THE JUDICIAL ACTIVISM AND THE WEAKNESS OF POLITICAL POWER: EFFECTIVE CRISIS OR PARADIGMATIC CHANGE?

O ATIVISMO JUDICIAL E O ENFRAQUECIMENTO DO PODER POLÍTICO: CRISE EFETIVA OU MUDANÇA PARADIGMÁTICA?

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ABSTRACT

The purpose of this article was to promote a theoretical reflection on the Brazilian legal doctrine on the phenomenon of judicial activism. Using bibliographic research and the deductive method with conceptual analysis and reflection, we sought to identify the causes for judicial activism and reflect on whether this process of intentional intervention by the judiciary in policy-makers is a crisis of political powers or concerns itself strengthening of the judiciary for the enforcement of constitutionally guaranteed rights. The reflection on the theme from the critical theory allowed us to conclude that political activism characterizes a paradigmatic change in the judge's behavior and was triggered from the Constitutional text of 1988. Social issues started to be object of effective demand by society, especially before the inertia of the executive and legislative branches. The activist interventions of the judiciary sought to do justice by being punctual and acted, above all, in matters that involved effective risks to health and life, or even in other social issues neglected by the political powers.

KEYWORDS: Judicial activism. Criticism of judicial activism. Criticism of the law. Hermeneutics.

RESUMO

O objetivo neste deste artigo foi impulsionar uma reflexão teórica em torno da doutrina jurídica brasileira sobre o fenômeno do ativismo judicial. Recorrendo a pesquisa bibliográfica e ao método dedutivo com a análise conceitual e de reflexão procurou-se identificar as causas para o ativismo judicial e refletir se este processo intervenção intencional do judiciário no policy-makers se trata de uma crise dos poderes políticos ou se diz respeito ao fortalecimento do judiciário para a efetivação dos direitos constitucionalmente assegurados. A reflexão sobre o tema a partir da teoria crítica permitiu concluir que o ativismo político caracteriza

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uma mudança paradigmática no comportamento do juiz e foi desencadeada a partir do texto Constitucional de 1988. As questões sociais passaram a ser objeto de efetiva cobrança pela sociedade, sobretudo ante a inércia dos poderes executivo e legislativo. As intervenções ativistas do judiciário procuravam fazer justiça ao mostrarem-se pontuais e atuaram, sobretudo, em matérias que envolveram riscos efetivos a saúde e a vida, ou ainda em outras questões sociais negligenciadas pelos poderes políticos.

PALAVRAS-CHAVE: *Ativismo judicial. Crítica ao ativismo judicial. Crítica ao direito. Hermenêutica.*

1 INTRODUCTION

In Brazil, the sum of rights and guarantees whose effectiveness is demanded of the State, especially in the figure of the Legislative and Executive powers, but which according to Ferreira Filho (2007, p. 245) act slowly, making the Judiciary exercise more vitality its competences, notably in relation to the effectiveness of the rights and guarantees provided for in the constitutional text.

It is around this situation among the three powers that criticisms of the so-called judicial activism are born, which stands out due to the conduct of the magistrate who promotes an interpretation of the laws and the Constitution, in order to safeguard the right that is constitutionally provided for and pleaded. The directed criticisms promote questions about the democratic legitimacy of the magistrates (since they weren't conducted by scrutiny), the politicization of the justice and the institutional capacity of the Judiciary. Both critics argue that judicial activism is weakening the Brazilian politics and the democratic process as a whole. On the other hand, the arguments in favor of defending judicial activism are basically based on the fact that the inertia of the other powers, especially the Legislative, causes a visible non-compliance with the main social duties entrusted to the State. (MARTINI e LESSA, 2017, p.5-24)

The purpose of this article is to sharpen a theoretical reflection in the face of this debate on the phenomenon of judicial activism present in Brazilian legal doctrine. The question that guides the reflection is: if the intentional intervention of the Judiciary in the policy-makers is a crisis of the political powers, or if it concerns the strengthening of the judiciary in order to enforce the constitutionally guaranteed rights? We start from the hypothesis that in Brazil, starting from the 1988 Constitutional text, social rights became the object of effective charging by society and the activist interventions of the judiciary are on social issues neglected by political powers. There is significant progress in the development of studies on judicial activism in Brazil, however the theoretical reflection proposed here is justified by intending to address the issue of political activism based on critical theory and a paradigmatic change in the judge's behavior, which in addition to applying the law, updating it according to the social needs of the moment, he seeks to do justice (COELHO, 2004, p. 388).

To achieve the proposed objective, we opted for the use of bibliographic research and the deductive method, with conceptual and reflection analysis to identify how the legal doctrines, selected and treated in the next sections, understand the phenomenon of judicial activism and its intervention on the policy-makers. The article ends with a reflection on the critical theory of law and the paradigmatic change that the referred system establishes in the natio-

nal law, and which will allow to understand with greater clarity the phenomenon called judicial activism.

2 RECOGNITION OF SOCIAL RIGHTS AND THE JUDICIAL ACTIVISM

According to Schonardie, Foguesatto and Leves (2018) built over several generations, social rights show the recognition by the State regarding the minimum rights of citizens, going back to individual and collective contents, such as respect for the State regarding to individual rights - first generation - even to the rights recognized in the fourth generation, which deal with issues involving genetics or the environment, notably collective.

In any case, a joint approach is necessary between the social rights recognized in their various generations and the phenomenon of judicial activism, which is justified because one is the result of the other, that is, judicial activism is born due to the failure by the State to rights recognized throughout history.

Thus, it remains necessary to address the generation-building process so that after we list the reasons that fostered the judicial activism.

For Miguel Reale "[...] the different parts of the Law aren't situated side by side, as finished and static things, because Law is an order that is renewed day by day" (REALE, 2002, p. 6) (our translation into english). It isn't by chance that Sarlet asserts that in the constitutionalist doctrine the set of human rights historically goes back to the development and recognition of social rights, that is, to the generations of rights, each of them consistent with the historical moment in which they were developed, adding and expanding their protective scope (SARLET, 2015, p. 459-488).

Protective expansion that concerns the history built over five generations. In this sense, it's important to remember that the first dimension recognizes man as a subject of individual rights, demarcating his individual autonomy vis-à-vis the Public Power, while the second generation recognizes man's work in society and he as a social being, living up to social, economic and cultural rights, further expanding the sense of the *wellfare state* (COELHO, 2011, p.182).

For Cavalcante Filho, the first generation of rights is characterized by the imposition on the State of the duty to respect individual rights, demanding from the State an obligation not to do so, which is embodied in the impossibility of promoting any offense to those rights. On the contrary, second generation rights impose on the State an obligation corresponding to the duty to do, that is, to hand over to deprived social groups: rights such as education, health and public security, thus reducing inequalities (CAVALCANTE FILHO, 2010, p.12)

The third dimension recognizes the constitutionalization of citizenship rights (man as a human being and as a citizen), where the ethical basis is formed by solidarity, fraternity and charity, recognized as collective or diffuse ownership, and imposes the need to observe an environment that provides effective dignified life. Hence the concern with environmental

rights, and with values such as peace and self-determination of peoples, quality of life, communication and preservation of historical and cultural heritage (COELHO, 2011, p.183).

Bobbio clearly emphasizes this historical construction that goes back to the social rights of man, built gradually. The author adds:

> From a theoretical point of view, I have always defended - and continue to defend, strengthened by new arguments that human rights, however fundamental they may be, are historical rights, that is, born in certain circumstances, characterized by struggles in defense of new freedoms against old powers, and born gradually, not all at once and nor once and for all. The problem - on which, it seems, philosophers are called upon to give their opinion - the foundation, even the absolute, irresistible, unquestionable foundation, of human rights and a poorly formulated problem: religious freedom is an effect of wars of religion; civil liberties, the struggle of parliaments against absolute sovereigns; political freedom and social freedoms, the birth, growth and maturation of the wage workers movement, peasants with little or no land, the poor who demand from public authorities not only the recognition of personal freedom and negative freedoms, but also the protection of work against unemployment, the first rudiments of instruction against illiteracy, then assistance for disability and old age, all of which are needs that the wealthy owners could satisfy for themselves. (BOBBIO, 2004, p. 9) (Our translation into english)

The doctrine recognizes the rights of the third generation as transindividuals, that is, they belong to all citizens, but they cannot be recognized as belonging to any one of them in isolation. Relevant examples of this generation would be the right to an ecologically balanced environment, the right to peace and the right to development (CAVALCANTE FILHO, 2010, p. 12).

Bobbio for his part also highlights issues involving the environment:

> Together with social rights, which were called second generation rights, today emerged the so-called third generation rights, which constitute a category, to tell the truth, which is still excessively heterogeneous and vague, which prevents us from understanding what is actually being it comes. The most important of them is the one claimed by ecological movements: the right to live in an unpolluted environment. But new requirements are already being presented that could only be called fourth generation rights, referring to the increasingly traumatic effects of biological research, which will allow manipulations of each individual's genetic heritage. (BOBBIO, 2004, p.9) (Our translation into english)

Once again, Constitutional Law was imbued with incorporating new extensions, given that man is currently the holder of virtual and bioethical rights that have exponentially expanded legal discussions to a global sphere, effectively corresponding to the fourth and fifth generations of human rights (COELHO, 2011, p.183).

However, there is no consensus on the rights recognized as fourth generation, so that some doctrines recognize the genetic engineering, while others refer to the struggle for participation in the democratic process (CAVALCANTE FILHO, 2010, p.12).

The advent of the Social Welfare State reversed important parts of the basic postulates existing in the State of Law and, consequently, the Judiciary also has its attributions changed,

going on to analyze the measures taken and the achievement of the results pursued by the Legislative (FERRAZ JR, 1994).

Change of posture imposed on the Judiciary, which, mainly due to the classic division of powers imposed, was limited to respecting the socio-political conditions of the 19th century. This scenario would be altered due to the technological society and the Social State, which demanded: from the Judiciary the unneutrality and from the judge the exercise of a socio-political function, that is, a prospective responsibility and concerned with the political purpose. In this new scenario, the judge is now equally responsible for the political success of the other powers of the government, including working to correct any mistakes that may conflict with the social nature pursued by the State (FERRAZ JR, 1994, p.12-21).

In fact, a simple reading from the Constitutional text highlights this generous character of rights and guarantees. For Sarlet:

> In Brazil, the Federal Constitution of 1988 included a generous cast (at the time, possibly, without precedents and parallels in contemporary constitutionalism) of social rights and workers' rights in the Title of Fundamental Rights and Guarantees, in addition to a set of principles and rules dealing with on economic, social, environmental and cultural matters in the titles of the economic and social constitutional order. (SARLET, 2015, p. 461) (Our translation into english)

This model, however, demands an effective commitment from the powers of the Union, under penalty of non-compliance with the forecasts enshrined in that constitutional text.

In this sense, Moura points out that "[...] in Brazil, judicial activism is directly related to the crisis of legitimacy and democratic representativeness, which generates a detachment between the representative bodies and the society, and the inability or lack of interest in meeting the demands producing a shift in the exercise of citizenship to the sphere of the Judiciary" (MOURA, 2016, p.638) (our translation into english).

According to Oliveira,

> The conception of activism, in turn, is linked to an extensive and vigorous effective participation of the Judiciary in the consolidation of the values and purposes established by the Constitution. It's a proactive interpretation of *Lex Fundamentallis* that provides a reinterpretation of its real meaning, scope and axiological values, with the aim of allowing the making of modern, reforming/revolutionary, progressive and constructive decisions. (OLIVEIRA, 2017, p. 3) (Our translation into english)

Following Silva's thinking, it's very clear the reasons that would justify the decisions made by the Judiciary, since it's evident in contemporary society a deficit of dignity that sees in the Judiciary as the recipient of social frustrations, especially when realizing the rights that founded the essential core. Thus, with the State inert in its obligations, the Judiciary is called upon to intervene in guaranteeing the existential minimum (SILVA, 2017, p. 14-28).

Oliveira also draws attention to the fact that in Brazil the phenomenon of judicialization is also due, in large part, to the very text of the Constitution, since it has a embracing analytical text, and that by constitutionalizing the matters through interpretation, it removes automatically, these issues of the scope of the policy, converting them into constitutional norm. According to Oliveira, another supporting factor for this phenomenon would be the 'hybrid system of constitutionality control' that allows any magistrate to acclaim the declaration

of unconstitutionality of a norm, which causes that: new insurgencies are submitted to the scrutiny of the judiciary and further encouraging the protagonism. (OLIVEIRA, 2017, p. 2)

For Martini and Lessa, the ineffectiveness of the State in managing public health is what promoted the phenomenon of judicial activism, since in the face of the inertia of the other powers, at least one of the powers remained sensitized to such an important theme, that is to say, essential for achieve welfare and social justice (MARTINI e LESSA, 2017, p. 5-24).

Expectations and pressures on the celerity of implementation, as well as the expansion of rights already recognized in certain categories, or even the effectiveness of rights, all relapse on the Judiciary. It's in this sense that comes the so-called "State-Providence" ("*Estado-providência*"), the driving force of judicial activism that leads judges and courts to reveal, in some situations, the limits that are imposed by the legal system itself (RAMOS, 2015, p. 286). Thus, guided by the Constitutions that began to provide for and deal with fundamental rights, judges allow themselves to give due treatment and attention to the respective rights (BARBOZA, 2014, p. 85).

Understanding not far from the conclusion led by Coelho when stating the need to consider not only the compliance with the rules of conduct existing in society at any price, but also the consequences of its application, which he calls effective justice. This is because,

> [...] if there is an objective of justice, it's summed up in the binomial dignity/solidarity, which is true both for the common man, the citizen who feels injustice in his own flesh, and for those to whom society has delegated the task of distributing justice, what matters in making it effective in all sectors of individual and collective human life. (COELHO, 2001, p. 147) (Our translation into english)

Synthesis also possible is extracted from the understanding presented by Herknhoff when stating that

> There cannot be an authentic prevalence of the Law, if the Law doesn't aim to realize Social Justice. It's not possible to intend true Development if it isn't centered on the Human Person, if its address isn't the construction of a society in which the human persons that integrate it can realize their existential potentialities. (HERKNHOFF, 2004, p.116) (Our translation into english)

In the words of Barroso,

> [...] the judicial activism is an attitude, the choice of a specific and proactive way of interpreting the Constitution, expanding its meaning and scope. Usually it settles in situations of retraction of the Legislative Power, of a certain detachment between the political class and the civil society, preventing the social demands from being effectively fulfilled. (BARROSO, 2009, p.6) (Our translation into english)

Barroso justifies the role of the Judiciary, on the grounds that judicial activism is linked to a protagonist participation of the Judiciary in the realization of constitutional rights (BARROSO, 2009, p. 6).

This understanding is not far from the one pointed out by Oliveira when asserting that:

> [...] as being an attitude, a proactive way of interpreting, especially the Political Charter, to discipline a situation that wasn't disposed of by any norm, or that was disposed of, but that no longer meets the factual reality demanded

> by those interested who need a jurisdictional provision. (OLIVEIRA, 2017, p. 3) (Our translation into english)

Oliveira, continually, stresses the need to keep in mind that there isn't an endless set of ready solutions for any and all factual conflicts presented to the judiciary that needs to deliver the judicial provision. At the same time, it's necessary to consider the fact that the Judiciary cannot be limited to the exact terms and expressions contained in the normative text, many of them subjective and ambiguous, or even the situations of normative gaps. Both situations, demanding from the magistrate a political action by the judge, creating solutions not yet conceived by the legislator, always obeying the limits of reasonability, extreme observance of the text of the Constitution, without losing sight of the fact that it must avoid situations of legal insecurity or hurt the separation of powers (OLIVEIRA, 2017, p. 5)

As Baquero and other authors point out, the inertia of these democratic institutions, that is, this malfunction puts at risk the credibility of this system, not only because of the citizens' distrust as to the need for the system itself, but also regarding the existence of political parties. According to Baquero:

> Paradoxically, the strengthening of representative democracy in Brazil, undermined by the ineptitude of the political elite in its political and institutional performance, involves the strengthening of institutions, which will exist in the exact measure of the change in political practices and habits that are socially and culturally ingrained throughout the society. (BAQUERO, 2018, p. 102) (Our translation into english)

This is what happens in relation to the judicial institution, called to intervene in various social issues. Finally, it's extremely important to present the conclusions of Mazarotto and Quadros (2018), which emphasizes that the so-called construction of a just society occurs by the various institutions that compose it, which are directly responsible for the dissemination and prevalence of a equality scenario, especially from the moment when the State assumes the tasks of assistentialist nature, aiming at everyone without any distinction. However, the management failures that arise motivate the political intervention of the Judiciary as a way of effective implementation of the positivized rights, since its first function is precisely to fully promote the provisions set out in the Constitutional text. It's, therefore, an instrument for effecting guarantees and an inclusive instrument (MAZAROTTO e QUADROS, 2018, p. 156-178).

Thus, having presented the facts and arguments that would justify the intervention of the Judiciary, we should present the arguments against the intervention, the subject of the next topic.

3 CRITICISM TO JUDICIAL ACTIVISM

One of the biggest questions made to the interventionist model led by the Judiciary would be the democratic legitimacy, since, theoretically, the characters would lack the necessary requirement to validate their decisions, even if this decisions directly serve the interests of citizens. In fact, even though judges, judges of the Superior Courts (appellate judge)

and ministers aren't elected public agents, they still exercise political powers, insofar as they accumulate forces even to invalidate acts of other powers, even if these two bodies are represented by the President of the Republic or by members of the National Congress in its entirety (BARROSO, 2009, p. 1-29).

Despite being considered as the third and least important of the three powers presented by the classic model of division, the importance of the Judiciary Power is unquestionable when analyzed from the perspective of individual freedoms and rights, of which it's undoubtedly its main guarantor (FERREIRA FILHO, 2007, p. 245). Herknhoff is very clear in asserting that:

> [...] there can be no real prevalence of the Law, if the Law doesn't aim to achieve Social Justice. It's not possible to intend true Development if it isn't centered on the Human Person, if its address isn't the construction of a society in which the human persons that integrate it can realize their existential potentialities. (HERKNHOFF, 2016, p. 116) (Our translation into english)

In this sense, by the way, Cambi asserts that the law isn't effectively limited to the norms, since it isn't possible to extract pre-established decision content from it, and the Brazilian Constitution directs the process as a whole towards a discussion and argumentation bias, from in order to extract the best possible response from the legal system to social problems. As Cambi rightly points out, "[...] in countries of late modernity, such as Brazil, it's not satisfactory that the Judiciary fails to enforce fundamental rights, waiting for the indefinite action of the legislator" (CAMBI, 2012, p.88) (our translation into english).

When dealing specifically with the Judiciary and its guarantees, Ferreira Filho recalls that it's up to the judiciary to do justice, but that in the current modern State this task is confused with the application of laws. Thus, accepting the Judiciary as a mere enforcer of rules, in spite of this being its essence, would mean making it limited, especially when analyzing specific cases that require special attention, limiting it to the administrative function (FERREIRA FILHO, 2007, p. 248-249). Like this:

> [...] respect for democracy, in a substantial sense, justifies the responsible judicial leadership. It's important to note that its use doesn't imply incentive to decisionisms or voluntarisms, nor to the return to the Jurisprudence of Values. On the contrary, it's intended to safeguard the position of the jurisdiction in the implementation of the Constitution, having, for this purpose, to obstruct the obstacles against the realization of fundamental rights. (CAMBI, 2012, p. 93) (Our translation into english)

As Alberto asserts:

> [...] if, at first, the law was a safe parameter for defining social issues, with the increase of the social complexity it became insufficient, which demanded active action by the Judiciary, carrying out, even in a counter-majoritarian way, the inserted values in the Charter of the Republic. (ALBERTO, 2012, p. 42) (Our translation into english)

It's not by chance, the author Hespanha, announced that the new world configuration and the scientific revolution, as well as the valorization of diversity, pluralism of societies, equality, groups with differences (cultural, experiential, physical and intellectual capacities), professionals, policies etc., would impose on the current model to accept new ways of building democracy and new paradigms for the law, making it effective (HESPANHA, 2013, p. 63)

In this tone, Alberto stresses in a very clear and forceful way that it's not up to the Supreme Federal Court (*Supremo Tribunal Federal – STF*), an alternative that doesn't express itself on controversial issues, so by not doing so, it would be fostering a model that imposes limited performance, in the exact terms of the original model that was designed for it (ALBERTO, 2012, p. 43).

In any case, if the arguments set out above were not enough, the doctrine also justifies the decision-making power of magistrates from two angles, one being the normative and the other philosophical.

The first one - normative - is evident in the fact that the Brazilian Constitution, like the other nations that adopted the democratic regime, recognizes a portion of political power to the Judiciary and, above all, to the Supreme Federal Court (*Supremo Tribunal Federal – STF*). Even the other public agents not elected through the electoral system, also, hold part of this political power. In any case, it's certain that when applying the laws, the magistrates are effectively implementing decisions taken by the legislators, that is, the representatives of the people, despite the need to consider that the magistrates and Courts don't perform purely mechanical activities (GRAU, 2002, p. 64).

With regard to philosophical justification, this is the result of two aspects, namely, constitutionalism and democracy, as taught by Barroso:

> The philosophical justification for constitutional jurisdiction and the role of the Judiciary in institutional life is a little more sophisticated, but still easy to understand. The democratic constitutional state, as the name suggests, is the product of two ideas that have joined, but aren't confused. *Constitutionalism* means limited power and respect for fundamental rights. The State of law as an expression of reason. *Democracy* means popular sovereignty, government of the people. The power based on the will of the majority. Between democracy and constitutionalism, between will and reason, between fundamental rights and government of the majority, can arise situations of tension and apparent conflicts. (BARROSO, 2009, p. 11) (Our translation into english)

This measure portrays the position of the magistrate who decides the question posed in a broad and proactive way, but always interpreting the Constitutional text, going beyond the ordinary legislator. And this initiative translates into an effective mechanism that makes possible to "get around" a situation created by the inertia or ineffectiveness of those who are inserted in the political process (BARROSO, 2009, p. 1-29). In fact, Barroso in another of his works stated:

> The role of the Judiciary and, especially, of the constitutional courts and supreme courts should be to safeguard the democratic process and promote constitutional values, overcoming the deficit of legitimacy of the other Powers, when applicable. However, without disqualifying their own performance, what will happen if they act abusively, exercising political preferences instead of realizing constitutional principles. (BARROSO, 2005, p. 51) (Our translation into english)

So far, in fact, the role of the judge in the materialization of fundamental rights seems evident.

We should now emphasize the existence of two other criticisms directed at judicial activism. The first would be the risks of politicization of justice.

For Ferraz Júnior, it's in the State of law that the judge is diverted from his administrative function, like that of any public official, to incorporate the expression of force originating in the State. Here the freedom and independence of the judge are born, while the State, its officials and other public agents come to answer civilly and administratively for damages caused to the citizen, whose responsibility is of the magistrate. Hence also comes: the birth of the necessary immunity of the judge for his acts, which fosters the necessary partiality and which reinforces, without any doubt, the legal security (FERRAZ JR, 1994, p. 12-16).

Once again, we invoke Ferraz Júnior's magisterium to remind us that the so-called 'political de-neutralization of the judiciary' launched and exposed it as a whole in the media, showing a conflict that considers the responsibilities and independence of the judiciary, reaching the conclusion that the legal system is at the service of implementing social values. In effect, this marketing directly affects the judiciary, so that even its neutrality in certain events is exploited politically, in order to form popular consensus, reducing the right to a simple condition of a consumer object and making it lose its prudence (FERRAZ JR, 1994, p. 16-21). In this sense Ferraz states that:

> Well, with the politicization of Justice, everything starts to be governed by relations between means and ends. Law doesn't lose its status as a public good, but it loses its sense of prudence, because of its legitimacy it ceases to rest on the *potential* concord of men, to be based on a kind of coercion: the coercion of functional effectiveness. That is, politicized, the jurisdictional experience becomes prey to a game of stimuli and responses that requires more calculation than wisdom. It follows from this that the judge's relation with the world has become merely pragmatic. Because, seeing it as a political problem, he feels and transforms his decision-making action into a pure technical option, which must be modified according to the results and whose validity rests on the proper functioning. (FERRAZ JR, 1994, p.19) (Our translation into english)

Another relevant fact that must be considered is that: from the Social State comes the figure of the so-called principle of positive freedom, where everyone is guaranteed equal access to full citizenship, whose implementation is quickly demanded from the Legislative and Executive powers, but the consequences would also affect the Judiciary, as well as alter the role of this latter (FERRAZ JR, 1994).

It means to say that, from then on, the Judiciary is also responsible for the concretization of social rights, assuming responsibilities that would initially belong only to the other powers. Regarding politicization, Cappelletti stresses:

> Effectively, the role of the judge is much more difficult and complex, and the judge, morally and politically, is far more responsible for his decisions than traditional doctrines had suggested. [...] He can no longer hide himself, so easily, behind the fragile defense of the conception of law as a pre-established, clear and objective norm, on which he can base his decision in a 'neutral' form. His personal, moral and political responsibility is involved, as well as legal, whenever there is an openness to different choice in the law. And the experience teaches that such openness is always or almost always presente. (CAPPELLETTI, 1993, p. 33) (Our translation into english)

According to Cappelletti's magisterium, initially only the United States wouldn't have offered resistance to assume the responsibilities imposed by the politicization that was initially considered an excessively heavy burden, but, that the duty to comply with the provisions

of the respective texts, requires more forceful conduct, so to ensure that the State – in the person of the Executive and Legislative powers – complies with its obligations (CAPPELLETTI, 1993, p. 46-47)[3].

For Barroso, the movements of the Courts in the direction of promoting decisions built on arguments are perfectly valid, since there are no ready solutions to all the problems that arise, as well as the lack of absolute independence of the law in relation to politics.

Regarding this theme, Ferreira Filho states that politicization has relevant support in national politics, coming from those who pursue a model of "external control" of the Judiciary, as a way of punishing the excesses committed. Effectively, the indoctrinator understands that this would be an attempt to impose on the Judiciary a politically correct standard of their decisions, mainly because they aren't the judges elected by the people, but should be controlled by the representatives of the people (FERREIRA FILHO, 1994, p. 1-17).

This risk cannot be effectively removed, as highlighted by Barroso, incumbent upon the magistrate the duty of observing the existing limits, without failing to fulfill the duties of protecting fundamental rights, incurring unfair results (BARROSO, 2009, p. 1-29).

Another risk pointed out by the critics would be the institutional capacity of the Judiciary. In this sense, Barroso clarifies that both powers exercise it, thus preventing a kind of hegemonic instance that brings risks to democracy. However, he emphasizes that in the constitutional model in force, the final word, with regard to the interpretation of constitutional rules carried out in the Judiciary, doesn't mean that all matters must be effectively decided by this. It's what happens during the analysis of demands involving technical or scientific rigor, where the Judiciary will privilege the understandings presented by the Legislative and Executive, or as an intervention act as a limiter due to extravagant decisions that compromise more relevant issues, such as the case, for example, of the public health system. In short, it reserves limited performance and only in cases where its performance is necessary (BARROSO, 2005).

A practical example of this application can be seen in relation to the judgment of the Cesari Battisti case, in which the institutional capacity remained directly addressed by the *STF*, which declared itself incompetent, recognizing the Executive's competence and technical capacity to decide on the extradition process[4].

With this, we have sufficient foundation to understand the system's functionality, capable of recognizing and guiding judgment powers and limits of decision-making powers. Even because, the circumstances that give rise to judicial activism must be recognized as a solution with a provisional character, and that its use must be applied in an eventual and controlled way, and that the expansion of the judiciary must not lose sight of the bad that affects the Brazilian democracy, which is the crisis of representation of the legislative power (BARROSO, 2005, p. 1-42)

The fact is that political parties must consider citizens as true political and potentially participatory actors with regard to the most important choices in the community. Moreover,

3 In addition to the duty of compliance foreseen by Cappelletti, it's also a fact that the magistrate is prevented from evading his legal duty to deliver the judicial provision, especially when dealing with constitutionally guaranteed rights.

4 Judgment issued by the Federal Supreme Court in the Separate Petition for Extradition nº 1085 / Complaint nº 11243 (*Acórdão proferido pelo Supremo Tribunal Federal na Petição Avulsa de Extradição nº 1085. Petição Avulsa na Extradição nº 1085 / Reclamação nº 11243*). Vote by Minister Luis Fux, p. 33. Available in: http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ext1085LF.pdf. Accessed on: July 28, 2019.

the parties must rethink their role and what they have effectively fulfilled, the latter, moreover, more focused on ideological and organizational interests than the real object, which is to make the ideals that permeate representative democracy viable (FACHIN e SILVA, 2017, p. 239).

4 CRITICAL THEORY OF LAW AND THE PARADIGMATIC CHANGE

According to Ferrajoli, two models of the State of Law are accounted for in the modern State. The first stands out for the existence of a single source of law, which is the formal one, that is, the State of Law that draws on the principle of legality and that enshrines the juspositivist understanding, praising and further strengthening the State's monopoly on production of normative rules. In turn, the second model shows obedience by the State regarding the fundamental principles and rights provided for in the Constitutional text, while preaching the division of powers and also the obedience to the maximum rule by them (FERRAJOLI, 2001, p. 31).

Regarding the phenomenon of the Constitutional Revolution, Cappelletti argues that in Europe this only occurred because of the understanding that fundamental rights require a judicial machine to become effective, so that constitutional Courts were created and constitutional processes were created to make them work (CAPPELLETTI, 2001, p. 261).

Note that important points deserve attention at this point. The first, more obvious, portrays the importance given to constitutional issues and their promotion, while the second, in turn, points to the need to create a specialized judicial structure to enforce the rights ensured from the Constitutional Revolution.

The Constitutions started to provide for fundamental rights and an important detail concerns the fact that, even though they existed before World War II, the former were recognized only for their purely declaratory character, whereas in the current model the protection of human rights is evident, in addition to acting simultaneously as a limiter of Legislative and Executive powers, that is, as an effective instrument of constitutionality control (BARBOZA, 2014, p. 85).

However, this change doesn't immediately deliver the rights provided for in the constitutional texts, providing the opportunity for the creation of a critical movement.

As Wolkmer points out, this critical model highlights a relatively new system that was inaugurated in the 1960s in the extinct Soviet Union, and that starts to question the juspositivist model that reigned sovereignly in academic and institutional circles, demystifying the legality of traditional dogmatics, while which introduced a socio-political analysis. Indeed, this model was consolidated in France in the 1970s, expanding to countries such as Italy, Spain, Belgium, Germany, England and Portugal (WOLKMER, 2015, p. 44).

This criticism sought the necessary alignment of the rules with the evolution perceived by society. In this sense, in fact, Stein points out that from this idea of changing society, an anthropological paradigm of transformation of man is extracted, which leads him to freedom

in the face of natural determinisms and historical social. (STEIN, 1986, p. 102 apud WOLKMER, 2015, p. 34). Regarding the Frankfurt criticism Stein points out that:

> It's characterized by the assumption that we are all on a plan in which there is only the human. And it's from this plan that the questions arise. The knowledge issues can no longer be resolved by appealing to nature or to theological explanations. From the destruction of the idea of consciousness, from the criticism of the epistemological models of the subject-object relation, from the rejection of theories of representation, these questions can no longer be resolved through a kind of journey into the interior, towards consciousness. It's not by describing a fictional mental-cognitive machine that we are going to solve the problem of knowledge. We will have to solve it based on the analysis of what man produces: his speech, his culture, his History. (STEIN, 1986, p. 113 apud WOLKMER, 2015, p. 34) (Our translation into english)

That said, Wolkmer points out the need for observation as to the form of knowledge that critical theory imposes, asking whether it conforms to scientific-observable knowledge or to a reflexively acceptable philosophy (STEIN, 1986, p. 113 apud WOLKMER, 2015, p. 35). Answer that is given by Geuss when asserting that the critical theory has as purpose the enlightenment and the emancipation, but not the need for empirical confirmation. Thus, they are admitted even because of the heavy evaluation screen that they suffer, but which give them the characteristic of being reflexively acceptable (GEUSS, 1988, p. 92 apud WOLKMER, 2015, p. 34)

Lack of scientific specificity that doesn't remove the critical model and the characteristic of social researcher that makes its recognized and that legitimizes its due to multiple interests of repressed groups, causing them in their self-awareness. Thus, critical theory has the positive role of ideologically bringing them to participate in an adequate process of clarification and emancipation, which meets the needs and interests of the really oppressed (GEUSS, 1988, p. 141-143 apud WOLKMER, 2015, p. 35-36).

For Coelho, this engagement doesn't include: discussions in the field of social sciences, especially in the field of law, where justice, the State and values are objects of ideological discourses. Precisely because they are objects created by knowledge, and knowing that knowledge is gradually transformed, the legal knowledge is also transformed, receiving a new assignment that promotes criticism in the sense of prospective, that is, focused on future needs based on reality social that is experienced at that time. Hence the importance of jurisprudence which, when considering other sciences in its core, allows a broader and more accurate reading of the real social conditions. It's concluded with this, that the criticism of the law brings in its belly the accumulated past not with the intention of incorporating it into the ordering as a rule, but as a tool that allows the structuring, making possible the reconstruction of the man and of the society (COELHO, 2004, p. 383).

For Wolkmer, critical legal theory can be conceptualized as:

> [...] the theoretical-practical formulation that reveals itself capable of questioning and breaking itself with the normative that is disciplinarily ordered and officially enshrined (in knowledge, in speech, in behavior and in the institutional) in a given social formation and the possibility of conceiving and operationalizing other differentiated, non-repressive and emancipatory forms of legal practice. (WOLKMER, 2015, p. 46) (Our translation into english)

In fact, the day-to-day work of critical theory is to promote the evolution of debates, in order to contemplate a wider range of interests that permeate society. In this sense, Coelho emphasizes that in the view of dogmatics, the criticism seeks to rewrite the general theory of law, mixing concepts, experience and dynamics of law, but for the author it's necessary to add the role of the jurist in the replacement of normative content, of so that him considers the context and the social reality. After all, "[...] the judge, especially, isn't responsible for applying the law, but for doing justice" (COELHO, 2004, p. 388).

It can be seen from the above that Coelho announces a new role entrusted to jurists, which is to update the norms according to the social needs of that time. Thus, this theory imposes an extremely important role on the judges, making them begin to observe with greater caution not only the cold letter of the law, but consider in their decisions the social relations that permeate society and the specific case. In fact, this paradigmatic change regarding the performance of the magistrates, as well as the valorization of the figure of the judge, had already been presented by Carnelutti; and he said:

> It's evident that the judgment suggests the figure of the judge, in which the science of law, increasingly, recognizes the elementary body of law. It wasn't thought of in the past. For a long time, the judgment was devalued, compared to the law, and the judgment appeared as a background element, compared to the legislator. Nevertheless, the truth is that, without judgment, the law could neither arise nor serve the purposes of law. Historically, judgment precedes laws: before creating laws, the chief asserts himself as a judge; the primitive formation of laws is the custom, and this supposes a sequel of judgments. On the other hand, without judgment, the law would be an unfulfilled and often inactive mandate. [...] Not only the law, but also the sentence aren't a finished legal product, that is - without metaphors -, it's not enough to achieve the ends of the law. To this end, the executive process is so necessary as the cognitive process. (CARNELLUTI, 2015, p. 83) (Our translation into english)

A similar statement can be seen in the doctrine of Ferraz Júnior when he emphasized that the state of Social Welfare unified the State and society, so that this latter seeks the effectiveness of its rights by demanding from the Legislative and Executive the materialization of the promised rights. New scenario that requires of the Judiciary to change its attributions, which starts to work together with the other powers in the implementation of the annotated social rights (FERRAZ JR, 1994, p. 12-21)

Thus, guided by the Constitutions that started to provide and deal with fundamental rights, the judges end up giving due treatment and attention to the respective rights (BARBOZA, 2014, p. 85). In effect, this constitutional model ends up transferring to the judge the task of extracting rights and guarantees provided for amid the abstract rules of the text of the constitution. In this sense:

> The open and abstract character of the constitutional norms changes the positivist paradigm of a supposed prediction of the norm to be adopted to the specific case, and countries begin, which adopted constitutionalism as a way of protecting fundamental rights against state arbitrariness, to approximate to common law, especially with regard to constitutional jurisdiction. To that extent, as there is no possibility of pointing out in advance which right is applied to the case, it will be up to the Judiciary to densify and give meaning to these rights, according to the historical, social, political, moral and legal

> context of the society at that moment. The norm, therefore, doesn't exist in the text, but only in the specific case. (BARBOSA, 2014, p. 92) (Our translation into english)

Barroso also emphasizes the role of the magistrate, remembering that an important event of constitutionalism is the institutional rise of the Judiciary in its constitutional jurisdiction, notably in the judicialization of social issues, or even those of a moral or political nature, including endowed with a certain degree of activism judicial. However, he argues that there must be a zeal with regard to legitimacy that cannot go beyond institutional limits, and whenever there are no fundamental rights or guarantees at stake, the choices must prevail by rules created by legislators. Finally, that constitutional jurisdiction shouldn't suppress the voice of society, especially because power emanates from the people and not from magistrates (BARROSO, 2013, p. 923-924).

In effect, the jurist doesn't have the role of maintaining a static normative plan, but rather updating it in order to incorporate the demands and requirements of the social reality of that moment, especially to the magistrate, who is no longer just responsible for applying the law, but, do effective justice (COELHO, 2004, p. 388).

Effectiveness that considers the wishes of society, and recognizes that: "Justice isn't something that can be reduced to a sectorial manifestation of the human: it cannot be reduced to a concept, a virtue, a norm, a value, a criterion. It's a feeling, an emotion, a passion, something that people experience and that permeates all of this" (COELHO, 2011, p. 147) (our translation into english).

Note, moreover, that the Law of Introduction to the Norms of Brazilian Law (*Lei de Introdução as Normas do Direito Brasileiro - LINDB*) in its art. 5º makes an express prediction about this possibility of teleological interpretation[5], that is, the idea of the purpose of the law that can be considered by the court, whether in filling in gaps or even to consider the consequences arising from the sentence handed down.

Siqueira Neto, in turn, emphasizes not only the need for the magistrate to observe the constitutional rules, but goes further to affirm that a new function is recognized for the magistrate, which is embodied in the "expansion of the function of the so-called Constitutional Judge who becomes an enforcer from constitutional right to the true builders of constitutional citizenship. Everything, repeat, without disrespecting the division of powers, since its performance is within the limits of the Constitution and the Legal Order" (SIQUEIRA NETO, 2015, p. 297) (our translation into english).

Furthermore, "[...] there is a paradigm shift here, moving from constitutional decision to constitutional construction, a process in which the judge becomes an agent that promotes the construction of constitutional law" (SIQUEIRA NETO, 2015, p. 297). This author cites in this same work, as an example of this statement, the content of the inaugural speech by Minister Enrique Ricardo Lewandowski, whose importance deserves reproduction:

> In this context, the Judiciary confined, since the 18th century, to the function of simple *bouche de la loi*, that is, to the role of mere mechanical interpreter of the laws, was little by little compelled to maximize its hermeneutic activity

5 Law of Introduction to the Norms of Brazilian Law (*Lei de Introdução as Normas do Direito Brasileiro – LINDB*), with the wording of Law nº 12.376, of 2010, art. 5th: "In the application of the law, the judge will attend to the social ends to which it's directed and to the requirements of the common good".

> in order to give concreteness to the fundamental rights, understood in their several generations. It so happens that, ensuring the enjoyment of these rights, today, effectively, means offering a speedy judicial provision, because, as has long been known, justice that is late is justice that fails. Among us, in fact, a new citizen's right has recently been included in the current Constitution: the right to 'reasonable process'. (LEWANDOWSKI, 2013, p. 2) (Our translation into english)

In fact, "[...] this position reinforces the mission of the Constitutional Judge integrated to the valorization of Human Rights in a perspective of concomitant realization and harmonization" (SIQUEIRA NETO, 2015, p. 297) (our translation into english).

Still referring to the same inaugural speech, Lewandowski in turn highlights the Judiciary's posture, stating that "the Judiciary, overcoming a more orthodox hermeneutic stance, which unveiled the Law only from legal rules established in the Constitution and in the laws, passed to do so also based on principles, overcoming the traditional view that had of them, considered precepts of a merely indicative or programmatic character". And he continues to affirm that "[...] the judges began to draw practical consequences from the republican, democratic and federative principles, as well as from the postulates of isonomy, reasonableness, proportionality, morality, impersonality, efficiency and dignity of human person, thus broadening the spectrum of their decisions" (LEWANDOWSKI, 2013, p. 3) (our translations into english).

Fact is, that from then on:

> "[...] the Judiciary began to intervene in issues that were previously reserved exclusively to other Powers, participating more actively in the formulation of public policies, especially in the areas of health, the environment, consumption, and the protection of the elderly, children, adolescents and people with disabilities [...] the Federal Supreme Court, in a particular way, started to interfere in borderline situations, in which neither the Legislative nor the Executive, managed to reach the necessary consensus to resolve them". (LEWANDOWSKI, 2013, p. 3) (Our translation into english)

There is, therefore, a notable paradigmatic change that demands from the State a greater attention and respect for the foreseen rights, demanding, above all from the Judiciary, a more forceful intervention, which can be seen with some ease from the phenomenon recognized as judicial activism, as remained duly dealt with on the specific topic.

5 FINAL CONSIDERATIONS

It became evident from this brief work that the construction of what we understand today as social rights faced an arduous path. In this sense, the constitutional revolution was extremely important, which, in the midst of the remnants left by the Second World War, promoted the incorporation of social rights. Thus, adding these to the rights ensured by the various generations of rights that, later, would be recognized, gives the order the constitutional guarantees that we have today consolidated.

In the Brazilian case, from the Constitutional text of 1988, social issues were duly settled within it and became the object of effective collection by society, especially in view of

the inertia of the Executive and Legislative powers. Indeed, the doctrine demonstrates that the recognized intervention in judicial activism proves to be punctual and acts, above all, in matters that involve effective risks to health and life, or even in other social issues where the neglect of other powers is also seen.

Thus, the judge, a figure called by indoctrinators as an essential tool, always guided by the Constitutional text, starts to decide in a broader, inclusive and assistential way, in order to enforce the postulates laid down in the major law. Even because it's necessary to consider that once provoked, this cannot evade the duty to decide. It's not by chance that, the research points out that it was precisely the ignored social demands and the paradigmatic changes that gave to the Judiciary the competence to deal with the questions taken to the referred body, effectively enforcing the Constitutional text of which it's the greatest guardian.

On the other hand, this brief survey demonstrates that there is political legitimacy in the Judiciary, just as there is a political portion in any sentence handed down by any magistrate, even if he uses, purely and simply, the normative text of a law, since the rule then used is effectively a legislative product widely discussed by the representatives of the people.

Furthermore, let us see that the institutional limits, too, remain obeyed, since in questionings made, in the many opportunities in which it was consulted by the other powers, the Judiciary, when it was effectively, recognized in the other the legitimacy of power. It means to say that, if there were, in fact, a exacerbated opportunism, the judiciary could take advantage of the fact that it was provoked to make the decisions that it literally wanted or understood.

Thus, if there is obedience to the constitutional limits and for everything else that has been substantiated previously, it's possible to conclude that there is no the alleged weakening of the policy at the time of the interventions of the Judiciary, since this guard shares part of the political power that was entrusted to it and that doesn't make it an imminent risk to the democratic process. On the contrary, it safeguards rights enshrined in the Constitution.

It can also be seen that not only the fundamentals that structure the decisions, but also the repercussions before and after the decision, as well as the inexistence of the Law or even the limits of its interpretation are also objects of public and notorious discussion, which this is exactly what the critical model has always pursued, all in the sense of discussing and implementing the predicted social rights, instilling in modern legal thinking the need to think about the law considering the effective fulfillment of the social predictions provided for in the Constitutional text, individually and collectively.

There is, therefore, a clear and notorious paradigmatic change, without the pseudo--weakening of any of the powers of the State. On the contrary, as Cappelletti rightly said, with the implementation of constitutional provisions by the Judiciary, both are strengthened, especially the State, which is the sum of all of them.

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