JUDICIAL ACTIVISM: A LIVING IMAGE OF LAW REFLECTED IN THE SOCIAL MIRROR

https://doi.org/10.56238/sevened2024.031-043

Marcio Bulgarelli Guedes[1], Juvêncio Borges Silva[2], Ricardo dos Reis da Silveira[3], Maria Cristina Vitoriano Martines Penna[4] and Laise Reis Silva Guedes[5]

ABSTRACT

The article analyzes the instrumentalization of the law for the purpose of promoting social emancipation. It hypothesizes whether the protagonism attributed to the Judiciary in the Democratic State of Law at the turn of the last century to the twenty-first century materializes the promises of modernity based on the theory of the social contract and driven by the Enlightenment ideology to make effective the freedom and social rights of the Constitution. To this end, first, legal positivism is presented, in search of the recognition of the subjects and equal participation; second, the historical bases of the constitutions are established, to confirm the metamorphosis of the law and the model of jurisdictional control by the main and incidental routes; to, third, show judicial activism, mapping the decisions of the Supreme Court. It concludes on the importance of the Judiciary in the realization of positive and negative rights. The article was guided by the hypothetical-deductive method and was based on books, scientific articles, legislation and jurisprudence.

Keywords: Legal Positivism. Emancipatory Promise. Time of Law. Constitutional Jurisdiction. Spectrum of Society.

[1] Doctorate student in Collective Rights and Citizenship
University of Ribeirão Preto - UNAERP
Sertãozinho, São Paulo, Brazil
E-mail: m.bulgarelli@bol.com.br
ORCID: https://orcid.org/0009-0005-0522-4235
[2] Professor of the Doctoral Program in Collective Rights and Citizenship
University of Ribeirão Preto – UNAERP
Ribeirão Preto, São Paulo, Brazil.
E-mail: jsilva@unaerp.br
ORCID: https://orcid.org/0000-0001-9403-2713
[3] Professor of the Doctoral Program in Collective Rights and Citizenship
University of Ribeirão Preto – UNAERP
Ribeirão Preto, São Paulo, Brazil.
E-mail: rsilveira@unaerp.br
ORCID: https://orcid.org/0000-0002-7917-6724
[4] Doctorate student in Collective Rights and Citizenship
University of Ribeirão Preto - UNAERP
São José dos Campos, São Paulo, Brazil
E-mail: cris.penna@bol.com.br
ORCID: https://orcid.org/0000-0001-7826-8259
[5] Doctorate student in Collective Rights and Citizenship
University of Ribeirão Preto – UNAERP
Três Pontas, Minas Gerais, Brazil.
E-mail: lrs_3p@hotmail.com
ORCID: https://orcid.org/0000-0001-8958-8303

INTRODUCTION

This article summarizes the successive solutions adopted in the face of the transformations of law, the State and society.

In methodology, it is intended to refute or confirm the hypothesis of instrumentalization of the law as a promise for social emancipation, focusing on the rise and protagonism of the Judiciary in the model of the Democratic State of Law of the current Constitution of 1988.

The article is based on bibliographic research (legal works, scientific articles, legislation and jurisprudence), with a qualitative approach to judicial activism, in search of an answer to the problem and proof of the hypotheses raised.

For the development of the theme, the article was structured in four phases: The first phase is the inquiry phase. The second phase is the panoramic phase. The third phase is the "zoom" or approximation phase and the fourth phase is the final or reflective considerations phase.

The inquiry phase brings the motivations of the study and follows the path to follow during the development of the work. Thus, from the outset, the question arises: what is meant by emancipatory promise in the social contract and what is the role of the Judiciary in the Democratic State of Law due to the model of constitutional jurisdiction and the transformations of law, society and the State into judicial activism?

In the panoramic phase, to answer the question of the previous phase, theoretical and practical development will be carried out, with historical, political, social and legal notes. As a premise, it wants to present the social contract as a promise of the right to connect with the future, preserving the social conquests of perpetual peoples untouched, and it wants to demonstrate the successive transformations of the State, in self-regeneration, like a phoenix, to transform the law into a kind of social mirror capable of reflecting the image of society and, at the same time, to give it a life of its own to recognize the subjects and redistribute income.

Still in the panoramic phase, in counterpoint, from the classical theory of the separation of functions from the organs of the State, in the face of the political upheavals according to the Brazilian constitutions, it is intended to highlight the rise of the Judiciary power throughout the transformations of the liberal State to the Social State and from the Social State to the Moral State of Law of the 1988 Constitution and to present the model of control of constitutionality by the means of defense or incidental and by the concentrated way, identifying the procedural instruments of access to the Judiciary to guarantee all

constitutional rights violated, not recognized or not distributed by the other powers as a way of concretizing the promise of connecting the future.

In the third "zoom" phase, with a focus on the Judiciary, the image of judicial activism will be expanded, with the intention of presenting the Anglo-Saxon origin, the species (methodological judicial activism, procedural judicial activism, structural judicial activism, judicial activism by law and, finally, antidialogical judicial activism), the causes (technological advancement, transformations of society, dysfunctionality of the other powers and inaccuracies of the law) and the concept, as well as the divergence of understanding on the matter. In detail, in a kind of jurimetrics, we want to map some judgments in the Federal Supreme Court, involving the allocation of public resources, prohibition of nepotism, stem cell research, civil union between homosexuals, interruption of pregnancy of an anencephalic fetus, federal intervention, "ADPF of the favelas", racism, presumption of innocence and homeschooling.

In the phase of reflective considerations will be the conclusions of the work. The result is the confirmation of the leading role attributed to the Judiciary in the Democratic Rule of Law of the 1988 Constitution. Thus, when provoked by society and institutions, in the ideal of participatory democracy, the Judiciary is moved to the center of political decisions and must decide in search of the realization of fundamental constitutional rights, through creative interpretation and social transformation through law. The political aspect of the decisions was not analyzed, although the hypothesis of interference in the face of the model is not excluded.

EMANCIPATORY PROMISES

In premise, the entire legal order (constitution, laws, codes) is thought of as a promise, in the sense of a norm. Through the promise, the future becomes "*less unpredictable"* (OST, 2005, p. 61).

The social contract is a mutual promise. The people entrust to the government the task of establishing general and permanent laws, with a view to the public good, with the commitment of the rulers not to exceed or deviate from the terms of the contract (constitution), guaranteeing equality and freedom. They are considered reciprocal obligations.

The liberal State, centered on the social contract of the great revolutions – English (1689), American (1776) and French (1789) – promises free competition and non-intervention in social relations, with individualism at the center of the conflicts in the "status libertatis" (CORDEIRO, 2001, p 75-76).

At that time, freedom was associated with the idea of property, approaching John Locke's conception. Over time, however, freedom began to be associated with equality, approaching the conception of Jean-Jacques Rousseau (ANTERO, 1979, p. 83-84). New fundamental rights are conceived and other social rights become part of the idea of citizenship and democracy.

In the twentieth century, social movements and trade unions contested the liberal state, causing self-regeneration. The "Welfare State" emerges and, in it, the State begins to intervene in social relations, with the obligation to do and intervene, and is therefore called the Social State. However, the nomenclature does not reach the promises of social emancipation, requiring a new configuration.

The Democratic State is then perfected. It is the time of the "status civitatis". The State assumes the political promise, with the standardization of individual rights, social rights and collective rights in the Constitution. We are faced with a society marked by plurality. The right to demand information of collective interest and the right to democratic participation in decisions of interest to the community are guaranteed (FIGUEIREDO. 1989, p. 20-22).

For the promise to be emancipatory, it is necessary to recognize the individuals and social groups excluded by society and that there is the redistribution of income as part of the concept of citizenship (GALVÃO, 2015, p. 7-24). As a result of human construction, it is intended that the law imposes a progressive agenda to overcome economic determinism and to guarantee equality.

The rational-scientific approach to law occurs with the legal positivism of the twentieth century. Law is established by state norms, which have authority by virtue of their recognition by a higher legal rule. This matrix rule is recognized as a function of a convention. A "legal" norm detached from morality, but anchored in legal criteria of validity stipulated by the hypothetical fundamental norm (KELSEN, 2011, p. 221), which will serve as a ballast for the construction of the State and law.

The Constitution is the superior norm that establishes the constitutive rules of the State and of the law. It is the *"body"* of the State (TEMER, 1989, p. 17-20), marked by the complexity of changing its precepts and by the means of constitutional control. In a political sense, the content of the Constitution concerns the way of being of the State, the organs of power and government, and individual and collective rights. In a sociological sense, the constitution can represent effective social power or distance itself from it. In a legal sense, the rational will of man.

That traditional society, whose legal recognition depended on social status, is now, in modern society, replaced by the promise of equal treatment, with the law appearing with the function of defining a system of recognition and affirming fundamental rights and guarantees - negative rights (individual freedoms) and positive rights (political, economic and socio-environmental rights).

Law becomes dynamic through the rule of modification, allowing the alteration of the primary rules (rights and obligations) by official agents, as opposed to the static character of rules based on morality. From this perspective, morality is no longer conceived as an absolute truth and law has the power to regenerate values, prevent setbacks and promote social transformations.

It is as if the law were the "social mirror" (SANTOS, 2012). It reproduces the dominant images and, sometimes, the reflected image takes on a life of its own. Thus, it is said that law can reflect the changing morality of society; it can become a statue, reflecting conservative values that do not represent social reality; and, finally, it can reflect a more virtuous image to society, promoting social emancipation. This third image of law is the objective of progressive legal theory.

If, on the one hand, there are those who argue that the law can serve to foster transformation through social emancipation, on the other hand, there are adverse positions (DIMOULIS, 2017, p. 1-4), criticizing that the law is submissive to the interests of the dominant classes; that the role of the law is diverse, but it is not emancipatory; and that the law is a mere repository and that, Even if there is a change, this change happens only to privilege the "status quo". In any case**,** the law establishes rules that rule out other reasons for acting, even if they are contrary to moral convictions.

According to the theory, recognition must happen in three distinct spheres. In the sphere of love, in the sphere of law and in the sphere of the community of values. When this does not occur, however, in a paradoxical way, disrespect generates a feeling of injustice and works as a guiding idea for the struggle for recognition. With the advantage that, every time recognition is won for social reasons, it is incorporated into the company's assets, with the principle of prohibition of retrogression. Thus, it serves as a model for the emergence of new social struggles and for the evaluation of the moral development of a society.

The law can anticipate the demands for recognition, giving means for it to impact the social relations and culture of a society. Likewise, the law has the potential to redistribute income in the face of economic inequalities. It is not only a question of economic interest,

but, above all, of the principles of freedom and equality, by allowing individuals to participate in equal conditions in social life and to have access to the existential minimum.

All members of society are considered partners. If there is no recognition, or even if there is a poor distribution of income, we will be faced with institutionalized social subordination. Lack of recognition means denying the individual's participation. The poor distribution of income consists of preventing equal participation.

Thus, the law is the appropriate means for the remodeling of social subordination, with policies that enable the visibility of the subject as a member of society; and has the capacity for institutional restructuring capable of redistributing income for participation.

On the one hand, a society lacking in the realization of rights and, on the other hand, a Constitution that guarantees rights to all. This is the counterpoint. What is the role of the Judiciary?

THE RISE OF THE JUDICIARY

The Constitution is the presupposed and necessary paradigm for the investigation, bringing the theory of the distribution of functions to the organs of the State.

According to theory, the Legislature has the function of creating positive law. The Executive exercises the functions of head of state and government, implementing the general rules by its actions. The Judiciary reserves itself to the technical functions of applying the law in the resolution of conflicts.

In the liberal State, for a long time, it was understood that the Legislative power overrode the other powers, as it represented the general will (NEVES, 2001, p. 122). Once the law was created, it was up to the Executive to apply it and the Judiciary to assess the controversies arising from it, however, without interpreting the content of the law. He was a mere reproducer of the "will" already fixed.

The Political Constitution of the Empire of Brazil (1824) adopted the Judicial Power (Title VI), declaring it independent and composed of judges and jurors. However, the control of constitutionality was exercised in the Legislature, by the General Assembly, and it was responsible for making laws, interpreting them, suspending and repealing them and watching over the safeguarding of the Constitution, and not by the Judiciary. There was also the Moderating power, with the sanction of the Emperor, which concentrated several prerogatives and, therefore, was considered the key to political organization (article 13, VIII and IX).

The Constitution of the Republic of the United States of Brazil (1891), in its article 60, paragraph 1, paragraphs "a" and "b", instituted the federative regime, implemented the

federal and state courts and, influenced by the universal jurisdiction ("judicial review"), of North American law ("common law"), implemented the control of constitutionality by way of defense or exception (or incidental). Alongside the Legislative and the Executive, the Judiciary became a sovereign power of the Republic, however, at a time when Justice was not accessible to all, the vote was not universal and women did not vote, being still a mere reproducer of the will of the laws in the solution of disputes, as a rule, criminal and private rights.

The Constitution of the Republic of the United States of Brazil (1934) maintained the duality of Justice, expanded the forms for the control of constitutionality and instituted the Military Justice and the Electoral Justice, in the Judiciary, and inserted the Labor Court. There was an innovation in the representation of federal intervention, however, the Judiciary was prohibited from hearing political issues (Article 68).

The Constitution of the United States of Brazil (1937), of an authoritarian nature, extinguished the Federal Justice and the Electoral Justice, with strong political interference by the Executive in the other branches. During its validity, the prohibition of the Judiciary to hear political issues was maintained and the Moderating power was resurrected, with the supreme authority to the President (Article 73). The Supreme Court is weakened by reserved and limited functions (Article 96).

In the period of the Social State, the center of decision-making was extended to the Executive branch and, instead of correcting socioeconomic inequalities, it tended to *"hypertrophy"* (MACIEL, 2000, p. 67), legislating through provisional measures and prioritizing the opening of the market. In real life, the social promises of the formal plan do not materialize, requiring a new reconfiguration of the model.

After World War II, there was redemocratization. The Constitution of the United States of Brazil (1946) rescued the innovations and sensitive constitutional principles and instituted the possibility of federal intervention in the State to expunge the norm from the legal system, the suspension of the execution of unconstitutional laws after a decision of the Federal Supreme Court and the option of extraordinary appeal of the causes. The Judiciary was structured, adding the Labor Courts to its staff.

The Constitution of the Federative Republic of Brazil (1967) maintained the previous judicial organization. Institutional Act No. 5, of 12-13-1968, however, caused major changes in the Judiciary, emptying its power. The constitutional guarantees of the magistrates were suspended and the President of the Republic, by decree, had the power to dismiss, remove and retire the magistrates. In addition, the acts performed under the cloak of the institutional

act were excluded from the appreciation of the Judiciary, as well as the granting of "habeas corpus" (SIFUENTES, 2000, p. 97-99), differing from the current reality.

With the promulgation of the Constitution of the Federative Republic of Brazil, on October 5, 1988, like a phoenix, the Democratic Rule of Law was reborn. Now, the new Promethean Charter is called the "Citizen Constitution" and brings social rights and citizenship, structuring the Judiciary, in Title IV - "Organization of Powers" (TEIXEIRA, 1998, p. 82-83). Constitutional theory rescues the promise of modernity (equality, social justice and guarantee of fundamental human rights) and repositions the Judiciary in the classic relationship between the powers of the State, electing it as the protagonist of the democratic process and claiming its most effective presence in the solution of social and collective conflicts.

Although everyone recognizes the Judiciary in its strategic role, however, there are two groups with different arguments about the role of judges and courts. In the first group, called proceduralism, the Judiciary should be limited to the task of protecting the process of democratic creation of Law, guaranteeing the formal aspect. In the second group, called substantialism, the Constitution establishes the conditions of action as an explanation of the promises of the social contract (STRECK, 2014, p. 55-57). On the real-life level, finally, based on empirical data, the research group Judiciary and Democracy ("Jude") states that the judicialization of politics is the result of the model of the 1988 Constitutional Law (ARANTES, 2023, p. 1-3).

It is a fact that the constitutional model causes the Judiciary to be provoked to decide on issues relevant to society and that, as a political power, it recognizes the right to set obligations and to say those that do not exist. Constitutional jurisdiction derives from the application of the Constitution by judges and courts, in the exercise of control of the constitutionality of laws or public acts and in the interpretation of the infra-constitutional order in accordance with the Constitution in the various ways of access to the Judiciary (BARROSO, 2015, p. 383). In fact, in order to facilitate citizens' access to justice (SANTOS, 1999, p 189), in addition to the paradigm shift, procedural instruments emerge for the defense of diffuse, collective and homogeneous individual interests that are unavailable (ZAVASCKI, 2006, p. 88), for the verification of the unconstitutionality or illegality of the act of an agent of the Public Power (TUCCI, 1990, p. 38) and for the guarantee of the decisions of the Federal Supreme Court and for the preservation of its competence (OLIVEIRA, 2015, p. 6-7).

Among the procedural instruments, we can mention the popular action, the public civil action, the collective writ of mandamus, the "habeas data", the writ of injunction, the

direct actions (ADI, ADO, ADPF, ADC and IF) and, more recently, the constitutional complaint.

All are procedural instruments that value the functions of the Judiciary within the Democratic Rule of Law of the 1988 Constitution, with the attribution of powers of intervention to the judge and with the possibility of setting fines distinct from indemnities, even if ex officio, for the implementation of public policies.

The substantive due process of law and the universality of jurisdiction, enshrined in article 5, XXXV and LIV, of the 1988 Constitution, guarantee the interpretation within isonomy and legality and the application of constitutional principles, building an awareness of citizenship in the Democratic State of Law, to avoid the existence of illegal acts and arbitrary laws *(*RULLI, 2001, p. 132-137).

Constitutional jurisdiction, therefore, can be by incidental or exceptional means and by main or concentrated means (BARROSO, 1998, p. 103). In that incidental way, all judges and courts, as organs of the Judiciary, may fail to apply a rule that they deem unconstitutional. In this main route, control is exercised in a concentrated manner in the Federal Supreme Court, with binding decisions, "erga omnes", reaching cases different from the one in which the precedent was issued.

In this context, it can be said that the legitimacy of the Judiciary derives from the normative force of the Constitution and the laws. Thus, when provoked by society and institutions, it is incumbent upon it to resist the onslaughts of the other Executive and Legislative branches that render fundamental human rights ineffective and that represent a social setback (STRECK, 2014, p. 43-73), in the face of the principle of prohibition of retrogression, as a way of preserving the social achievements of past peoples, in an evident evolution towards the model of State and activist democracy.

JUDICIAL ACTIVISM ON "ZOOM"

In a humorous expression, activism is what the judge does and you don't agree with (SUANNES, 2002, p.107).

Judicial activism has to do with the role of judges and courts in the interpretation of the Constitution and in their relationship with the other political bodies of the State.

In the Democratic State, the independent judge is a fundamental condition (MACIEL, 2000, p. 67). It is understood that the independence of the court is a *sine quo non condition.*

The modern constitutional thesis requires that judges and courts – and legal operators, together with social actors – be creators of law and free interpreters of the law

(GAULIA, 2001, p. 142-145), aiming at the concretion and effectiveness of legal commands, justice and social peace.

If, before, the Judiciary was not accessible to laypeople and was alien to political issues, now, in the Democratic State of Law, it frees itself from the *"Abdullah syndrome"* (STRECK, 2014, p. 237) and is elevated to the center of political decisions, starting to interact with the community (PACHÁ, 2001, p. 236).

At the origin of judicial activism, when studying the decisions of the justices of the Supreme Court of North America, the following were identified: activist judges in the defense of the rights of minorities and the poorest; activist judges in the protection of freedom; self-restrictive judges; and judges of the balance of political force (CAMPOS, 2016, p. 60-62).

It can be seen, therefore, that judicial activism is opposed to judicial self-restraint. Through judicial activism, the will of the Judiciary prevails over the will of other political entities, given the need to act in defense of constitutional freedoms. By judicial self-restraint, however, there is no invasion in politics and preference is given to the Legislative power.

There are those who argue that there is no permission for judicial activism, even in the Democratic State of Law, and that the Judiciary should limit itself to ensuring citizenship and the means for resolving conflicts. When the Judiciary legislates or interferes in public policies, the invasion transforms it into an authoritarian instance and undermines representative democracy by usurping the other powers (DIAS, 2020, p. 177).

It should be noted that the law is not perfect and finished, needing adaptations according to reality. Thus, in order for the promise to connect with the future, the legislator establishes the principles, such as general clauses, brings blank references and indeterminate concepts. In many situations there is not even a conflict between the laws, but only a void to be filled by integration techniques (analogy, equity and principles). These are hypotheses considered as hard cases, which sometimes bring judges closer to a legislative function to settle the conflict (GAULIA, 2001, p. 144.).

If, for some, judicial activism is inappropriate, for others, at the other end, it serves to give completeness to the Democratic Rule of Law. The advancement of technologies and the emergence of new legal relations in society cause the Judiciary to be provoked to express itself on the facts that are placed in paradoxes (BEGALLI, 2001, p. 153). Judges and courts have a responsibility to give effect to constitutional freedoms and limitations of powers. In the political upheaval, one sees *"in justice the last refuge of a disenchanted democratic ideal" (*GARAPON, 1999, p. 26).

In addition, the discredit in relation to representative democracy highlights the urgency of the independence and strength of the Judiciary. Even if free elections, universal suffrage, multi-party politics, etc., are maintained, even so, it ends up raising doubts of legitimacy, given that the representatives of the people, after being elected, act motivated by *"petty interests",* often manipulated by *"economic power"* (FRIEDE, 2002, p.129) and by the *"media"* (GARAPON, 1999, p. 26).

In view of the possibility of control and invalidation of the acts of State organs, it can be said that the Judiciary has a counter-majoritarian function. In addition, in certain social demands, in the face of the risks of tyranny of the majority, distortions of the democratic process or oppression, the Judiciary has a representative function; and, finally, for freeing man from the crisis of representativeness and for functioning as a transforming agent, the Judiciary has the Enlightenment function (**HARTMANN,** 2023. p. 10-11). Judicial control of laws and public administration by the Judiciary favors participatory democracy and representative democracy. For example, "*minority parties, which are not in coalition with the Executive, can use the judicial process against the instances of power, that is, against the arbitrariness of the ruler on duty"* (SANTOS, 2002, p.146-147.)*element.*

If the interpretation is creative, expanding or limiting the meanings of the law, it is methodological judicial activism. If there is an expansion of decision-making power, through procedural instruments (e.g., complaint), this is procedural judicial activism. If the judicial decision interferes with the decisions of the other powers, such as the duty to legislate, the duty to carry out public policies and the duty to allocate public resources, etc., this is structural judicial activism. If there is progress in relation to indeterminate fundamental rights, we are faced with judicial activism by right. Finally, in the absence of deference to the other powers, by understanding that the Judiciary is the exclusive interpreter, this is antidialogical judicial activism (**HARTMANN,** 2023. p. 2-5).

This dimension of judicial activism (methodological, procedural, structural, and by law) becomes more evident when the judgments of the Federal Supreme Court are analyzed.

In Direct Action of Unconstitutionality No. 2925, on 12-19-2004, after deeming the concentrated control adequate, the Federal Supreme Court judged unconstitutional the interpretation of the budget law that implies the opening of supplementary credit in an item unrelated to the destination of the revenue.

Another case of judicial activism was the prohibition of nepotism in the Judiciary, with the judgment of the Declaratory Action of Constitutionality (ADC) 12, on February 16, 2006,

by the Federal Supreme Court. Subsequently, this understanding was extended to the other branches, with the issuance of Precedent No. 13.

In Direct Action of Unconstitutionality (ADI) No. 3510, on May 2, 2008, the Federal Supreme Court understood that the provision of the biosafety law for the use of embryonic stem cells in scientific research for therapeutic purposes is constitutional, based on constitutional norms that conform to the fundamental right, dismissing the action.

The recognition of civil unions between homosexuals is also another example of judicial activism. On 5-5-2011, the Federal Supreme Court judged the allegation of non-compliance with a precept (ADPF) No. 132 and the Direct Action of Unconstitutionality (ADI) No. 4277, declaring, in a methodological dimension, the constitutionality of civil unions between people of the same gender.

In the judgment of the Allegation of Non-Compliance with a Fundamental Precept (ADPF) n. 54, on April 12, 2012, the Federal Supreme Court declared unconstitutional the interpretation of the interruption of pregnancy of an anencephalic fetus as a crime, debating issues of sexual and reproductive freedoms, health, dignity, self-determination, in short, fundamental rights.

Federal intervention representation (IF) No. 5179 was filed, under the pretext of compromising the Executive and Legislative branches, in the face of the large corruption scheme in the Federal District, but, on June 30, 2010, the Federal Supreme Court dismissed the federal intervention, because, being an extreme and exceptional measure, at the time of the judgment, order had already been restored.

In ADPF No. 635, due to the public security plan implemented in Rio de Janeiro, civil society organizations presented recommendations, through direct action, to the Federal Supreme Court. Several precautionary measures were granted (such as prohibition of the use of armored helicopters as a shooting platform in police operations; prohibition of operations in school perimeters and hospitals; mandatory preservation of the crime scene; expeditious investigations; suspension of the effectiveness of the article that excludes homicides resulting from police intervention, etc.).

On 6-13-2019, the Federal Supreme Court judged the direct action of unconstitutionality by omission (ADO) 26-DF. In decision, homophobic and transphobic conducts, as they translate expressions of racism, by identity of reason and through typical adequacy, fit the primary precepts of incrimination in Law No. 7,716/1,989 and the qualifier in the hypothesis of intentional homicide.

There are situations in which the Federal Supreme Court protects the Powers, in the face of the verification of the progressive and effective march for the achievement of the

constitutional program. This is the case of the direct action of unconstitutionality by omission (ADO) n. 2, which sought to expand the staff of the Federal Public Defender's Office. Not all policies are ready and finished, on the contrary, many of them are complex and involve spending. In a decision, pointing out the competitions held and the forecast for the creation of new positions in a budget bill, the action was dismissed.

The case of the execution of the sentence based on conviction in the second instance changed the course of history. The 1988 Constitution inscribed the principle of the presumption of innocence, by which the definitive imprisonment of the defendant should take place after the final and unappealable judgment. However, in 2016, the Federal Supreme Court authorized the defendant's imprisonment from the conviction in the second instance. In view of this, direct actions of constitutionality (ADC) 43, 44 and 54 were filed in the Federal Supreme Court and, in the judgments, the actions were judged to be well founded, with the declaration of the constitutionality of the provision of the criminal procedural legislation, which regulates exactly the presumption of innocence by conditioning definitive imprisonment to res judicata.

In addition to these examples of direct actions, through concentrated control, there are also several precedents, from the Federal Supreme Court, of judicial activism in diffuse or incicental control. An interesting case is the extraordinary appeal (RE) 888815/RS, judged on 9-12-2018, in which the Federal Supreme Court judged unconstitutional any of the types of radical "unschooling", moderate "unschooling" and pure "homeschooling". According to Theme 822, homeschooling is not a subjective public right of the student or his family. However, nothing prevents regulation by federal law, in the "utilitarian" or "for circumstantial convenience" modality, as long as the obligation and the joint and several duty are complied with.

FINAL CONSIDERATIONS

In final reflections, on the promise of the social contract of connection with the future, it is concluded that the law can and should serve as an instrument for social emancipation.

It was found that, since the emergence of the modern State, the law has been transformed according to the social reality of each era, replacing one form with another, without breaking the thread that connects them.

To register the emergence and revocation of norms, the law presupposes being reborn reinvigorated, with each new edition, with the purpose of becoming effective. Over time, however, according to the needs of today's people, metamorphosis is inevitable in the face of new technologies, the influence of the media and the essence of democracy.

This phenomenon can be verified in the history of Brazil. Over the years, constitutions serve to prove the transformations of the State. It can be seen that most constitutions disguised an authoritarian and exclusionary regime (1824, 1891, 1937, 1967 and 1969), reflecting an image of the dominant ideology, and that there are few constitutions that are really considered democratic (1934, 1946 and 1988).

The Democratic Rule of Law of the 1988 Constitution is the practical result of successive solutions experienced by perpetual peoples until the current people. Moving from the model of "status libertatis" to the model of "status civitatis", we witness the promise of the realization and realization of individual and collective rights, making democratic recognition and participation in public life viable.

What stands out in the Citizen Constitution is the protagonism reserved for the Judiciary, elevated to the role of guardian of the Constitution. With the expansion of the procedural means of access and the encouragement of democratic participation, whether by concentrated control or by diffuse control, the Judiciary began to interfere in important political decisions of public life, for the recognition of subjects of rights and for the distribution of income, with the concretion of Promethean ethical and legal values.

Judicial activism is driven by a progressive jurisprudence. In the social mirror, it reflects an image with a life of its own, capable of making constitutional and legal precepts prevail to correct inequalities in issues as diverse as they are sensitive to society, but which need to be defined. Social rights are not conditioned by the will of the administrator and the principle of separation of powers cannot serve as an obstacle to the realization of social rights.

This was proven when analyzing some judgments of the Federal Supreme Court. Faced with the dysfunction of the other organs of the State, the Judiciary was provoked by society and institutions to express itself on important issues (embryonic research, same-sex marriage, public security, budget allocation, equalization of racism, the fight against nepotism, etc.), participating in the process of transforming the law, the State and society.

In a democratic society, all legitimate interests must have legal protection, especially those that have always been on the margins of legal guarantees (minorities). Thus, as a judicial body, society expects to find in the judge the jurist, the conciliator, the peacemaker of social relations and, in particular, the protagonist of public policy. Although it is joked that judicial activism is for those who do not agree with the judge's decision, in practice, however, it is presented as something desirable and, as long as it is not considered antidialogical, judicial activism must handle the law to overcome economic determinism and to produce a structural impact on society with the realization of the promises of social rights.

REFERENCES

1. Antero, P. H. C. (1979). O pensamento político de Rousseau. *Teoria Política – Cadernos da UnB*, 4, 83-84.

2. Arantes, R. B. (2024, 27 de junho). Judicialização da política é fruto de como a Constituição de 88 foi formulada. *Jornal da USP*. Disponível em: https://jornal.usp.br. Acesso em: 5 de janeiro de 2023.

3. Barroso, L. R. (2015). *O controle de constitucionalidade no direito brasileiro*. 7ª ed. Saraiva.

4. Barroso, L. R. (1998). Dez anos de Constituição de 1988 (foi bom pra você também?). *Revista da Associação dos Magistrados Brasileiros*, 2(5), 103.

5. Begalli, P. A. (2001). Justiça e modernidade. *Revista da Associação dos Magistrados Brasileiros*, 5(11), 153.

6. Brasil. (1824). *Constituição Política do Império do Brazil, de 25 de Março de 1824*. Disponível em: https://www.planalto.gov.br. Acesso em: 6 de janeiro de 2024.

7. Brasil. (1891). *Constituição da República dos Estados Unidos do Brasil, de 24 de Fevereiro de 1891*. Art. 60, §1º, alíneas “a” e “b”. Disponível em: https://www.planalto.gov.br. Acesso em: 6 de janeiro de 2024.

8. Brasil. (1934). *Constituição da República dos Estados Unidos do Brasil, de 16 de Julho de 1934*. Art. 68. Disponível em: https://www.planalto.gov.br. Acesso em: 6 de janeiro de 2024.

9. Brasil. (1937). *Constituição dos Estados Unidos do Brasil, de 10 de Novembro de 1937*. Artigos 73 e 96. Disponível em: https://www.planalto.gov.br. Acesso em: 8 de janeiro de 2024.

10. Brasil. (1988). *Constituição da República Federativa do Brasil de 1988*. Art. 102, I, alíneas “a”, “l”, “p” e “q”; III, alíneas “a”, “b”, “c” e “d”; §1º e §2º; Artigos 103 e 103-A. Disponível em: https://www.planalto.gov.br. Acesso em: 7 de janeiro de 2024.

11. Brasil. (1977). *Emenda Constitucional Nº 7, de 13 de Abril de 1977*. Disponível em: https://www.planalto.gov.br. Acesso em: 9 de janeiro de 2024.

12. Garapon, A. (1999). *O juiz e a democracia: O guardião das promessas* (M. L. de Carvalho, Trad.). Rio de Janeiro: Revan. Disponível em: https://kupdf.net. Acesso em: 27 de junho de 2024.

13. Campos, C. A. de A. (2016). A evolução do ativismo judicial na Suprema Corte Norte-Americana. *Revista do Ministério Público do Rio de Janeiro*, 60, abr./jun. Disponível em: https://mprj.mp.br. Acesso em: 25 de junho de 2024.

14. Cordeiro, F. A. S. (2001). Constitucionalismo contemporâneo e globalização. *Revista da Associação dos Magistrados Brasileiros - Cidadania e Justiça*, 5(11), 75-76.

15. Dias, E. R., & Sá, F. C. L. (2020). O ativismo judicial à luz do pensamento de Konrad Hesse sobre a força normativa da Constituição. *Revista de Informação Legislativa

(RIL)*, 57(225), 165-179. Disponível em: https://www.senado.leg.br. Acesso em: 4 de janeiro de 2024.

16. Dimoulis, D. (2017). Positivismo jurídico: significado e correntes. *Tomo Teoria Geral e Filosofia do Direito*, (1). Disponível em: https://www.pucsp.br. Acesso em: 3 de janeiro de 2023.

17. Figueiredo, L. V. (1989). *Direitos difusos e coletivos*. São Paulo: Editora Revista dos Tribunais.

18. Friede, R. (2001). Regimes políticos, regimes de governo e regimes ideológicos. *Revista da Associação dos Magistrados Brasileiros - Cidadania e Justiça: Fundamentos da ética e respeito ao outro*, 5(12), 129.

19. Galvão, J. O. L. (2015). Direito e transformação social: Contributos teóricos para a (re)construção de uma teoria jurídica emancipatória. *Revista de Informação Legislativa (RIL)*, 52(208), 7-24.

20. Gaulia, C. T. (2001). A interpretação das leis principiológicas e a convicção político-ideológica do magistrado. *Revista da Associação dos Magistrados Brasileiros - Cidadania e Justiça: Os reflexos da globalização nos institutos jurídicos*, 5(11), 142-145.

21. Hartmann, S. E. S. (2023, 10 de outubro). Ativismo Judicial. *Direito Hoje*, Edição nº 65. *Portal Unificado da Justiça Federal da 4ª Região*. Disponível em: https://www.trf4.jus.br. Acesso em: 5 de janeiro de 2024.

22. Honneth, A. (2003). *Luta por reconhecimento: A gramática moral dos conflitos sociais* (L. Repa, Trad.). São Paulo: Ed. 34. (Trabalho original publicado em 1995).

23. Kelsen, H. (2011). *Teoria pura do direito* (J. B. Machado, Trad., 8ª ed.). São Paulo: Martins Fontes.

24. Maciel, C. B. (2000). O juiz independente no Estado Democrático. *Revista da Associação dos Magistrados Brasileiros - Cidadania e Justiça: O Direito do Século XXI*, 4(8), 67.

25. Marques, M. R. (2004). Um olhar sobre a construção do sujeito de direito. *Boletim da Faculdade de Direito - STVDIA IVRIDICA 96 AD HONOREM*, 4, 110.

26. Mello, M. A. (2001). Óptica Constitucional: A igualdade e as ações afirmativas. Em *Cidadania e Justiça: Fundamentos da ética e respeito ao outro*. *Revista da Associação dos Magistrados Brasileiros*, 5(12), 102.

27. Mendes, G. F., & Branco, P. G. G. (2015). *Curso de Direito Constitucional* (10ª ed.). São Paulo: Saraiva.

28. Neves, D. C. (2001). Poder político e Poder Judiciário. *Revista da Associação dos Magistrados Brasileiros - Cidadania e Justiça: Reforma política urgente*, 5(10), 122.

29. Ost, F. (2005). *O tempo do direito* (É. Fernandes, Trad., Revisão técnica de C. A. M. Souza). EDUSC: Editora da Universidade do Sagrado Coração.

30. Pastor, R. V., & Tarrega, M. C. V. B. (2023). A supremacia da norma e a origem democrática são os elementos fundamentais para a existência de uma Constituição. *Encontros da Disciplina: Teoria de la Constitución*. Curso de Pós-Graduação de Doutorado em Direito, Unarerp, 1º semestre.

31. Pachá, A. (2001). Por um controle legítimo de Poder. *Revista da Associação dos Magistrados Brasileiros - Cidadania e Justiça: Reforma política urgente*, 5(10), 236.

32. Rulli, A. J. (2001). Devido processo legal substantivo e jurisdição. *Revista da Associação dos Magistrados Brasileiros - Cidadania e Justiça: Os reflexos da globalização nos institutos jurídicos*, 5(11), 132-137.

33. Sadeck, M. T. (2011). Judiciário e arena pública: Um olhar a partir da Ciência Política. In A. P. Grinover & K. Watanabe (Orgs.), *O controle jurisdicional de políticas públicas* (pp. 1-32). Rio de Janeiro: GenForense.

34. Santos, L. N. (1999). A ação civil pública como instrumento de proteção ambiental. *Revista Cidadania e Justiça*, 3(6), 188-195.

35. Santos, M. L. (2001). Políticas públicas (econômicas) e controle. *Revista da Associação dos Magistrados Brasileiros - Cidadania e Justiça: Fundamentos da ética e respeito ao outro*, 5(12), 146-147.

36. Sifuentes, M. J. (2000). O Poder Judiciário no Brasil e em Portugal: Reflexões e perspectivas. *Revista da Associação dos Magistrados Brasileiros - Cidadania e Justiça: O Direito do Século XXI*, 4(8), 97-99.

37. Supremo Tribunal Federal (STF). (2024, 9 de janeiro). ADC 43 - Número Único: 4000886-80.2016.1.00.0000 - Ação Declaratória de Constitucionalidade - Origem: DF - Relator: Min. Marco Aurélio - Redator do acórdão: Min. Edson Fachin - Relator do último incidente: Min. André Mendonça. Disponível em: https://www.stf.jus.br. Acesso em: 9 de janeiro de 2024.

38. Supremo Tribunal Federal (STF). (2024, 9 de janeiro). ADC 44 - Número Único: 4000918-85.2016.1.00.0000 - Ação Declaratória de Constitucionalidade - Origem: DF - Relator: Min. André Mendonça - Redator do acórdão: Min. Edson Fachin - Apenso Principal: ADC43. Disponível em: https://www.stf.jus.br. Acesso em: 9 de janeiro de 2024.

39. Supremo Tribunal Federal (STF). (2024, 9 de janeiro). ADC 54 - Número Único: 0069352-29.2018.1.00.0000 - Ação Declaratória de Constitucionalidade - Origem: DF - Relator: Min. André Mendonça - Apenso Principal: ADC43. Disponível em: https://www.stf.jus.br. Acesso em: 9 de janeiro de 2024.

40. Supremo Tribunal Federal (STF). (2024, 9 de janeiro). ADI 4277 / DF - Distrito Federal - Ação Direta de Inconstitucionalidade - Relator: Min. Ayres Britto - Julgamento: 05/05/2011 - Publicação: 14/10/2011 - Órgão julgador: Tribunal Pleno. Disponível em: https://www.stf.jus.br. Acesso em: 9 de janeiro de 2024.

41. STF. **ADI 2.925**. Relatora: Min. Ellen Gracie, relator p/ acórdão: Min. Marco Aurélio. Tribunal Pleno, julgado em 19/12/2004, DJ 04/03/2005, VOL-02182-01, PP-00112, LEXSTF v. 27, n. 316, 2005, p. 52-96. Site: ADI 2925 (stf.jus.br) (visitado em 8-1-2024).

42. STF. **ADI 3.510**. Relator: Min. Ayres Britto. Tribunal Pleno, julgado em 29/05/2008, DJe-096 divulgado em 27/05/2010, publicado em 28/05/2010, Ement. VOL-02403-01, PP-00134, RTJ VOL-00214-01, PP-00043. Site: ADI 3510 (stf.jus.br) (visitado em 8-1-2024).

43. STF. **ADO 2 / DF - DISTRITO FEDERAL**. AÇÃO DIRETA DE INCONSTITUCIONALIDADE POR OMISSÃO. Relator: Min. Luiz Fux. Julgamento: 15/04/2020. Publicação: 30/04/2020. Órgão julgador: Tribunal Pleno. Site: Pesquisa de jurisprudência - STF (visitado em 8-1-2024).

44. STF. **ADO 26 / DF - DISTRITO FEDERAL**. AÇÃO DIRETA DE INCONSTITUCIONALIDADE POR OMISSÃO. Relator: Min. Celso de Mello. Julgamento: 13/06/2019. Publicação: 06/10/2020. Órgão julgador: Tribunal Pleno. Site: Pesquisa de jurisprudência - STF (visitado em 8-1-2024).

45. STF. **ADPF 132**. Relator: Min. Ayres Britto. Tribunal Pleno, julgado em 05/05/2011, DJe-198 divulgado em 13/10/2011, publicado em 14/10/2011, Ement. VOL-02607-01, PP-00001. Site: ADPF 132 (stf.jus.br) (visitado em 9-1-2024).

46. STF. **ADPF DAS FAVELAS**. Vitória do povo negro e das favelas: STF exige mudanças imediatas na Segurança Pública do Rio. Site: ADPF das Favelas (visitado em 8-1-2024).

47. STF. **ADPF 54**. Relator: Min. Marco Aurélio. Tribunal Pleno, julgado em 12/04/2012, acórdão eletrônico, DJe-080 divulgado em 29/04/2013, publicado em 30/04/2013, RTJ VOL-00226-01, PP-00011. Site: paginador.jsp (stf.jus.br) (visitado em 8-1-2024).

48. STF. **ADPF 635**. Número Único: 0033465-47.2019.1.00.0000. ARGUIÇÃO DE DESCUMPRIMENTO DE PRECEITO FUNDAMENTAL. Origem: RJ - RIO DE JANEIRO. Relator: Min. Edson Fachin. Site: Supremo Tribunal Federal (stf.jus.br) (visitado em 8-1-2024).

49. STF. **IF 5179**. Órgão julgador: Tribunal Pleno. Relator: Min. Cezar Peluso (Presidente). Julgamento: 30/06/2010. Publicação: 08/10/2010. Site: Pesquisa de jurisprudência - STF (visitado em 8-1-2024).

50. STF. **Notícia**. Decide que cumprimento da pena deve começar após esgotamento de recursos. A decisão não afasta a possibilidade de prisão antes do trânsito em julgado, desde que sejam preenchidos os requisitos do Código de Processo Penal para a prisão preventiva. Data: 07/11/2019. Site: Supremo Tribunal Federal (stf.jus.br) (visitado em 9-1-2024).

51. STF. **RE 888815 / RS - RIO GRANDE DO SUL**. RECURSO EXTRAORDINÁRIO. Relator: Min. Roberto Barroso. Redator do acórdão: Min. Alexandre de Moraes. Julgamento: 12/09/2018. Publicação: 21/03/2019. Órgão julgador: Tribunal Pleno. Site: Pesquisa de jurisprudência - STF (visitado em 9-1-2024).

52. STF. **Reclamação n. 5.470/PA**. Decisão Monocrática. Relator: Min. Gilmar Mendes. DJ 10/03/2008. Fonte: OLIVEIRA, Pedro Miranda de. Meios de impugnação das decisões judiciais: Aspectos destacados da reclamação no novo Código de Processo Civil. Revista de Processo, 2015. REPRO VOL. 247 (SETEMBRO 2015). Site: RPro_n.247.12.PDF (mpsp.mp.br) (visitado em 13-1-2024).

53. STF. **Súmula Vinculante 13**. O verbete foi aprovado na sessão plenária de 21 de agosto de 2008. Os debates entre os ministros podem ser consultados aqui: SUV_11_12_13__Debates.pdf (stf.jus.br) (visitado em 13-1-2024).

54. STRECK, Lênio. In: **Hermenêutica Jurídica e(m) Crise**: uma exploração hermenêutica da construção do Direito. 11ª ed. Porto Alegre: Revista do Advogado, 2014, p. 43-73.

55. STRECK, Lênio. **Hermenêutica Jurídica e(m) Crise**. Uma exploração hermenêutica da construção do Direito. 11ª edição, revista, atualizada e ampliada. Porto Alegre: Livraria do Advogado Editora, 2014, p. 55-57.

56. SUANNES, Adauto. A ideologia da Suprema Corte. Texto Extraído do livro **Os fundamentos éticos do devido processo penal**, Editora Revista dos Tribunais, 1999. Cidadania e Justiça: Fundamentos da ética e respeito ao outro. Revista da Associação dos Magistrados Brasileiros, Ano 5/nº 12, p. 107.

57. TEIXEIRA, Sálvio de Figueiredo. A formação do juiz contemporâneo. Cidadania e Justiça: reformas em debate. Revista da Associação dos Magistrados Brasileiro. Ano 2/nº 4, 1º Semestre de 1998, p. 82-83.

58. TEMER, Michel. **Elementos de Direito Constitucional**. 6ª edição, ampliada e revista de acordo com a Constituição de 1988. 2ª tiragem. São Paulo: Editora Revista dos Tribunais, 1989, p. 17-20.

59. TUCCI, José Rogério Cruz e. **"Class Action" e Mandado de Segurança Coletivo**. São Paulo: Saraiva, 1990, p. 38.

60. ZAVASCKI, Teori Albino. **Processo coletivo**. São Paulo: Editora Revista dos Tribunais, 2006, p. 88.