept would be arguments of principle and not of politics, and the judicial process should effectively be ruled under that idea (DWORKIN, 2005a, p. 109). The intention is not to say that arguments of policy cannot reinforce a legal argument, but they can only do it if they are in accord with other arguments of principles and count on legal provisions.

Here resides the main difference of the political performance in court and in the parliament. It is not only the difference, but also the complementarity between those performances and the functionality of its separation would appear at that same point. If the judicial control of constitutionality is accepted, for example – and there are several reasons for that – we would have to accept that courts make important political decisions. The issue becomes to know the good reasons in hand. In regards to that, Dworkin's point of view is clear: a court shall make decisions of principle and not of policy; decisions on people's rights under a certain legal system and not decisions on how to promote general wellness (DWORKIN, 2005a, p. 101).

For Dworkin, Law as Integrity "requires a judge to test his interpretation of any part of his community's vast network of structures and political decisions, asking himself if it could be part of a coherent theory that would justify the network as a whole". However, "no real judge could impose anything that, all at once, gets close to a full interpretation of the law that rules his community". For that reason, Dworkin uses *judge Hercules* to illustrate his characterization of Law. Having Herculean powers and all

the time he requires to make his decisions, Hercules is able to completely analyze the set of laws and judicial precedents in the legal order where he operates, extracting from that analysis the subjacent principles and, based on that information, judging towards the best concretization possible of the principles that a given community chose as its basic political morality (DWORKIN, 2005a, p. 294).

Hercules would have beforehand the complete structure of the decision network and its subjacent principles that feature the legal system of the community where he operates. Having this material in hands, he would be able to find inside him the exact place where it is possible to locate the concrete case under his judgment, being able to explore all his possible justifications that supposedly maintain the integrity of the legal body. Non-Herculean judges, on the other hand, start from the concrete cases submitted to them to, from that punctual area of the legal system, rebuild it to the point where it offers the most suitable and upright response to those cases (DWORKIN, 2006, p. 54).

In the words of Dworkin himself (2002, p.549):

> He said that Hercules, who has superhuman abilities and therefore works quickly, could prepare in advance a richly detailed political theory with which he could then tackle specific difficult cases. It is not my intention to suggest that the most common judges did the same thing, even though they perform their duties as far as the full use of their limited abilities and time allows. It was my intention, however, to say that they make very small portions of the same work, as and when the occasion so requires, so that they do not produce a general theory but, at best, small passages of a general theory or, as it undoubtedly often occurs, excerpts from different theories. While doing so, they are based not on a formal philosophical study, but on intuitive ideas of what a more general system would justify, made more articulated by the experience of defending their intuitions in the face of real and hypothetical cases provided by practice.

The mythical judge fulfills the function to show the hidden structure behind the judicial decisions made under the prescription of the Law as Integrity: the search of each singular judge to rebuild the legal system under which he operates as an intact whole, which justifies his decision as the one that presents the law under its best light, considering the principles of political morality chosen by the community as the vectors

of its concretization while a brotherly political project. By using Hercules, Dworkin configures the Law as Integrity as an interpretation and realization of the Law that leads its operators to correct responses even for the most difficult legal cases. In fact, the difference between easy and difficult cases stops making sense at this point once easy cases would only be special examples of difficult cases in which the interpretation is less complex. Hercules would serve to illustrate the conduct of the Judiciary in both cases, only recognizing what anyone would recognize: it is not necessary to ask questions when you already know the answers (DWORKIN, 2003, p. 317).

Nevertheless, Sandra Martinho Rodrigues refers to Ronnie Warrington and Costas Douzinas' criticism on Dworkin, highlighting that "Hercules is, in fact, the personification of what Dworkin believes, that is because his way to 'decide' the cases mirrors the particular conception that Dworkin has of liberalism" (RODRIGUES, 2005, p. 120 e 147). Habermas, in turn, criticizes Dworkin claiming that the necessary background for the correct development of his legal theory is necessarily the North American society, an example of success historically linked of liberalism in the last 200 years (HABERMAS, 1999, p. 214-215).

That criticism is relevant. Dworkin textually says that "the idea of human rights is more basic than the idea of democracy (DWORKIN, 2004, p. 109). Even if you complete that statement by saying that democracy permeates those rights and those rights qualify democracy, it is a conception that is different from the one of Habermas, for example, who postulates the ideas of public and private autonomy are co-original and interdependent. Private autonomy, under the liberal perspective of Dworkin, is politically paramount.

Likewise, Dworkin is skeptic regarding principles that postulate human rights extrapolating individual rights. He says, for example, that it is not possible to justify, by means of the rhetoric of the rights, a decision of a court that limits the uses of atomic power. It is a balance between risks and advantages that should only be decided in a majoritarian way, not belonging to the moral dimension in which Law van intervene, but to the dimension of politics in strict sense, from where it should keep clear (DWORKIN, 2004, p. 41-42). He also highlights the dangers of a very enlarged understanding of human rights beyond individual rights that may have the idea of human rights itself thins out (DWORKIN, 2004, p. 44-45).

The decision that the negligence towards ecological issues took Hercules to make in the *Snail Darter* case is well known.

That case is about the construction by the federal government of the United States of a dam that would put at risk a specific species of fish, the *snail darter*, a small fish of about 7.5 centimeters that, according to Dworkin, had void ecological relevance. Under the prescription of the Law of Threatened Species, the North American Supreme Court decided to hinder the construction in its last stage in order not to destroy the habitat of the *snail darter* and extinguish its species (DWORKIN, 2003, p. 25-29). Due to the insignificance of the species and based on principles such as the non-waste of public money, besides arguments such as the benefits that the dam would bring to people living in the surrounding areas, Dworkin (Hercules) questions the decision of the Supreme Court, locating the correct answer to the legal issue raised in order to authorize the conclusion of the dam.

However, it seems strange to turn the eyes nowadays – in face of the current developments of the ecological movement and the importance that its demands gained in contemporary political debates – to the judgment of the *snail darter* case by judge Hercules and, consequently, to the criticism made by Dworkin on the decision made by the Supreme Court in the "real" case. Would the principles that form the North American society indeed point to a legal decision that ignored the law of the protection of species? How to explain the importance that the ecological movement gained in the last years, even in the United States, if the defense of species against extinction fails to have, in the principles the provide it with moral support, strong enough backing so as to guarantee that objective against projects aimed at the economic development of a certain place?

Thus, among the principles that ground the Law as Integrity in Dworkin, there would be nothing as a "principle of responsibility", as proposed by Hans Jonas (2006). According to Jonas, from the moment when human action is able to interfere in nature as not to allow for the continuity of human life on Earth – a classical example is the development of the atomic bomb – it is important to assimilate a new conduct imperative that forces human beings to be responsible for the preservation of life on the planet. That is a moral principle placed at the universal level, proposing a specific conduct not only in the relationship of people nearby, but also in the relationship between people who are far from each other in time

and space. However, such moral universal principle would not be an individualist liberal principle. Thus, it could be part of an argumentation of principle within the difference established by Dworkin between arguments of principle and arguments of policy? Or would its character that goes beyond the focus on the individual make it an argument of policy unable to oppose the Judiciary, for example, to prescriptions of the Legislative Power? Scrutinizing Jonas' work may help answer those questions, and that is the subject of the following topic.

2 HANS JONAS AND THE PRINCIPLE OF RESPONSIBILITY

A book that aims at solving some of the deepest social transformations and, based on them, erecting a new ethical principle that is able to guide human behavior so as to preserve humanity itself: that is the objective of the book "*The principle of responsibility*" by Hans Jonas. The ethical principle that is able to deal with those pretentions should be, according to Jonas, more or less like that:

> "Act so that the effects of your action are compatible with the permanence of an authentic human life on Earth"; or, negatively expressed, "Act so that the effects of your action are not destructive to the possibility of such a life"; or simply: "Do not endanger the necessary conditions for the indefinite conservation of humanity on Earth"; or, in a positive use again: "Include in your present choice the future integrity of man as one of the objects of your will" (JONAS, 2006, p. 47).

Such principle meets the needs of the traditional ethics when it extrapolates (a lot) the space of the city, the present time and the relationships between people nearby. According to Jonas, that traditional ethics would not handle the contemporary situation anymore once it would not follow a fundamental social change that had the humanity experience a human behavior that is capable of achievements unthinkable in the past. That change would be due to the most recent progresses of techniques, which was granted the power of interfering in nature, as well as in human life itself, in ranges never experienced before.

By then, Jonas said, ethics had had as a tactic assumption a human condition fixed on its fundamental traits by the nature of man and things based on which it would be possible to define what would be good for

that human being, whose reach of action and, consequently, responsibility, would be strictly outlined. However, according to the author, that human action would have changed with the appearance of the modern technique, in opposition to the technique of previous times, so that, if ethics is related to action, that new human action would require a new ethics in whose formulation lie the objectives of its work (JONAS, 2006, p. 29).

In the past, man could rely on the continuity of nature, of the whole in which his action would superficially interfere, without disturbing its own balance. The human being has always used the technique and interfered in nature. But those interventions, by then, were localized and superficial and man was still small before the elements on which he would interfere, in an always ephemeral and precarious way and without harming its essence. Only inside the city – greatest interference of human technique on the natural environment – ethics that is able to regulate his action would make sense: it was in the accurate limits of the city and the relations between men themselves (although not in regards to the essence of what that man would be) that human action was able to intervene in a more dramatic way, requiring its regulation. It is possible to say that the traditional ethics is anthropocentric and aimed at the geographic and time proximity (the "here" and "now" of the action), with no concerns about the extra-human world and the "long route of the consequences" under the responsibility of the chance or the providence (JONAS, 2006, p. 31-36).

With the modern technique, that picture undergoes a fundamental change. The modern technique, says Hans Jonas, introduces into the world "actions of such an order of magnitude, with objects and consequences that are so new that the ancient ethical frame cannot frame them anymore" (JONAS, 2006, p. 39). That does not mean that the later prescriptions regarding behavior towards people have lost their validity in the more intimate sphere of interpersonal relationships. But they cannot handle the responsibility that overloads the collective action that is now able to reach a vulnerable totality and nature, bringing to the human responsibility sphere nothing less than the entire biosphere. With such a thing, proximity and simultaneity delimitations disappear, broken by the spatial growth and time extension of the cause and effect sequences, bringing a new dimension to ethics: the one of the cumulative characteristic regarding the effects of those actions, which is having the later action unfold in a situation that is totally different from the initial action (JONAS, 2006, p. 39-40).

"No previous ethics was forced to consider the global status of human life and the distant future, including the existence of the species", says Hans Jonas. And the consequence of that is, in the words of the author, the fact that this is at stake nowadays requires "a new conception of rights and obligations to which no previous ethics or metaphysics can even offer the principles, let alone a finished doctrine" (JONAS, 2006, p. 41). The presence of the human being in the world, Jonas continues, "was a primary and indisputable piece of information from where the entire idea of obligation related to the human conduct would come". What happens after the appearance of the modern technique is that the very presence of the human being in the world becomes an object of obligation, the "obligation to protect the basic assumption of any obligation, that is, exactly the presence of mere candidates for a moral universe in the future physical world", which means to protect the vulnerability of the mankind and of nature from a threat to the conditions of their existence (JONAS, 2006, p. 45).

That does not result in the fact that people are responsible for the future human beings. Their responsibility, Jonas says, is for the very "idea of man whose way of being requires the presence of his embodiment in the world". There shall be such a presence and, consequently, those who can threat it have to be responsible for it. And that is not, making use of the Kantian distinction, a hypothetical imperative related, for example, to the possibility or not of the existence of the human being in the future, but a categorical imperative, unconditional, which simply imposes that there necessarily will be human beings in the future. That is, the ethics is based not on itself, on an obligation, but on the *Being* itself, on the ontological idea of the necessary substantive existence of the *Being* as human (JONAS, 2006, p. 94).

Here, Hans Jonas questions one of the most rooted assumptions in ethics: the one that obligation cannot derive from the *Being*. But that assumption, he argues, is connected to a specific conception of Being that is not the one he accepts in his work. That is a conception of Being deprived from value, which fails to agree with what Jonas wishes to prove: the Being, to the detriment of the nothing, that is, the non-Being, has a value once it is what allows for values. It is impossible to attribute something to the non-being, may that be value or non-value. For the mere possibility to attribute value to the Being, a decisive distinction that cannot be submitted

to graduation, the faculty for value is seen in the Being. And that faculty would itself be a value: the value of all values as the mere opening for value attribution already insures the absolute priority of choice of the "Being" to the detriment of the nothing (JONAS, 2006, p. 95-102).

Thus, the modern technique requires ethics that encompasses and enforces for the human being the unconditional obligation of accepting the Being and, consequently, not accepting the non-Being; "yes" to life, as a purpose on itself, having value, as an emphatic "no" to nothing that prevents for itself any purpose and value (JONAS, 2006, p. 150-156). That ethics is the ethics of responsibility, whose base is the principle that greater power, greater freedom to act, results in greater responsibility for resulting acts (JONAS, 2006, p. 217). When enlarging his reach over the world, the human being - who is an integrating part of the world - has to acquire such a responsibility over that world similar to the paradigmatic responsibility of parents over their kids and rulers over ruled people. They have to ponder their actions, as well as their future consequences, when they are executed, questioning how such consequences can hinder the continuity of the Being and meet the non-Being, as they burden the actions of parents and rulers so as to led a child or a nation to continuity (JONAS, 2006, p. 175-187).

Prior to the concretization of any professional future, for example, the parent is in charge of making sure that the child is alive until that future is present. Prior to the consolidation of any wealth increases, the ruler is in charge of making sure that the nation lasts so as to enjoy that wealth later. Prior to any finite gain, there shall be the impediment to endless losses, that is, the impediment of the impossibility of any gains. That is the vector of the ethics of responsibility. Extreme care about what is risked in the face of what is expected, having the parameter not of absolute good one may reach, although without which it is still possible to live, but the absolute wrong that not even allows for life.

Hans Jonas does not wish to oppose to the principle of hope, the principle of fear, as important as it may be in the construction of his ethics. The principle he is trying to make sacred is the principle of responsibility, which includes both a portion of fear and hope, both a portion of caring for the object of the responsibility and the motivation for actions that make that caring effective. Fear should not be mixed with cowardice. According to the author, protecting life in its broader sense against the dangers of time and against the very action of human beings is not an utopic purpose, but it

is also not such a humble purpose: it means taking over the responsibility for the future of the mankind (JONAS, 2006, p. 351-353).

Indeed, that is not little. Nowadays, that is also not a conservative position, even if, in Hans Jonas' work, some excesses of his catastrophic futurology and the resulting dread can lead to the conclusion that a fearful immobility may be a better solution than any daring. In fact, that is a first line issue for social and natural sciences, for the private and especially the collective action, in particular, the form of the political action.

Regarding that, it is interesting to observe the part where the author himself questions the possibilities of the representative government to tackle those new requirements, once its procedures and operation principles only privilege current interests, no change for the future generations to be regarded, although they are going to bear the consequences of present decisions (JONAS, 2006, p. 64). That is how some authors see from a positive perspective the recent "judicialization of politics" as a way to turn the Judiciary Power into a forum of principles that is able to guarantee those principles against eventual decisions based on the power of the moment, or claiming from the law a reconstruction of the public time that, in the current conjunction of the past learning towards the future promises, aims at launching a "social time" as a necessary opposition for the self-destructive entropy of the physical time – as suggested by François Ost in "*The time of the law*" (OST, 2005, p. 410).

Here, it is possible to suggest an eventual meeting interface between Jonas and Dworkin once, when Jonas highlights the limitation of a representative democracy in dealing with the realization of the principle of hope, his argumentation is quite similar to Dworkin's defense of the constitutional jurisdiction, which would be the chance to defend the deepest principles of the political community against the prescriptions of a transitory legislature that is limited by present interests. However, that approximation fails to make it automatically possible to consider the possibility to include the principle of responsibility among the principles endorsed by a political community that carries out Dworkin's Law as Integrity once those principles, as already mentioned and for Dworkin, are restricted to principles aimed at the liberal protection of the individual.

3 JONAS' PRINCIPLE OF RESPONSIBILITY AND DWORKIN'S COMMUNITY OF PRINCIPLES

When trying to explain Dworkin's intellectual connections, under the excuse that the originality of his thoughts would not allow to clearly outline an intellectual genealogy of his ideas, Guest says that:

> On the idea that people are entitled to treatment with equal interest and respect, he is Kantian. This very abstract principle in Dworkin's thought states the importance of people as ends, not as means. He also asserts, I suppose, the idea of equality, Kant's insistence on the universalizable characteristic of moral rules. But there is little else that demonstrates anything specific in common between Kant and Dworkin (GUEST, 2010, p. 23).

Even if there is "little besides that demonstrating anything specific in common between Kant and Dworkin", what Guest highlights in common between both is significant and central. That is even clearer in Dworkin's latest book, in which the author dedicates to moral and ethical issues at a more general level and not only regarding political morality and legal correctness. The base of his more encompassing moral and ethical theory clearly is the Kantian notion of person: an autonomous individual being having his own dignity consisting of self-respect and authenticity (DWORKIN, 2011, p. 203-204).

Thus, the Kantian intuition that human beings are themselves ends and they are worth not a price but dignity is the main pillar of the liberal non-utilitarian thinking *and* of the Law as Integrity. Also in the intuition that, for that very reason, if *every* human being has dignity, guiding the norms of conduct of those human beings from that principle is going to result in universal validity standards and that is the support for the thesis of the Law as Integrity that legal issues are, ultimately, moral issues. For relying on the difference between a universal moral level and a fragmented political level of preferences, the Law as Integrity can differentiate the activities of the Judiciary Power from the ones of the other political powers: while the last ones are in charge of consolidating political aspirations of collectivities in a dispute about what is good, the first one shall defend a moral conception of good resting on the universal inside of which those collectivities agree to dispute.

That conception is close to the one of Habermas, deeply influenced by the Kantian thought and that also makes a difference between the two spheres and that restricts any possible judiciary activism to the protection of moral dimension, populated by democratic procedures and human rights, according to Habermas' theory. However, that conception is diametrically opposed, for example, to the Behaviorist conception of Law deriving from Richard Posner's pragmatism. Advocating in favor of a conception of criminal law that outstands for its efficiency, Posner says that "criminal law is a social control instrument and it treats people as objects, not as Kantian subjects" (POSNER, 2007, p. 236). Basically, one can say that, while the Law as Integrity accepts the above mentioned difference between moral and political fields, skeptical conceptions as Posner's and other pragmatists' ones – and even the ones of legal positivism – deny that this universal moral dimension exists. They treat it as a way to mask political decision is strict sense or even purely personal decisions.

Law as interpretation encompasses different interpretations such as positivism, as Dworkin himself suggests, pragmatism and the Law as Integrity. When denying the universal moral dimension, the positivism and the pragmatism fail to fit the Law as Integrity. But, and other interpretations that do not deny that dimension at the same time they do not exactly match the Kantian liberalism professed by Dworkin? Would they fit the Law as Integrity?

As previously said, among the principles that ground the Law as Integrity in Dworkin, there is nothing as Hans Jonas' "principle of responsibility". Nonetheless, one may ask: a community of principles that aggregated Jonas' principle of responsibility among its principles and whose judges would also be guided by that principle, beyond traditional individual rights, would necessarily have laws beyond or below the Law as Integrity? If the political and legal institutions were coherently guided by those principles, would there be integrity in Law as prescribed by Dworkin?

In that case, Law would not fulfill Dworkin's ideal of liberalism. But it is not possible to guarantee that the ideal of the Law with Integrity would not be fulfilled. On the contrary, there is reason to believe that it would: the Law as Integrity would also be respected under those circumstances. To use a Derridan expression, the "constitutive exterior" of the Law as Integrity is not the "non-liberalism". If that was true, it would not need

to deny Weber and Kelsen's liberal inspiration positivism, or example. However, integrity in Law does not accept any variation of positivism. Thus, its "constitutive exterior", to make use of a spatial metaphor, "is located elsewhere".

Dworkin's liberalism is not related to the imposition of an external philosophical standard as it became clear in the explanation of judge Hercules' work. Dworkin and, consequently, Hercules, work with their traditions, the traditions of their community. In that sense, even if Dworkin's liberalism sometimes transpires a transcendental dimension, its use in the judiciary practice comes from the community and, when describing the community of principles, Dworkin clarifies that the duties and responsibilities deriving from a political organization of that kind only respect the members of that community (DWORKIN, 2003, p. 242-243).

Thus, there is life beyond the community of principles and it does not exhaust the possibilities of political grouping. And yes, whatever is outside that community of principles is outside the Law as Integrity. The Law of Integrity depends on a fraternal commitment between the members of a political community that chose to share common moral and not on liberalism. Its denial is not non-liberalism, but the community without principles. That is, to make the Law as Integrity effective is not necessary to envision the success of liberalism, but to accept that the moral dimension of universal principles is important for the community and has to be taken seriously. Conventionalism and pragmatism do not fit Law as Integrity not because they lack liberalism – that is not necessarily true – but because they lack attention towards the importance of moral principles shared by a fraternal community.

The previous example of intact law beyond liberalism may be closer from the Law as Integrity than, for example, the Law in a community that is ruled by a too individualist ultra-liberalism such as what bases Margaret Thatcher's statement that there is no society, there are just individuals and their families.[1] It would be the same case of extreme social fragmentation as post-modern conceptions propose. In that case, there is

1 The famous sentence of the former British prime minister was recalled when she died as a motto for articles of criticism and pride in the Brazilian press. As example, I list Demétrio Magnoli's articles in O Globo (available on: <http://oglobo.globo.com/opiniao/essa-coisa-de-sociedade-nao-existe-8080595>. Accessed on Nov 18, 2016) and Vladimir Safatle's article in Folha de São Paulo (reproduction available on: <http://www.viomundo.com.br/politica/vladimir-safatle.html>. Accessed on Nov 18, 2016). Dworkin, in turn, as Rawls, defends a more open political perspective towards social solidarity and resource redistribution, as it gets clear in *The sovereign virtue: theory and practice of equality* (DWORKIN, 2005b).

room for legal pluralisms[2] and not for a Law as Integrity that, as it allocates law in the universality dimension, aims at an order of principles that unifies the community around a common notion of good, even if it allows for pluralism regarding people and groups' understanding on what is good.[3]

However, all those scenarios are speculative. There is no Law as Integrity that is not the one proposed by Dworkin and there is no Dworkin who gives up his liberal assumptions. Thus, it is possible to notice that the most important factor for the Law as Integrity is a community of principles and not liberalism. As the theory is known, both things go together: it is the Law of a community of liberal principles; it is a set of principles that form a seamless net and, for that reason, always allow for a correct answer to legal cases, even the difficult ones. That is not a mere internal perspective of the agent, but an internal perspective of a specific political theory. That is, it is not the weak thesis of one only correct answer deriving from the fact that the author who professes it thinks so. It is the thesis of one only answer allowing for that seamless principle net to be kept intact. Again, as the theory is known, that seamless net is a liberal principle net.

In that case, it still is possible to insist on the use of "Dworkin against Dworkin". If Hans Jonas was able to offer a coherent philosophic reflection for the creation of a universal moral principle that is able to justify environmental preservation, that kind of intellectual construction can be used to help another kind of intellectual construction that is quite dearly to Dworkin: the reconstruction of coherent political theory and notion of justice deriving from past political decisions such as laws, Constitution and judicial precedents in a community of principles, center of the Law as Integrity. Thus, if that community of principles endorses an environmental preservation principle in one of those most important past political decisions, such as its Constitution, that principal shall be assimilated in a coherent and universalizable conception of justice, even if it goes beyond liberalism and protection of individual rights. Thus, it would not be totally "anti-Dworkian" to consider, in a case such as the Brazilian case, the attempt to absorb new contributions of the political philosophy, such as Hans Jonas', to make a post-liberal conception of justice effective

2 As an example of post-modern conception of law, the work of Boaventura de Sousa Santos can be cited. According to him, "one of the characteristics of post-modern culture is the attention given to spaces and the particularization of spaces (...) The new sociological theory of the law to which it is pointed out is dominated by the concepts of legal pluralism, interlegality and new legal common sense" (SANTOS, 1988, p. 139)

3 It is the idea of reasonable pluralism as defended by Rawls (2003).

(LESSA, 2008, p. 369), which seems to have guided, even if not in a philosophical and rationally articulated way, the text of the country's latest constitution, the so-called "citizen Constitution". To impose itself as a denial milestone in what regards the dictatorship previously in force, it bet not only in the democratic form, but also in the supremacy of individual, social and diffuse rights held by the community as a whole and not only by some of its members. The right to an ecologically balanced environment is one of the most eloquent examples of that.

CONCLUSION

The present article tried to think about the possibility of assimilating a "principle of responsibility" - as proposed by Hans Jonas in his book called *The principle of responsibility* – within Dworkin's theoretical framework and, consequently, the activity of his famous judge Hercules. On that purpose, Dworkin's notion of Law as Integrity, on one hand, and the idea of a principle of responsibility highlighted by Jonas, on the other hand, were briefly presented.

Dworkin became famous for proposing, against the legal formal positivism, a notion of law based not in a model of rules, but in a set of principles that would ground the entire legal order. On that purpose, he gathered the theory of law and the political philosophy to show the law as a collective undertaking that generated fruits whose legitimacy would come from its rationale in a morally intact totality when it was loyal to its principles. To illustrate that vision of Law *in actu*, Dworkin made use of a judge that has mythic capacities and that he called Hercules. He would be able to know the entire network of principles that ground the legal order to always get to the only correct answer for a legal case, which would exactly be the only decision capable of maintaining the integrity of principles of that order.

Hans Jonas outstood in his work when he prescribed the need to guide human ethics based on a principle of responsibility towards nature and future generations in view of the new reach of human actions that, with the new Technologies, with the atomic bomb and genetic manipulation, affect people who as far in space and time, as never before. Thus the need to assume new ethics that makes people responsible, for example, for the preservation of a healthy environment for human beings in the future.

Would such principle be able to fundament a morally intact legal order such as Dworkin's principle of Law as Integrity?

The present studies leads to the answer that no, in view of Dworkin's own demonstrations, not willing to accept principles that advance beyond the defense of individual rights, fundament of the political liberalism that Dworkin, on track with Rawls, endorses. However, in the view of the criticism aimed at the dependence on Dworkin's thoughts regarding the North American liberal political tradition, the present article bets on a reading of "Dworkin against Dworkin" to emphasize that coherence of judicial decisions regarding its founding principles may find new directions inside other different legal traditions, as it could be the Brazilian case and the one of other Latin American realities. In that case, a principle as the one highlighted by Jonas could provide an interesting philosophical base for those traditions, more used than the Dworkian liberalism to issues such as environmental preservation. Within that reading key, the Judiciary, as a forum of principles, could intervene in decisions that put the environment at risk, being responsible for long-term care the elected politicians may not offer due to the short-term view over the following election. That would not be possible in an orthodox Dworkian reading in which Hercules would not recognize such issue as an issue of principle, but of politics, totally available to elected political powers.

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Article received on: 21/08/2016.
Article accepted on: 25/11/2016.

Como citar este artigo (ABNT):

MACHADO, Igor Suzano. Comunidade de princípios e princípio responsabilidade: o juiz Hércules confuso diante de uma natureza ameaçada. *Revista Veredas do Direito*, Belo Horizonte, v. 13, n. 27, p. 243-265, set./dez. 2016. Disponível em: <http://www.domhelder.edu.br/revista/index.php/veredas/article/view/860>. Acesso em: dia mês. ano.