Judge conciliator-a mythological figure approach due to the principle of conciliation in the labour courts and law 9,099/95

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SUMMARY

The present work aims to demonstrate that the principle settlement in its essence is not achieved by the magistrate togado in practice of the courts, as the dogma inscribe on his long way of studies and training that makes it able to decide and argue about their decisions, but legally unable to articulate conciliatory techniques sufficient to put an end to the conflict in a more harmonious. It will be shown that the judge prepares since long before being invested in the jurisdiction, in the preparatory courses for competitions and, after approval, the courses offered for the new judges to be a direct decision maker, the one who has the power to decide. The figure of the conciliator diverges completely from the direct decision-maker. That seeks conciliation techniques apply to end the dispute, techniques that the magistrate as a rule does not have or interested in knowing.

Key words: principle. Conciliation. Reconciled. Decision maker. Judge.

ABSTRACT
This paper aims to demonstrate that the principle conciliatory in its essence is not reached by robin magistrate in court practice, as the dogma developed in his long journey of study and training which makes it able to decide and argue legally on their decisions but unable to articulate enough conciliatory techniques to end the conflict more harmoniously. It will be shown that the judge is preparing since long before it invested in the jurisdiction in preparatory courses for tenders and, after approval, the courses offered for new magistrates to be the direct decision maker, the one who has the power to decide. The figure of the conciliator completely disagrees with the direct decision maker figure. That, seeks to apply conciliation techniques to end the dispute, techniques that the judge usually does not have, nor cares to know.


**INTRODUCTION**

In the definition of Mauritius Godinho Delgado (2007:187), principles are "fundamental propositions that inform understanding of the phenomenon. Are central guidelines which infer a legal system and that, after he inferred report, informing him ".

However, the concept should not be viewed as simplistic as the topic is a matter of disagreement between large indoctrinators.

For Divya Streck (1999:86), "the General principles of law have meaning defined. Some scholars say that the principles correspond to standards of natural law, universal and immutable legal truths inspired by the sense of fairness ".

Robert Alexy (2008:117) "principles are commandments of optimization in the face of factual and legal possibilities".

In an article published in 2011 to criticise the vote, the Minister Luis Fux, Professor Padman Streck, mentions Robert Alexy and his definition of principles like denotes: "For Alexy, as quoted and read (and least understood) and supporter of semantic-structural distinction between rules and principles, the principles are worth prima facie broadly (warrants of optimization). Specific circumstances can make its scope is restricted. The principles – which, in some passages of his theory of fundamental rights, Alexy equates with their fundamental rights-are on a collision course, and the proportionality criteria derived from the weighting solve this apparent contradiction, causing, in a specific case, one of them prevails. Remember the result of weighting of colliding principles is a rule that Alexy calls "fundamental right adscripta standard" (which, in the daily practice of the application of the law, no one does). "
As we see, define principle is not so simpleton like want some indoctrinators, but neither is the object of this work. The approach is just to justify the importance of this Institute that to what we believe is the starting point of the entire Bill.

Thus, the principle of Reconciliation should be seen as a determining factor in what will be treated in this work because it will approach in the light of article 764 of the consolidation of labor laws and of article 2 of Law 9,099/95.

**The CONCILIATION LAW 9,099/95**

It is a fact that Law 9,099/95 that created the special courts, especially the expanded Civil access to the Judiciary by the lower income classes who have not put aside their rights, although financially, with low possibility of access without a lawyer.

Fact predictable, because this was one of the goals of the law that, in the wake of the consumer defense code of 1990, aimed to ensure the underprivileged ways to have tutored his right when offended.

It is also a fact that the creation of Courts and access would demand the objectified popularized troubled judiciary. Thus, law 9,099/95 expressly emphasizes the Conciliation Institute as will.

It can be affirmed that the conciliatory principle advocated by advent of Law 9,099/95 establishing the special courts comes from the Justrabalhista legal system. This is because, in that since the rule is always planning reconciliation as if checks below.

The wording of article 21 of Law 9,099/95 is very similar to that of art. 846 of the CLT, as applies:

"Art. 846-open to hearing the judge or President will propose conciliation. (Wording by law number 9022, 5.4.1995)

- 1-if there is agreement plough term shall be signed by the President and by litigators, consigning the term and other conditions for its fulfillment. (Included by law No. 9022, 5.4.1995)
- 2nd-Between the conditions referred to in the previous paragraph, can be established to be the part that does not comply with the agreement required to satisfy fully the request or pay an indemnity agreed, without prejudice to the fulfilment of the agreement. (Included by law No. 9022, 5.4.1995)"

Indeed, the law on strikes envisioned speed and greater effectiveness in the "say right" in cases of less complexity, favouring conciliation. So, is the rule of Law 9,099/95:
"Art. 2 the process will be guided by the criteria of orality, simplicity, informality, procedural economy and speed, seeking, where possible, conciliation or transaction.

Section VIII

The conciliation and Arbitration Court

Art. 21. Open the session, togado or lay judge will clarify the Parties present on the advantages of conciliation, showing them the risks and consequences of litigation, especially with regard to the provisions of § 3 of art. 3 of this Act.

Art. 22. The reconciliation will be conducted by judge togado or lay or conciliator under his guidance.

Sole paragraph. Obtained reconciliation, this will be reduced to writing and approved by judge togado, by sentence effectively executive title.

Art. 24. Not achieved conciliation, the parties may choose, by mutual agreement, by arbitration, as provided for in this law."

Without doubt, the conciliation where demands especially the deal focuses on a specific issue and there is no need to protect links of any kind is the most recommended output and the law 9,099/95 by favouring such situations, could not adopt another principle than that of conciliation.

CONCILIATION COURT SPECIALIZES

More than a principle, the rule in labor legal system is the attempt of conciliation as extracts from article 764, chapeau: "The individual or collective disputes submitted to the labour courts will always be subject to conciliation".

The same legal device, paragraphs 1 and 3 strengthen the conciliatory determination as glimpsed:

"art. 764.

- 1 For the purpose of this article, the judges and the Courts Work employ always facilitation and persuasion towards a conciliatory solution of conflicts.
- third parties can celebrate agreement termination of proceedings even after closed the conciliatory judgement. "
With regard to the provisions of paragraph 3 above, the legal system of labour conciliation can be proposed and carried out at any time and at any stage of the process, including in the implementation.

Indeed, it is not uncommon in judicial auctions and public auctions conducted by the Specialized Justice, lots be withdrawn moments before being offered to the public before the signing and approval of agreement. In these cases, the judge examines the Convention and decides for its approval so that freaks out the cool effects. The release of the goods pawned and the provision for disposal by public auction or square is conditional on the fulfilment of the agreed rule.

However, I glimpsed the obligatory conciliation proposal only on the device above. In the ordinary labour rite is determined that: "Art. 846-open to hearing the judge or President will propose conciliation. (Wording by law number 9022, 5.4.1995) ...  

Art. 850-Complete the statement, can the parties add final reasons in no surplus of 10 (ten) minutes for each. Then the judge or President will renew the proposal for conciliation, not realizing this, will be handed down the decision.

Such rule, originally from conciliatory principle binds the effectiveness of the hearing and the judgment to the conciliatory proposal formulation, since, if not expressly appear in the minutes of the hearing conciliation proposals by the judgment, the judgment may be overturned. These are matters of public order as if extracts of judged below:

"TRT-23-ORDINARY LABOR RESOURCE RO 1,412,200,900,623,006 MT 01412.2009.006.23.00-6 (TRT-23)

Date of publication: 12/1/2010

Menu: INVALIDITY For LACK Of CONCILIATION PROPOSAL. The Labor Law provides expressly in various bondage devices imperative of individual and collective disputes conciliation proposal. This is procedure that favors the autonomy of will of the parties by means of a negotiated settlement under the tutelage of the State. The judge fit to lead the negotiations between the parties printing guidelines in order to resolve the conflicts in order to bring social peace and favoring the reasonable duration of the process. The subjection of the collective conciliation proposal is, therefore, subject to public order, whose non-compliance requires the Declaration of invalidity of the decision-making proceedings applied. An ordinary appeal to that provision to declare null and void all acts practised decision-making from the order of FL. 177 and determine the return of the case back to the lower court for your regular processing, leaving the other defendants materials by disadvantaged applicant."
"TRT-16-00044-2007 MA 44,200,799,916,003-999-16-00-3 (TRT-16)

Date of publication: 11/23/2007

Menu: PROCEDURAL NULLITY. ABSENCE OF CONCILIATION PROPOSAL. The mandatory conciliation attempt, along the lines of Article 764 of the consolidated, is imperative of public policy, leading to its absolute absence the nullity of the process. Seen, reported and discussed these autos to APPEAL, in which they are parties (complainant) PETER AGUILAR and MUNICIPALITY of BURNOPFIELD/MA (claimed)."

The principle of reconciliation is so present and so representative in labor that makes justice spatial res judicata the sentence homologatória of agreement and have character is not actionable, except social security, and may be modified only by Termination Action. Such assertion is amparo in the sole paragraph of art. 831 of CLT that thus offers: Art. 831-the decision will be made after the parties rejected the proposal for conciliation.

Sole paragraph. In the case of conciliation, the term is drawn up be worth as non-actionable decision, except for the Social security system with regard to contributions that are due. (Wording by law No. 10035, 25.10.2000)

CONCILIATION AND CONCILIATOR

As stated by Claudio Ribas (2014:114), "reconciliation is an important tool to consolidate the policy of solving disputes without State intervention, through its power to judge, but through properly prepared to conduct technical procedure".

The best concept of CONCILIATION that we found is that defined by the Court of Justice of the State of São Paulo, which thus determines: "auto Process, informal but structured composition, in which one or more facilitators help the parties to find a solution acceptable to all".

This definition is extracted the figure of what we call "indirect Decider" which is the one that will act on the deal in order to intervene indirectly in the result using scientific methods to compose themselves parties. The figure of the facilitators in the definition above is that of CONCILIATOR (indirect decider) and the figure of the judge togado.

According to the booklet offered by TJSP requires the CONCILIATOR (indirect decider):

- Establish trust (acceptance of the conciliator of the parties)
• Listen actively—Know listen with equanimity, you must let people speak without stopping them before hearing what effectively wish to say. ("LISTEN TO LISTEN, NOT TO ANSWER")
• Recognize feelings (need or ulterior motives), which will be the basis for negotiation
• Make open-ended questions (containing no attribution of guilt)
• Be free from trials and evaluations (neutrality)
• Separate the people from the problem
• Create standards goals
• Get on the autonomy of will (spontaneous attitude)
• Intervene with parsimony (and rapid)—it is recommended that the conciliator not intervene unnecessarily.
• Confidencializar the hearing (confidential)

Check here to search the application of techniques that influence the parties so that they reach a clear autocomposição indirect interference in decision-making.

What is sought in conciliation is that, with little interference from the indirect, the parties can decidendor set and compose a solution to the conflict without a direct decision-maker (Judge togado) decide for one of the sides.

It can be said that, in Conciliation the parties give up any right to have a quick and effective solution to the conflict. One can still say that if that if search is that the Parties individually lost a bit so all win too, because a claim resisted brought to togado judge and judicial protection can not only put an end to the conflict as yet not do better justice.

Francisco José Cahali (2012:37), "autocompositivas solutions, although it may engage a third party as a facilitator of communication (including with proposals of a solution, as the case may be), the final result depends solely on the will of the parties; the acceptance or refusal to composition is in the will of the person concerned. Already in the methods heterocompositivos, the solution of the conflict is matter by a third party, with the power to both (magistrate, referee, etc.) give because talking in solution awarded; the Parties shall be submitted for decision by the third preferred, even if contrary to their interests ".

For Banks, "we have real conciliation anticipation of the end of the process, as it is allowed to the conciliator investigate the causes of the dispute, to establish the frank dialogue and objective between the parties, including, taking knowledge of the State of solvency of the debtor, in the case of appointed obligation to do or not do, and especially in situations of damning content disputes."

Daring to disagree with the assertions, as already mentioned can be seen in figure a conciliation which we call indirect decider because, in spite of the will of the parties as a final point, conciliatory or not, there is strong influence of conciliator who, unlike the mediator, interferes in demand making proposals and influencing the parties.
Therefore, it is possible to affirm that, by better technique can be applying, the conciliator is not without taking advantage of one of the sides to influence the other party to compromise or even not to give in. There is no exemption, certainly.

Such terraces above techniques are not the same applied in mediation, whose complexity is much higher as well as the skill and training of the facilitator. However, it is not mediation dealing with the principles explored here.

THE JUDGE AND THE CONCILIATOR

As demonstrated to the conciliator fits apply techniques for which the parties settle down and be on auto a less traumatic solution to the conflict, but subject to certain extent. What if question is if there are harmonically in the same figure as associate judge and the conciliator.

This is because the direct decision-maker was indoctrinated throughout his academic life to make decisions, impose measures, determine, i.e. the last word, since the indirect decider-conciliator – has other goals and other ideologies in addition to other indoctrination.

In his "Hermeneutics and (m)" professor Padman (1999:51) makes mention of the above stated, as if extracts:

"Ideologically, this (double) paradigm crisis stands in a tangle of beliefs, fetishes, and justification values through specific subjects called for Warat (1994:57) of common sense theorist of Jurists who are legitimized through speeches produced by institutions, such as parliaments, courts, law schools, professional associations and public administration. This concept reflects a complex of accumulated knowledge submitted by the legal institutional practices, expressing, but a set of representations, teleological, moral, aesthetic, political, metaphysical, epistemological, scientific, technological, professional and family lawyers acetam in their activities by means of legal Dogmatics ".

And yet, "the common sense coisifica the theoretical world and compensates for the shortcomings of legal science".

As you can tell, the "judge" is indoctrinated to such and do, or should I devote, his life in the pursuit of knowledge for legal interpretation of the rule and the application in the case study.

The legal studies as a rule are in this sense, the better applicability of decisions, rational application of "decisum", as one realizes in Alexy (1991) in his theory of legal argument that brings a rational and logical discourse in pursuit of "claim" correction of legal discourse.
On the other hand, the conciliator did not have this dogmatic and training in practice, even needs to be a professional of law by receiving training for application of conciliatory technique without demerits.

It is possible to affirm in a simple analysis, which in a sense, we are all conciliators because, at some point in our lives we participate in a discussion or interventivamente conflict of some sort, whether at work, at home, in a relationship with friends or neighbors, assisting in the resolution of the conflict and on composition. So, we all have some intuitive experience in conflict resolution through the use of conciliation.

Recently, on the occasion of the 125/2010 resolution of the National Council of Justice that created the Judicial Centres of conflict resolution and citizenship by determining parameters for enabling conciliators and mediators. It turns out that the said Annex does not define who can be a conciliator and mediated, inferring that any person can be, even without any adequate vocational training.

How silent the resolution, is the courts qualify or select the professional, as by the requirement of the Court of Justice of São Paulo that determines:

"Who can act as Conciliator.

The conciliators are auxiliary Justice, recruited, preferably between Bachelors in law, spotless reputation and who have professional and social behaviour compatible with function."

Certainly, the requirements for the judiciary require dedication infinitely greater, going through various stages probative and years dedicated to learning.

FINAL CONSIDERATIONS

Starting from the previous premise, it would be very simple-minded application of techniques of composition by the judges togados auto, since any ordinary human being can be an indirect decider, devoting little time to his life to study of the applicable techniques, and in many cases would have done much more innate ability to locutória a practical result, because a judge togado dedicated years to spend in tender and be invested in the jurisdiction.

A mythological being is a being of the imaginary. Mythology is the study of myths and myths are nothing more than fictions, factoides, fables. This figure is the one that represents the judge conciliator. A myth.

As already explained, the conciliatory activity is activity to anyone. In some cases, even necessary degree as in the case of extinct labor judges of Labor Court that were appointed by the workers ’ unions and
employers simply by being union leader. Such judges had the task, and conciliatory only after constitutional amendment 24, of 12/9/1999, was the figure of judge vowel on labor courts. With this, the labor claims which were adjudicated in first instance the seams of conciliation and Trial (formed by a judge togado, an employee representative and a vowel vowel employers ’ representative), came to be judged in the sticks work, composed of a single judge (togado).

The judge is not togado anyone. In practice only offers conciliation at the hearings on the grounds of legal determination and his sentence would be null if not ofertasse.

"Conciliator-judge" when it has to apply the principle conciliatory in his audience, in rule imposes the deal with threats to parties suggesting that there may be sanctions in case of refusing the offer. It is true that in these cases there is no conciliation and the acceptance of enforced by fear of what may come.

Fit the application of the principle of proportionality (WAR CHILD, 2003:245). The answer is Yes, of course. The concept of proportionality refers to prudence in determining the appropriate relationship between things. The idea of proportionality reveals himself not only as an important fundamental legal principle, but also constitutes a true argumentative frame, to express a judgment accepted as fair and reasonable generally, of proven usefulness in solving practical issues. This principle is defined by Willis with such emphasis that call it Principle of Principles.

In fact, it's not what it appears in rule. In many cases, even at the request of the parties to make an intervention offering a conciliatory solution to deal (proportionality), refuses flatly because its "position" does not allow such a coach. When not, is limited to the question of whether or not agree – nice – and formality, or continues the audience (in the case of the labour courts) or determines the performance of the instruction hearing scheduling of judgment as.

The mythological figure of judge peacemaker or conciliator is easily checked by the behavior of the magistrate. His training has been always in the sense of making decisions as it is to this that the State invests in the jurisdiction. Is trained to analyze and interpret as positivistic way legislation and apply it to the case. Never neutrally in order to move the pieces and take them to an auto composition as is the objective of the conciliator.

None of the rules presented in the booklet of the Court of Justice of São Paulo – above – is followed by judge togado by a simple fact: anyone can run them and the judge togado, in his vision, not just anyone. Such tasks are too much for whom he dedicated simpering for years to legal studies and is invested in the jurisdiction and has the power to decide.

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