



## JUDGE MOUTH OF LAW AND THE LAW ACCORDING TO THE MOUTH OF THE JUDGE IN LENIO STRECK'S THEORY

Sergio Alves Teixeira Junior

### Summary

This article aims to explore and analyze Lenio Streck's theory on the concepts of judicial practice, considering the figures of the law-giving judge and the law according to the judge's mouth. The methodology used was a bibliographical research, seeking the theoretical basis necessary for the study in articles and books. In conclusion, the Judiciary must apply democratic law unless it is unconstitutional or there are antinomies to be resolved. It is essential to avoid using principles in an ad hoc manner, without a solid basis for generalization and decision-making continuity, in order to prevent decisionism. Greater care is advocated in the interpretation and application of the law, always respecting the literalness of democratically established laws.

**Keywords:** Interpretation of the Law. Judicial Decision. Constitutionalism.

### Abstract

This article aims to explore and analyze Lenio Streck's theory regarding judicial practice concepts, considering the figures of the judge as the mouth of the law and the law as per the judge's mouth. The methodology employed involved a bibliographic research, sourcing theoretical grounding from articles and books essential to the study. In conclusion, the Judiciary should apply democratic law unless it is unconstitutional or there are conflicting norms to be resolved. It is crucial to avoid the ad hoc use of principles without a solid basis of generalization and continuity in decision-making to prevent decisionism. A greater care in the interpretation and application of the law is advocated, always respecting the literal wording of democratically established laws. **Keywords:** Law Interpretation. Judicial Decision. Constitutionalism.

### Introduction

The role of the judge in the contemporary legal system is a topic of intense discussion and debate, especially with regard to the interpretation and application of the law. The expression "law-making judge" evokes the figure of the magistrate who sees himself as a mere executor of the law, applying it literally and mechanically, without considering the contexts and particularities of specific cases. On the other hand, "the law according to the mouth of the judge" represents an approach in which the judge attributes meanings to laws according to his own personal convictions and interpretations, which can lead to excessive flexibility and a lack of legal predictability.<sup>1</sup>

The relevance of this study lies in the fact that the Brazilian Judiciary currently employs both models in the application of the legal system. While some judges are still bound by the literalness of the law, others adopt the approach of direct application of the Constitution, often creating their own rules without due rational and scientific basis. This dualism creates a scenario of uncertainty and inconsistency in judicial decisions, affecting the perception of justice and public trust in the legal system.

Therefore, the research is justified by the need to explore and critically evaluate these two conceptions of judicial practice, seeking a balance between the objectivity of law enforcement and reasoned contextual interpretation. Lenio Streck's theory offers a starting point for this analysis, proposing a path towards the integrity and coherence of the Brazilian legal system.

In this sense, this article aims to explore and analyze Lenio Streck's theory on the conceptions of judicial practice, considering the figures of the judge as the mouth of the law and the law according to the mouth of the judge.

1

### On the discretion of justice in a democratic state governed by the rule of law

Constitutional Law is currently in the era of post-positivism, also known as neopositivism, which brought a new hermeneutics by highlighting the rights inherent to human nature and incorporating morality to the inte legal interpretations. This philosophical movement marks the new constitutional law, where the di-

<sup>1</sup> MACHADO, Paulo Roberto. Legal hermeneutics and the fundamental right to the correct decision: towards a theory of de-judicial division. **Verba Legis Legal Journal**. 2015. Available at: [https://apps.tre-go.jus.br/internet/verba-legis/2015/verba-legis\\_2015\\_008-Hermeneutica-juridica-eo-direito-fundamental-a-decisao-correta.php](https://apps.tre-go.jus.br/internet/verba-legis/2015/verba-legis_2015_008-Hermeneutica-juridica-eo-direito-fundamental-a-decisao-correta.php) Accessed: Jun. 2024.



Fundamental rights are considered universal and timeless values, elevating them to the status of legal norms. Consequently, all judgments must take these rights into account, as determined by the Constitution, and legislators, judges and legal practitioners must obey constitutional precepts. It follows that judicial decisions must be based on these rights.

It is explained that judicial discretion is the power used by a judge to make decisions on various matters based on his or her opinion within general legal guidelines. It involves acting in certain circumstances according to the judge's personal judgment. Thus, judicial discretion is the exercise of judgment by a judge or court based on his or her personal assessment and guided by the principles of law.<sup>2</sup>

Streck<sup>3</sup> emphasizes the need for a democratic construction of law, where judicial decisions are not based solely on the discretion of judges, but rather on principles shared intersubjectively. He criticizes theoretical approaches that may conceal subjectivist positions and defends an approach that promotes intersubjectivity in the interpretation and application of norms.

The simple declaration of a Democratic State does not satisfy the basic desires of society. To make democracy effective, means, policies and instruments are needed, but these are absent. Gilmar Mendes<sup>4</sup> emphasizes that the Democratic State of Law must incorporate and overcome the previous liberal and social models. Brazilian society and scholars discuss the full functioning of the country, calling for the dignity, equality and freedom provided for in the 1988 Constitution. In addition, Brazil is a signatory to the American Convention on Human Rights, emphasizing the protection of human rights in a universal manner.

The Brazilian Federal Constitution, in its title of fundamental principles, enshrines human dignity as a central value of the Democratic State of Law. In a democratic State of law, it is essential to protect fundamental rights and human rights, requiring that the entire normative system be reinterpreted in light of the new constitutional order. In this model of State, fundamental rights must prevail over reasons of State, imposing their strictest limits.

Sarlet<sup>5</sup> highlights the dignity of the human person as closely linked to fundamental rights and human rights, being a pillar of contemporary constitutional law. In the same sense, Canotilho<sup>6</sup> highlights the need for balance between an excessively jurisdictional court, which would rigorously apply the monitoring of unconstitutionality, and an excessively political court, which would be more thoughtful in the evaluation of normative acts.

Streck<sup>7</sup> highlights the importance of properly reasoned judicial decisions. Poorly reasoned decisions not only compromise legal certainty, but also put democracy and fundamental rights guaranteed by the Constitution at risk. He argues that there is a fundamental right of citizens to receive answers appropriate to the Constitution, which implies a need for robust justification by the Judiciary.

Streck<sup>8</sup> proposes a balance where the interpretation of laws and principles must be done in a coherent and well-founded manner, respecting the new constitutional order and the centrality of fundamental rights. This balance is crucial to ensure that justice is not just the mechanical application of the law, but also a reflective practice that ensures the protection of human rights and the dignity of the human person, as advocated by the Federal Constitution, as discussed in the following section.

#### Reflections on the figures of the "law-speaking judge" and the "law according to the judge's mouth"

It is worth mentioning initially that the power of democratic decision-making needs to be supported by aspects of legitimacy, since the decision is not sovereign through the will of the majority or based on choice.

2 VERBICARO, Loiane Prado. Judicial discretion and the truth conditions of legal propositions in light of the Hart and Dworkin debate. **Electronic Journal of the Law Course at UFSM**, v. 13, no. 1, p. 133-158, 2018.

3 STRECK, Lenio Luiz. Between activism and the judicialization of politics: the difficult realization of the fundamental right to a constitutionally adequate judicial decision. **Legal Space: Journal of Law**, v. 17, no. 3, p. 721-732, 2016. 4

MENDES, Gilmar Ferreira. **Constitutional Law Course**. 4th ed. New York: Routledge, 2009.

5 SARLET, Ingo Wolfgang. **Human Dignity (of the Person) and Fundamental Rights in the Federal Constitution of 1988**. 10th ed. Lawyer's Bookstore. Porto Alegre: Lawyer's Bookstore, 2015. 6

BROWN, Joseph. **Constitutional jurisdiction and discursive uneasiness**. In: MIRANDA, Jorge (org.). *Constitutional Perspectives in the 20th Anniversary of the 1976 Constitution*. Coimbra: Coimbra Editora, 1996. 7

STRECK, Lenio Luiz. Between activism and the judicialization of politics: the difficult realization of the fundamental right to a constitutionally adequate judicial decision. **Legal Space: Journal of Law**, v. 17, no. 3, p. 721-732, 2016. 8

STRECK, Lenio Luiz. Is applying the "letter of the law" a positivist attitude?. **New legal studies**, v. 15, n. 1, p. 158-173, 2010.

of a powerful State, where there is the mere prior writing of solely theorized procedural rights.<sup>9</sup>

This process does not involve a judge privileged by judgments of justice and security carried out by induction or deduction. The proper democratic decision comes from a moral and ethical act, arising from processes centered on the principles of a grouped and humanitarian society, permeated by audible rights and guarantees, and, above all, guided by fundamental rights.<sup>10</sup>

It is considered that a large part of Brazilian doctrine is lost in the vast models of evidence assessment. Even if there is a consensus that the model of free assessment of evidence would be more democratic, the judge and the parties would end up being hostages to the hierarchy of evidence values stipulated by law, with greater conformity on the part of the judge, who can adapt the assessment of evidence to the specific circumstances of the case.<sup>11</sup>

There is, therefore, a structural problem in the conception of law: on the one hand, judges believe in the possibility of seeking the real truth; on the other, they take upon themselves the management of evidence in the process, with the production of evidence being capable of being managed based on their conscience.<sup>12</sup>

The expression "law-making judge" refers to a traditional view, especially associated with legal positivism, where the judge is seen as a mere enforcer of established rules, with no room for interpretation or personal assessment. According to this perspective, the judge must strictly follow the text of the law, being a neutral and objective figure who simply applies the rules without interfering.

This historical idea dates back to the French Revolution and the codification of laws in continental Europe, as exemplified by the Napoleonic Code. In this context, the standardization and centralization of legal norms were seen as essential for the stability and predictability of the legal system, reflecting a desire to shift the interpretative power away from judges in favor of a mechanical application of the law.<sup>13</sup>

On the other hand, criticism of the concept of "law-making judge" argues that this approach is overly restrictive and may limit justice and equity in the application of rules. With the development of contemporary legal thought, especially after the consolidation of democratic constitutions, such as the 1988 Federal Constitution in Brazil, the view of the judge as a mere mechanical enforcer of the law has been questioned.<sup>14</sup>

There is now a growing trend towards recognizing that judges have not only a duty, but also a duty to interpret and apply the law in accordance with constitutional values and principles, taking into account the social context and fundamental rights. This means that the role of the judge goes beyond simply being *the law's mouth*; he must play an active role in protecting individual rights and promoting social justice, balancing the application of the law with ethical and moral reflection.<sup>15</sup>

Behind this defect is the discretion that supports legal positivism. The discussion of the accusatory system involves a paradigm shift, and it is necessary to understand that the inquisitorial system is linked to the paradigm of subjectivity, in which the individual is subject to evidence, with the prevalence of principles such as the free conviction of the judge and the free assessment of evidence.<sup>16</sup>

Principles, as deontological standards, must be followed: either a principle is adopted or not adopted. The procedural model, being a theoretical matrix, does not allow syncretism; thus, either the system is inquisitorial or accusatory, and, in this context, the procedural subjects are the protagonists of the production of evidence. There is no doubt that, when the NCPD removed the judge from control over the archiving, it did justice to the principle of the presumption of innocence regarding the possibilities of arrest and the limitations on the production of evidence in view of the adoption of the accusatory system.<sup>17</sup>

There is a critical situation in Law in Brazil, especially with regard to the interpretation of laws and

9 STRECK, Lenio L. **New Code of Criminal Procedure**. The problem of systems syncretism (inquisitorial and accusatory) rio). Brasilia a. 46 n. 183 July/September 2009.

10 STRECK, Lenio L. **New Code of Criminal Procedure**. The problem of systems syncretism (inquisitorial and accusatory) rio). Brasilia a. 46 n. 183 July/September 2009.

11 STRECK, Lenio L. **New Code of Criminal Procedure**. The problem of systems syncretism (inquisitorial and accusatory) rio). Brasilia a. 46 n. 183 July./Sep. 2009.

12 STRECK, Lenio L. **New Code of Criminal Procedure**. The problem of systems syncretism (inquisitorial and accusatory) rio). Brasilia a. 46 n. 183 July./Sep. 2009.

13 SILVA, CO Judge Mouth of the Law and the Voice of the Constitution. **JusBrasil**, 2020. Available at: <https://www.jusbrasil.com.br/articles/judge-mouth-of-the-law-and-voice-of-the-constitution/1142386936> Accessed: Jun. 2024.

14 SILVA, CO Judge Mouth of the Law and the Voice of the Constitution. **JusBrasil**, 2020. Available at: <https://www.jusbrasil.com.br/articles/juiz-boca-da-lei-ea-voz-da-constituicao/1142386936> Accessed: Jun. 2024. 15

SILVA, CO Judge Mouth of the Law and the Voice of the Constitution. **JusBrasil**, 2020. Available at: <https://www.jusbrasil.com.br/articles/judge-mouth-of-the-law-and-voice-of-the-constitution/1142386936> Accessed: Jun. 2024. 16

STRECK, Lenio L. **New Code of Criminal Procedure**. The problem of systems syncretism (inquisitorial and accusatory) rio). Brasilia a. 46 n. 183 July./Sep. 2009.

17 STRECK, Lenio L. **New Code of Criminal Procedure**. The problem of systems syncretism (inquisitorial and accusatory) rio). Brasilia a. 46 n. 183 July./Sep. 2009.

to the autonomy of law. Although there is a modern discourse that seems post-positivist, it often carries the same old practices of legal positivism, which can weaken the autonomy achieved by law throughout history.<sup>18</sup>

Strict control in the interpretation of the law is necessary, highlighting the problem of the growth of jurisdiction in relation to legislation. The Brazilian criminal procedural system illustrates these concerns, where the impartiality of the judge and the independence of the prosecutor are essential for a democratic system. The adoption of an accusatory system, which was supposed to replace the inquisitorial system of the 1941 Code of Criminal Procedure, is seen as a significant advance. However, the persistence of old practices, even after the amendment of article 212 of the CPP by Law 11.690/2008, which was supposed to promote a more accusatory system, continues.<sup>19</sup>

Even though the legal community formally embraces the new legal text, there is still resistance to changing its practices, maintaining the traditional inquisitorial model. The decision of the STJ (Superior Court of Justice) that, when interpreting the new article 212, maintained the practice of initial questioning by the judge, contradicts the text of the law that provided that the parties would ask questions directly to the witnesses.<sup>20</sup>

Complying with the law to the letter, especially when that law is the product of a democratic process, is crucial to the advancement of democracy. The idea that following the “letter of the law” is an outdated positivist stance is criticized. Instead, current legality, established by the Constitution, integrates principles that must be respected.<sup>21</sup>

Legal interpretation must be made based on obedience to constitutionally founded law, differing from primitive exegetical positivism. The indiscriminate use of principles to circumvent laws without resorting to adequate constitutional jurisdiction is seen as a return to positivist discretion.<sup>22</sup>

In Streck's text,<sup>23</sup> He strongly criticizes the replacement of the legal system by what he calls a “moral system,” where judicial decisions are based on individual and collective beliefs, convictions, and subjectivities, instead of strictly following the law and the Constitution. He uses two contrasting examples — a case of judicial authorization for a student to attend two public colleges simultaneously, against Law 12.089/2009, and the practices of Operation Lava Jato, which include plea bargains and serving sentences without formal charges or proceedings.

Streck<sup>24</sup> argues that such decisions reflect judicial activism that disregards legality in favor of a supposed balance of rights or interests, using the balancing act as a pretext to justify deviations from the law. He severely criticizes this type of practice, emphasizing that it weakens democracy by delegitimizing the role of the legislator and legal norms.

Furthermore, he draws a historical analogy with periods such as Germany after the Weimar Republic, where the relaxation of law enforcement paved the way for abuses of power. Streck<sup>25</sup> concludes by reaffirming the importance of legality as a fundamental pillar of the Rule of Law and democracy, warning that the passive acceptance of these practices can lead to the institutionalization of arbitrariness and the devaluation of legal education, compromising the future of justice in Brazil.

For Streck and Abboud,<sup>26</sup> the introduction of a system of precedents can lead to a utilitarian application of law, where functionality and efficiency prevail over the constitutionality and integrity of the law legal system o. Streck and Abboud<sup>27</sup> also question the idea that higher courts should create theses

18 STRECK, Lenio Luiz. Is applying the “letter of the law” a positivist attitude?. **New legal studies**, v. 15, n. 1, p. 158-173, 2010.

19 STRECK, Lenio Luiz. Is applying the “letter of the law” a positivist attitude?. **New legal studies**, v. 15, n. 1, p. 158-173, 2010.

20 STRECK, Lenio Luiz. Is applying the “letter of the law” a positivist attitude?. **New legal studies**, v. 15, n. 1, p. 158-173, 2010.

21 STRECK, Lenio Luiz. Is applying the “letter of the law” a positivist attitude?. **New legal studies**, v. 15, n. 1, p. 158-173, 2010.

22 STRECK, Lenio Luiz. Is applying the “letter of the law” a positivist attitude?. **New legal studies**, v. 15, n. 1, p. 158-173, 2010.

23 STRECK, Lenio Luiz. The phrase “take a test to become a judge” is (and) what remains of the criminal proceedings. **Legal Consultant**, 2017. Available at: <https://www.conjur.com.br/2017-mar-09/senso-incomum-frase-faca-concurso-juiz-restou-processo-penal/> Accessed: June 2024.

24 STRECK, Lenio Luiz. The phrase “take a test to become a judge” is (and) what remains of the criminal process. **Legal Consultant**, 2017. Available at: <https://www.conjur.com.br/2017-mar-09/senso-incomum-frase-faca-concurso-juiz-restou-processo-penal/> Accessed: June 2024.

25 STRECK, Lenio Luiz. The phrase “take a test to become a judge” is (and) what remains of the criminal process. **Legal Consultant**, 2017. Available at: <https://www.conjur.com.br/2017-mar-09/senso-incomum-frase-faca-concurso-juiz-restou-processo-penal/> Accessed: June 2024.

26 STRECK, Lenio Luiz; ABOUD, Georges. Why Brazilian commonists want to prohibit judges from interpreting. **Legal Consultant Magazine, Sao Paulo, Common Sense**, v. 22, 2016. 27

STRECK, Lenio Luiz; ABOUD, Georges. Why Brazilian commonists want to prohibit judges from interpreting. **Re-**



general and abstract, arguing that this may reduce the role of the legislature and deviate from the principle of separation of powers. Therefore, Streck's text is a profound critique of the paradigm shift that some scholars and jurisprudence are promoting in Brazil, warning of the possible negative impacts on the structure and legitimacy of the national legal system.

## Conclusion

The discussion on the role of the judge in the contemporary legal system reveals a complex and multifaceted scenario, where the traditional approaches of “judge as the mouth of the law” and “law according to the mouth of the judge” continue to challenge legal practice. While the former represents a more restrictive view, focused on the literal application of the law with no room for interpretation, the latter reflects a more flexible approach, where judges can assign meanings and adapt rules to the specific circumstances of the case.

In the Brazilian context, these approaches coexist, creating an environment of uncertainty and inconsistency in judicial decisions. Judges who restrict themselves to the literal meaning of the law may ensure predictability, but they run the risk of ignoring social contexts and fundamental constitutional values. On the other hand, those who adopt a freer interpretation may promote justice in individual cases, but they also face criticism regarding the lack of rational basis and the possibility of arbitrariness.

Lenio Streck's theory offers an important critical perspective by emphasizing the need for a democratic construction of law, where judicial decisions must be based on intersubjectively shared principles. This implies not only respecting legality and constitutionality, but also ensuring the coherence and integrity of the legal system as a whole.

It is therefore crucial to strike a balance between strict application of the law and contextualized interpretation based on constitutional principles. This balance not only strengthens legal certainty and public trust, but also ensures that justice is truly achieved in accordance with democratic values and fundamental rights enshrined in the 1988 Federal Constitution.

In conclusion, the Judiciary must apply democratic law unless it is unconstitutional or there are antinomies to be resolved. It is essential to avoid using principles in an ad hoc manner, without a solid basis for generalization and decision-making continuity, in order to prevent decisionism. Greater care is advocated in the interpretation and application of the law, always respecting the literal meaning of democratically established laws.

## References

BROWN, Joseph. **Constitutional jurisdiction and discursive uneasiness**. In: MIRAN-DA, Jorge (org.). *Constitutional Perspectives in the 20th Anniversary of the 1976 Constitution*. Coimbra: Coimbra Editora, 1996.

MACHADO, Paulo Roberto. Legal hermeneutics and the fundamental right to the correct decision: towards a theory of judicial decision. **Verba Legis Legal Journal**. 2015. Available at: [https://apps.tre-go.jus.br/internet/verba-legis/2015/verba-legis\\_2015\\_008-Hermeneutica-juridica-eo-direito-fundamental-a-decisao-correta](https://apps.tre-go.jus.br/internet/verba-legis/2015/verba-legis_2015_008-Hermeneutica-juridica-eo-direito-fundamental-a-decisao-correta). php Accessed: Jun. 2024.

MENDES, Gilmar Ferreira. **Constitutional Law Course**. 4th ed. New York: Routledge, 2009.

SARLET, Ingo Wolfgang. **Human Dignity (of the Person) and Fundamental Rights in the Federal Constitution of 1988**. 10th ed. Lawyer's Bookstore. Porto Alegre: Lawyer's Bookstore, 2015.

5

SILVA, CO Judge Mouth of the Law and the Voice of the Constitution. **JusBrasil**, 2020. Available at: <https://www.jusbrasil.com.br/artigos/juiz-boca-da-lei-ea-voz-da-constituicao/1142386936> Accessed: Jun. 2024.

STRECK, Lenio Luiz. Is applying the “letter of the law” a positivist attitude?. **New legal studies**, v. 15, no. 1, p. 158-173, 2010.

STRECK, Lenio L. **New Code of Criminal Procedure**. The problem of systems syncretism (inquisitorial view **Legal Consultant, Sao Paulo, Common Sense**, v. 22, 2016.





STRECK, Lenio Luiz. Between activism and the judicialization of politics: the difficult realization of the fundamental right to a constitutionally adequate judicial decision. **Legal Space: Journal of Law**, v. 17, no. 3, p. 721-732, 2016.

STRECK, Lenio Luiz; ABBOUD, Georges. Why Brazilian commonlists want to prohibit judges from interpreting. **Legal Consultant Magazine, Sao Paulo, Common Sense**, v. 22, 2016.

STRECK, Lenio Luiz. The phrase “take a test to become a judge” is (and) what remains of the criminal process. **Legal Consultant**, 2017. Available at: <https://www.conjur.com.br/2017-mar-09/senso-incomum-frase-faca-concurso-juiz-restou-processo-penal/> Accessed: June 2024.

VERBICARO, Loiane Prado. Judicial discretion and the truth conditions of legal propositions in light of the Hart and Dworkin debate. **Electronic Journal of the Law Course at UFSM**, v. 13, no. 1, p. 133-158, 2018.