JUDICIAL ACTIVISM AS A MEANS OF MITIGATION OF THE PRACTICE OF SOCIAL DUMPING AND A COLLABORATION INSTRUMENT FOR THE FULL EFFECTIVENESS OF THE FUNDAMENTAL RIGHT TO WORK

O ATIVISMO JUDICIAL COMO MEIO DE MITIGAÇÃO DA PRÁTICA DO DUMPING SOCIAL E INSTRUMENTO DE COLABORAÇÃO PARA A EFICÁCIA PLENA DO DIREITO FUNDAMENTAL AO TRABALHO

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Abstract

This article deals with judicial activism as a means to refute the practice of social dumping and to promote the full effectiveness of the fundamental right to work, given the imperative importance and discussion inherent in it, especially in the juridical and socio-political environment. The consummation of the Judiciary as a State Power brought to light an organization of the Rule of Law, which, observed from the perspective of constitutionalism and the emancipation of human dignity in the post-war era, raised the limits of institutional performance, with the necessary observance of the principle of legality, as it began to demand greater participation, oversight, and correction among the powers, in order not only to promote strict legality, efficiency, and effectiveness, but to materialize them. Thus, through the hypothetical-deductive method, literature review, comparative law, and constitutional economic analysis of labor law, this article seeks to demonstrate the relevance of judicial activism as a transformative instrument of the Democratic and Social Rule of Law, both as a means of refuting the repeated non-compliance with labor standards and as a means of

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enabling the full effectiveness of the fundamental right to work, both in the relationship between state and private parties and among private parties themselves.

***Keywords**: Judicial Activism. Democratic and Social State of Law. Social Dumping. Fundamental Right to Work.*

***Summary**: 1. Introduction; 2. Historical Context of Judicial Activism; 3. Judicial Activism in the current constitutional perspective; 4. Judicial Activism as a means of refuting the practice of Social Dumping and promoting the full effectiveness of the fundamental right to work; 5. Final Considerations; References.*

1 INTRODUCTION

Judicial activism began to be conceived in the United States at the beginning of the twentieth century and was incorporated into Brazilian legal doctrine especially after the Constitution of 1988, given the emergence of new and controversial rights arising from freedoms enshrined in the Federal Constitution, which, treated abstractly in the Magna Carta, lack specific regulations and public policies capable of giving them full effect.

The importance of this topic has been gaining increasing attention from legal practitioners and from society itself, since it is directly correlated with the constitutional rights and guarantees embodied in the 1988 Constitution and with the Democratic and Social State of Law.

Although judicial activism is debated in academic circles under the terminologies of "judicialization of politics" and "politicization of law," it is undeniable that these terms refer to intervention in the political arena through the proactive action of judges, courts, and especially the Constitutional Court. The phenomenon has been severely criticized for failing to establish clear criteria, limits, and empirical data in social sciences and legal theory.

Understanding judicial activism merely as a form of judicial law-creation is an oversimplification, particularly because the judge's creative power not only finds legal support, but also grants the dynamism and breadth necessary for a codified, static law that often cannot keep pace with social development.

This does not remove from the institution the difficulties of accepting its existence, legality, legitimacy, scope, applicability, and doctrinal pacification, as this research intends to investigate.

It will also be necessary to examine whether judicial activism offends the separation of powers and popular sovereignty inherent to the Democratic State, as well as whether it might serve as an instrument, even if palliative, for the realization of fundamental rights.

In the current scenario, the Judiciary faces a severe dilemma: to take upon itself the responsibility of securing rights and delivering their due effectiveness - at the risk of being penalized for unbridled judicial activism - or to maintain the classic liberal standard of mere application of the norm and be criticized for being a mere spectator, without relevant social role and subservient to the other branches of government.

Moreover, it cannot be denied that a degree of slowness, inertia, and omission on the part of the Legislative and Executive branches still prevails in Brazil, particularly regarding public policies enabling the realization of fundamental rights and especially the fundamental right to work. For the progress of the Democratic and Social State of Law envisioned in the constitutional text, social aspirations must receive corresponding protection with speed and intensity - which is why judicial activism would be a legitimate instrument in the pursuit of effectiveness of state services.

Accordingly, through the hypothetical-deductive method, literature review, comparative law, and constitutional economic analysis of labor law, this article aims to analyze judicial activism as an appropriate instrument for achieving effectiveness of state services in a harmonious and balanced manner, in compliance with constitutional limits, pointing to the practical repercussions that political judicialization has provided for the construction of the new Democratic and Social State of Law, particularly regarding refutation of repeated non-compliance with labor rules - social dumping - and protection of the full effectiveness of the fundamental right to work.

2 HISTORICAL CONTEXT OF JUDICIAL ACTIVISM

Setting aside any comparison with diffuse judicial review, entitled *judicial review* (BARBOZA; KOZICKI, 2016, p. 735), and with the phenomenon of judicial law-creation, one finds the origin of judicial activism in the United States (TEIXEIRA, 2012), more precisely in the decision *Lochner v. New York*[2], in which the Supreme Court held that contractual freedom was implicit in the concept of due process of law under the 14th Amendment. This led to the declaration of unconstitutionality of a New York law establishing a 60-hour weekly work limit for bakers, deemed unreasonable and arbitrary.

This case also represents what came to be called the "Lochner Era" 1897-1937 (BARBOZA; KOZICKI, 2016, p. 740), during which state interventions in the economic domain were repeatedly rejected by the U.S. Supreme Court, and can be considered one of the first cases of blatant judicial activism by that Court. (SUNSTEIN, 1987)

It was through historian Arthur Schlesinger Jr., in a *Fortune* magazine piece entitled *The Supreme Court: 1947*, that the term *judicial activism* entered not only the legal lexicon, but also the political and popular one. (KMIEC, 2004)

American *judicial review* can be considered the greatest example of judicial activism in modern constitutional history, since, based on an open and principle-laden constitution, it permitted constitutional jurisdiction to provide the substantive definition of open-content constitutional clauses.

[2] Lochner v. People of New York, 198 US 45, 1905.

However, even in the American legal system, judicial activism cannot be understood merely as how much a Court is active, but as how willing its judges are to develop the law.

In Germany, the Jurisprudence of Values (LAREZ, 1997), embedded in distinct social and political contexts, manifests as a break with Legal Positivism and adaptation of law to the Democratic Rule of Law. Unlike Positivism, which left discretionary decisions to the judge's discretion, the Jurisprudence of Values seeks to impose limits for difficult cases, establishing conditions under which a decision is legitimate through an intersubjective interpretive process. (OLIVEIRA et al., 2011)

In Brazil, judicial activism gained prominence with the 1988 Constitution, given its extensive list of fundamental rights (LIMBERGER; NOGUEIRA, 2017) and the prerogatives it assigned to magistrates, inevitably driving them toward greater engagement with society. Consider the thousands of cases requiring the securing of fundamental rights for which no adequate legal provision yet exists.

Thus, judicial activism can be conceived as a mode of interpretation of constitutional mandates that seeks their direct application while extending their reach. It results, as a rule, from inefficiencies of the other Powers - especially the Legislative - in resolving social and political conflicts, giving room for the proactive action of the Judiciary. (LIMBERGER; NOGUEIRA, 2017)

After refuting recent interpretations of judicial activism and starting from the premise that many judicial decisions are unsupervised, Craig Green argues that judicial activism should be recognized as the abuse of unsupervised power exercised outside the boundaries of the judiciary's role. (GREEN, 2009)

However, judicial activism precisely corresponds to the effective jurisdictional guardianship of the State which, in the face of legislative omission or a legislative gap vis-a-vis society's aspirations, seeks to realize the desired right through expansive legal hermeneutics while complying with all constitutional precepts. Its expansion finds support in the principle of the supremacy of the general public interest. (TEIXEIRA, 2012)

Among the forms of judicial activism in the Brazilian legal system, one may highlight: *counter-majoritarian activism* (resistance against elected powers); *formal or jurisdictional activism* (resistance to legally established limits on court action); *material or creative activism* (resulting from new rights and constitutional doctrine); and *remedial activism*, characterized by the use of judicial power to impose positive actions on or control other government branches. (BORGES; NETO, 2016)

Judicial activism must not be confused with judicialization: while judicial activism seeks to extract the maximum potential of the Constitution without invading the stage of law creation, judicialization imposes the transfer of decisions from the Executive and Legislative to the Judiciary, which then establishes rules of conduct to be followed by the other branches.

While judicial activism is correlated to a volitional act of the judicial body, judicialization is associated with political or social issues and stems from society's development and the crisis of democracy. (OLIVEIRA et al., 2011)

Hence, it may be concluded that activism begins when, among several possible solutions, the judge's choice depends on the desire to accelerate social change or, on the contrary, to slow it down. (GARAPON, 1998)

In sum, while judicialization is a fact resulting from the constitutional model adopted - not a deliberate exercise of political will - judicial activism is an attitude: the choice of a specific and proactive mode of interpreting the Constitution to expand its meaning and reach, so that, in the face of retraction or omission of the Legislative and Executive Powers, social demands may be effectively met by the Judiciary. (BARROSO, 2012)

Activism has as its main argument the maximum promotion of fundamentally guaranteed rights (PEREIRA, 2007), which manifests through: (a) the direct application of the Constitution to situations not expressly covered by its text, independently of the ordinary legislator; (b) the declaration of unconstitutionality of normative acts based on criteria less rigid than patent violation of the Constitution; and (c) the imposition of conduct or abstentions on the Public Power, notably in the area of public policies. (BARROSO, 2012)

Furthermore, the ascent of judicial activism originated from important historical facts: the doctrine of separation of powers first conceived by Aristotle[3] in antiquity; by John Locke[4] through a systematic theory of separation of powers; the emergence of Parliament in the mid-sixteenth century[5] giving a new conception of State power separation; its systematization in the eighteenth century[6]; and the system of checks and balances strengthening constitutionalism.

A reinterpretation of the concept of separation of powers is indispensable. With the proliferation of fundamental rights in modern Constitutions and the acknowledgment that they are principles which may collide, requiring maximum application of each, a new conception of separation of powers becomes necessary. It is no longer understood that law and politics are completely separate fields. (FELLET; PAULA; NOVELINO, 2011)

Having provided this historical contextualization, we proceed to analyze judicial activism within the current constitutional perspective.

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3 The separation of powers proposed by Aristotle conceived a State composed of three functions: the deliberative, entrusted to an assembly with jurisdiction to decide on peace and war and to make or revoke laws; the executive, exercised by governmental magistracies; and the judiciary, which administers justice.

4 In his conception of separation of powers, Locke considered the legislature as the supreme power, to which the other two powers were subordinate, with the legislature subject only to the power of the people. The executive and federative powers would be exercised by the same person. What was sought was, essentially, the separation between the legislative and executive.

5 Regarding this, Machiavelli wrote: "Among the well-governed kingdoms of our time, France stands out, where Parliament and its authority serve as the principal institution ensuring the liberty and security of the king." See: MACHIAVELLI, Niccolo. The Prince. Sao Paulo: Martins Fontes, 2004, p. 90.

6 Montesquieu wrote: "When in the same person or in the same body of Magistracy the legislative power is united with the executive power, there is no liberty. Nor is there liberty if the power of judging is not separated from the legislative and executive." See: MONTESQUIEU. The Spirit of Laws. Sao Paulo: Editora Martin Claret, 2009, p. 169.

3 JUDICIAL ACTIVISM IN THE CURRENT CONSTITUTIONAL PERSPECTIVE

The break with the Liberal State and the transition to the Rule of Law fostered the valorization and adoption of increasingly open norms guided by constitutional principles, contributing to a genuine transfer of powers among the branches.

The Legislative Power, which once confined itself to closed and inflexible normative rules, has been adapting to the current context, implying a more active role of the Judiciary in the constitutional interpretation of abstract norms while weighing value-laden and political aspects of each case.

In this regard, we may draw on Peter Harberle's justification to perceive the constant transformation of the State:

> *"The type of the free and democratic Western Constitutional State is not immutable. Centuries were needed to mold the set of state and democratic elements, of individual and social and cultural fundamental rights, and the future will continue to develop them." (FELLET; PAULA; NOVELINO, 2011, p. 273)*

While judicial activism in the United States has a long history and continues to generate controversy, in Brazil this phenomenon is relatively new and should have many further developments.

Before analyzing judicial activism as a transformative instrument, it is necessary to address the controversies surrounding its alleged offense to the separation of powers and popular sovereignty.

Regarding the argument that judicial activism would violate the separation of powers, a mere analysis of the historical evolution of the Judiciary in the contemporary State organization, coupled with the growth of global constitutionalism, compels the rejection of this understanding. (LIMBERGER; NOGUEIRA, 2017)

In this vein, one perceives the prominent role that constitutional law came to play following the 1988 Constitution:

> *"Throughout Brazilian history, especially in dictatorial periods, constitutional law was reserved a minor, marginal role. In it one sought not the path, but the detour; not the truth, but the disguise. The Constitution of 1988, with its virtues and imperfections, had the merit of creating an environment conducive to overcoming these pathologies and to the diffusion of a constitutional sentiment." (AMARAL, 2010, p. 2)*

One can no longer conceive of the separation of powers with the same severity as during the Liberal State, where strict compliance with the norm excluded any possibility of broad inter-branch or public participation. The inclusion of fundamental rights in the constitutional text and growing concern with access to justice have overcome this rigid model, thereby strengthening democracy itself. (JACOB, 2018)

The constitutional norm has no autonomous existence vis-a-vis reality; its essence lies in its validity - the situation it regulates is intended to be materialized in factual terms. (HESSE, 1991)

Regarding the supposed absolute and rigid separation of Powers, the Minister of the Federal Supreme Court, Cezar Peluso, clarified in the judgment of ADI 3367 that[7]:

> *"In coherence with his theoretical assumptions and practical objectives, MONTESQUIEU never defended the idea of an absolute and rigid separation between the organs entrusted with each of the state functions. On the contrary, he even made reference to mechanisms of mutual relationship between the powers, precisely in order to prevent abuses in their exercise."*

As a corollary, the arguments of those who characterize judicial activism as a threat to the Democratic and Social State of Law collapse - the criticism about supposed violation of a separation that no longer exists comes regrettably from the Executive and Legislative Powers, which routinely exercise atypical functions such as provisional measures by the Executive and peer trials by the Legislature.

Regarding popular sovereignty (JACOB, 2018) - the alleged illegitimacy of the Judiciary to decide matters of broad political and social repercussion since its members do not go through electoral processes - the following must be highlighted:

> *"The Judiciary has characteristics different from those of the other Powers. Its members are not invested by electoral criteria nor by majoritarian processes. And it is good that this is so. Ideally preserved from political passions, judges decide impartially, based on the Constitution and the laws. But the power of judges and courts is representative - exercised in the name of the people, rendering accounts to society." (ALMEIDA, 2011)*

It is incoherent to question the legitimacy of members of the Judiciary, since they are obligatorily required to submit to constitutional criteria, which grants them legitimacy conferred by popular sovereignty.

The contribution of the Judiciary to the strengthening of democracy and the effectiveness of constitutional rights and guarantees cannot be belittled, since a traditional conception of magistrates as neutral, impartial, and passive no longer satisfies the aspirations of a constantly transforming society. (MARINONI, 2000)

There is no basis for claiming that foreign theories of Alexy and Dworkin have been distorted to underpin judicial activism (LIMBERGER; NOGUEIRA, 2017), since legal norms will always contain a 'void' legal space to be filled by the interpreter - a real situation that demands the application of the norm even when no prior provision exists.

The expansion of the Judiciary's interpretation produces concrete effects not expressly provided for in legislation, owing to the vacuum left by the National

[7] See Judgment of ADIN 3367. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp ?docTP=AC&docID=363371. Accessed July 11, 2023.

Congress on certain subjects. Judicial activism is responsible both for the creation of norms and for new grounds for application of constitutional provisions, always grounded in theoretical foundations of hermeneutics.

Among the numerous causes justifying this affirmative conduct of the Judiciary, the most relevant would be the undeniable need for the realization of constitutional precepts, often transgressed and undermined by omission of public powers. (MELLO, 2008) Judicial activism becomes an institutional necessity in the face of the omissions or negligence of the Public Power organs in complying with the constitutional statute itself.

Therefore, the judicial activism advocated here corresponds to a broader and more intense participation of the Judiciary in the materialization of the constitutionally enshrined values, precepts, and aims. (BARROSO, 2012)

Judicial activism is the result of a new constitutionalism that seeks, as a priority, the realization of social aspirations and justice embodied in the Constitution, which is why an undeniable broader and more intense participation of the Judiciary in the materialization of constitutional values and aims subsists. (CUNHA; COUTO, 2017) The mere positivation of human rights in Constitutions is no longer sufficient if they are not, in practice, materialized. (WERLE; KUNTZ, 2017)

The activity of the law applier, bound by the statute or precedents, cannot be differentiated - from the point of view of its substantive limits - from that of the legislator, whose power to create law is subject to the constraints dictated by a written constitution and by constitutional justice decisions (CAPPELLETTI, 1993), since even faithful compliance with legal formalities may result in injustice.

Therefore, in the face of the undeniable omission of the Legislative and Executive Powers, the Judiciary must overcome such formalisms in favor of the effective realization of fundamental and constitutional rights, so that the ideal of justice may at last be achieved.

Given this, neither the outright rejection of judicial activism nor a posture of judicial self-restraint[8] (KOERNER, 2013) on the part of the Judiciary allows for the full realization of fundamental social rights, which is why this phenomenon must be examined as a means of refuting the practice of *social dumping* and promoting the full effectiveness of the fundamental right to work.

[8] Self-restraint refers to the posture whereby the Judiciary seeks to reduce its interference in the actions of the other Powers - when Judges and Courts avoid directly applying the Constitution to situations not expressly within its scope, awaiting the pronouncement of the ordinary legislator.

4 JUDICIAL ACTIVISM AS A MEANS OF REFUTING THE PRACTICE OF *SOCIAL DUMPING* AND PROMOTING THE FULL EFFECTIVENESS OF THE FUNDAMENTAL RIGHT TO WORK

The difficulty in materializing social rights manifests as a global problem, and in Brazil it takes on alarming proportions.

Our Democratic State of Law (HABERLE, 2007) carries the mandate to foster economic development in step with the social value of work and the dignity of the human person, as well as respect for all minimum labor rights inserted in Article 7 of the 1988 Constitution, pursuing the full effectiveness of workers fundamental rights - both in the vertical relationship (State v. Private) and the horizontal relationship among private parties - social equality and social justice, whether through compliance with positive law or through judicial activism, thereby rejecting the deplorable practice of *social dumping* (JUNIOR; PINTO, 2013)[9/10].

Thus, differently from what was understood by the principle of supremacy of law in the Liberal State - which believed legislative activity to be something perfect and complete - today it falls to the law applier, that is, the Judiciary, to give the general and abstract norm applicable to the specific case an interpretation conforming to the Constitution, enabling the best way of protecting fundamental rights.

Given this, judicial activism is precisely fulfilled in the need for compliance with constitutional precepts by the Judiciary, by virtue of the legitimacy conferred upon it by the 1988 Constitution, not constituting any illegality, illicitness, or overstepping of its competence. In order for social rights to be given effect - such as the fundamental right to work - norms require measures even if located outside or beyond the constitutional text (AVILA; MIRANDA, 2017), thus requiring substantive measures for their realization. (RAMOS, 2010)

However, even if there are those opposed to judicial activism, it must not be forgotten that within the perspective of a Democratic and Social State of Law, it falls to the law applier to enable the full efficacy of constitutional provisions, insofar as:

> *(...) the Constitution is currently the great arena, the great locus, where the legal-political struggle takes place. The constituent process develops without interruption, even after the constituent power promulgates its work. The struggle that took place in the Constituent Assembly transfers itself to the field of constitutional practice (application and interpretation). To assert one or another interpretation of a constitutional provision, to defend its potential for immediate execution, or to point to the need for legislative integration, constitute behaviors imbued with very clear ideological commitments. In contemporary Brazil, it is the mission of the legal practitioner to produce a defense of the Constitution. (AMARAL, 2010, p. 4)*

[9] Social dumping is understood as the repeated and inexcusable practice of non-compliance with labor regulations with the aim of gaining economic advantage through the super-exploitation of human labor.

[10] Bill No. 7.070/2010, authored by Congressman Carlos Bezerra, defined social dumping as 'the repeated non-observance of labor legislation that commercially favors the company against its competition.' It established fines for its practice, including ex officio declarations by the judge. However, the proposal was rejected on 01/31/2011 and archived by the House Committee on March 5, 2012. Available at: http://www.camara.gov.br. Accessed July 11, 2023.

As a corollary, even in the face of legislative gaps (KELSEN, 1999), the hermeneutic task of the law applier is complex and inexorable, as provided for in Article 5, item XXXV of the Federal Constitution of 1988[11] and in Article 4 of the Introduction to Brazilian Legal Norms Act[12].

Accordingly, the role of the Judiciary in the process of interpretation and materialization of the Law is beyond dispute, revealing its creative capacity:

> *"The chief law-makers can be, and frequently are, the judges, because they are the final authoritative voice. Every time they interpret a contract, a real relationship, or the guarantees of process and liberty, they necessarily emit into the legal system particles of a system of social philosophy; with these interpretations, of fundamental importance, they lend direction to all law-making activity. The decisions of the courts on economic and social questions depend on their economic and social philosophy." (CAPPELLETTI, 1993, pp. 20-25)*

Thus, an active, participatory, and creative profile of the law applier in the interpretive process contributes to a more just, timely, effective, and efficient jurisdictional service. (KOERNER, 2013)

Drawing on Herbert Hart's teachings about the role of the interpreter in judicial decision-making, one infers that there is an epistemological opposition between the systems of *common law* and *civil law* (HART, 1994), which is why there are two distinct contexts for the resolution of a conflict: the context of decision-making and the context of justification and rationality of the decision through legal argumentation (CUNHA; COUTO, 2017). The inductive and pragmatic methods are typical of Anglo-Saxon States, while the deductive and systematic methods, seeking logic, rationality, and coherence, are typical of the Romano-Germanic system. (CUNHA; COUTO, 2017)

In this vein, Humberto Avila states:

> *"It is necessary to replace the conviction that the legal text is identical to the norm with the finding that the legal text is the starting point of interpretation; it is necessary to go beyond the belief that the function of the interpreter is merely to describe meanings, in favor of the understanding that the interpreter reconstructs meanings; it is important to leave aside the opinion that the Judiciary exercises only the function of negative legislator, in order to understand that it materializes the legal system vis-a-vis the concrete case." (AVILA, 2006, p. 34)*

In this vein, the magistrate, in all jurisdictional instances, is called today to return the protection of individuals under the court's jurisdiction, breaking with the standard of legal rationality that underpinned the era of the apogee of Western legal positivism during the nineteenth century and the first half of the twentieth century

[11] Which provides: "the law shall not exclude from the appreciation of the Judiciary any injury or threat to a right." Federal Constitution of 1988, Art. 5, XXXV.

[12] Which provides: "when the law is silent, the judge shall decide the case in accordance with analogy, customs and general principles of Law." Introduction to Brazilian Legal Norms Act, Art. 4.

(CARBONELL, 2005), culminating in a new idea of legal rationality. (TEIXEIRA, 2012).

Despite the recognition of the importance attributed to judicial interpretation, unlimited discretion is not advocated, since although the judge is inevitably a creator of law, they are not completely free from constraints. There are undeniable limits to judicial freedom, both procedural and substantive (CAPPELLETTI, 1993), which is why, even in the face of judicial activism, the role of the judge requires clear legislative contours. (BAUR, 1982).

In this sense, both Bill No. 1.615, of June 15, 2011,[13] and any other anti-*dumping* infra-constitutional norm or certain judicial activism by the Judiciary, by seeking to comprise the system of protection of social and fundamental rights (SILVA, 2017), will assume the contours of fundamental rights norms, since fundamental rights norms may be both those established in the Constitution and those found in infra-constitutional provisions. (ALEXY; BAEZ; SILVA, 2015)

Accordingly, the practice of *social dumping* affects all of society, as it disrespects fundamental rights and the prevailing economic order, conferring undue competitive advantage and may even be transformed into a form of slavery - keeping workers chained to their jobs while providing undignified working conditions and meager compensation - thereby preventing the full effectiveness of the fundamental right to work. (MARDERS, 2015)

Thus, although the employment relationship is established between employee and employer - a legal relationship between private parties - it is indisputably subject to the protection and guardianship (CARVALHO; LIMA, 2015) of fundamental rights, especially those related to the worker, the indisputably more fragile party in the relationship. (RAMOS, 2016)

Given this, *dumping* as an illicit act contrary to the constitutional and infra-constitutional legal order requires the creation of regulatory and punitive norms, notwithstanding pre-existing repressive means through systematic interpretation and application of the Brazilian legal system; in fact, it requires a system with prevention measures and enforcement of existing Law, with efficient oversight by the Executive Power through its regulatory power, in addition to public awareness policies and anti-*dumping* actions.

Accordingly, in order to achieve the full effectiveness of the social and fundamental rights of workers, there is a need for the State to protect, guarantee, oversee, and give effect to those rights, both in relation to private parties and among themselves.

Furthermore, regardless of the absence of an express legal provision in labor legislation concerning *social dumping*, this fact cannot be used as an obstacle to its

[13] Originally presented as Bill No. 7.070/2010 but rejected in 2011. Later reintroduced on June 15, 2011 as Bill No. 1.615/2011, currently under consideration by the Committee on Labor, Administration and Public Service (CTASP). The bill addresses social dumping and aims to establish civil indemnification and administrative fines for companies engaging in unfair competition by non-compliance with labor legislation. Available at: http://www.camara.gov.br. Accessed July 11, 2023.

characterization and condemnation in concrete situations, since the legal order must always be interpreted systematically, so that the legal interests affected by this practice - provided for both in the constitutional text and in ordinary legislation - receive due protection from the State.

Given this, regardless of one's position regarding the legality or limits of judicial activism, the law applier is led to overcome the traditional model (LEITE, 2011) with regard to reparation, in order to broaden the scope of responsibility in favor of the protection of the totality of current social conflicts (LOBATO JUNIOR; PINTO, 2013), and must therefore exercise the functions of damage prevention (SILVA, 1991), punitive, and pedagogical.

Accordingly, it falls to the State to seek mechanisms to mitigate practices such as *social dumping*, as well as to promote the full effectiveness of the fundamental right to work, which is why judicial activism - in the case of fundamental social rights norms - appears as a path toward the realization of dignity and equality for all. (SILVA, 2017)

5 FINAL CONSIDERATIONS

In light of the foregoing, it follows that any argument concerning a possible affront to the separation of powers, disregard of popular sovereignty, or misuse of external theories through judicial activism is fully overcome.

The break with the understanding that positive Law would be something perfectly complete, free of gaps, and fully regulated has given way to the understanding that Law is in constant mutation and renewal, as new rights and social aspirations prove inherent to the condition of the Democratic and Social State of Law.

Furthermore, in favor of the full effectiveness of fundamental rights - including the fundamental right to work - it becomes clear that it falls to the Judiciary, through a legal-rational interpretation of the specific case, to provide the proper protection to individuals subject to the court's jurisdiction.

In view of this, judicial activism as currently practiced in the Brazilian legal system reflects a necessity, capable of becoming an instrument of transformation of the Democratic State of Law, insofar as the conception of activism suggested in this article does not correspond to an irresponsible and unlimited faculty of the law applier, nor to any intention to challenge the law and other sources of law.

Accordingly, this does not constitute an affront to the separation of powers proposed by the constituent, nor any illegitimacy in that regard, as the same finds shelter in the 1988 Constitution itself. However, judicial activism must be conceived as a mitigated discretionary power, given that it requires mutual respect for the other constitutional limits and provisions.

In this sense, in order to refute any repeated practice of disregard for labor norms that - in addition to competitive-economic advantage - favors the precarization of employment relationships, it falls to the State to reject the practice of *social dumping*, even through judicial activism, in the absence of specific

legislation, in order to safeguard constitutionally enshrined social rights and guarantees, including the fundamental right to work.

In view of the foregoing, it follows that for the legitimate exercise of the state jurisdictional function, the judge must respect the values and aims set forth in the 1988 Constitution, always in observance of the fundamental rights and guarantees of all parties subject to the court's jurisdiction, and attentive to the social reality surrounding them, so that their activity, even if activist, may be legitimate and just.

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