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THE SOCIAL FUNCTION OF LAND IN ADI 3865 AND THE BREAK IN THE JURISDICTIONAL PANORAMA IN ITS CONSTITUTIONAL CONCEPT

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ABSTRACT

The present study aimed to analyze the social function of land with a focus on the Direct Action of Unconstitutionality 3865, which puts an end to the discussion about the fulfillment of the constitutional requirements established in Law 8629/93 (Agrarian Reform Law) for expropriation purposes. To this end, it was necessary to demonstrate that judicial decisions are capable of contributing to the realization of public policies, when the State does not carry them out, and also, to trace the path that goes from the birth of private property to its socialization that ends with legislation tending to include the social function as part of this property. Finally, the deductive method of research and literature review was used.

Keywords: Social Function of the Earth. ADI 3865. Counter-hegemonism. Agrarian reform.

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INTRODUCTION

The social function of property appears in Brazil as a means of limiting private property in the Federal Constitution of 1988, but its absolute character had already been the focus of discussions even before the outbreak of social struggles in Europe. The natural law philosopher John Locke, in his work "Second Treatise on Civil Government", treated the land and everything that is added to it as a natural right given to humanity. Thus, property arises from the idea that if man works to modify a certain space, it would be his by right. However, the property would be sufficient for use and sustenance.

Both the use of land in John Locke and the current adequate use as part of the concept of the social function of land, lead to the same purpose, that property should serve everyone, even if part of society does not achieve the right to own a certain space of land.

Starting from this premise, the social function of land is inherent to property and the latter cannot be read without considering the former. Along with property, productivity also follows, until today defended as sufficient to generate the right to land, but which now finds a barrier in the decision given by the Federal Supreme Court in Direct Action of Unconstitutionality 3865, which gives an interpretation in accordance with the constitution to articles 6 and 9 of the Agrarian Reform Law.

With this, the objective of the study is to analyze the decision of the STF in ADI 3865 given on September 1, 2023, which determines the fulfillment of the social function in rural properties, which goes beyond productivity, for the purposes of inexpropriation, taking into account articles 184, 185 and 186 of the Federal Constitution.

In the chapters that follow, there was first the need to deal with the evolution of the courts with regard to the paradigm shift that inserts the Judiciary in such a leading role, since social transformation often depends on judicial decisions that determine the implementation of public policies when the Executive does not carry them out.

Finally, in the third chapter it was necessary to deal with the evolution of property and the social function inherent to it, as well as the normativity that instituted the institute. The fourth chapter was in charge of the analysis of the STF's decision in ADI 3865 that gives rise to expropriation for non-compliance with the social function of the land.

Finally, the research was carried out through the deductive method and literary review of doctrinal and legal documents, as well as jurisprudential analysis.

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THE CHANGE FROM A HERMENEUTIC VIEW IN THE COURTS TO THE ACHIEVEMENT OF THE DEMOCRATIC RULE OF LAW

For many years, jurists were concerned with the Theory of Law within a bubble in which the civil and the criminal mattered. Judicial decisions, based on the simple interpretation of the law in the way they came to the legal world, symbolize the predominance of a law ready for interindividual relationships and conflicts that are easy to resolve in the aforementioned areas, with criminal decisions being the most reckless among individuals. This is because the judges based on Kelsen's normativist positivist law, in which legal questions are resolved based on what is purely described in the law, set aside other normative orders and applied the letter of the law to the fact simply and did not allow themselves to go beyond that. Going further does not mean being contrary to the law, but deciding issues in the transindividual field in order to restrict the formality of the law that dominated the courts.

But before dealing with positivism in the courts and the advance towards a view of law as a means of social transformation, it is necessary to briefly talk about the origin of positivism. To this end, Bobbio (1979) distances natural law from positive law. For him, legal positivism derives from positive law and not from philosophical positivism, and the former is distinguished from natural law in principle in Aristotle and Plato. Aristotle uses two criteria to distinguish positive law from natural law: the first is based on efficacy and while natural law has efficacy everywhere, positive law is only effective among a certain community in which that law is established; the second concerns the value judgment of actions, that is, natural law exists regardless of whether the actions prescribed to it are good or bad; Positive law, on the other hand, prescribes that from the moment that a certain action is regulated by law, it can only be practiced in the way established in that law.

An interpretation of the law along positivist lines would be acceptable if living in society were not so complex. But it is possible that through the law there are transformations in the structure of the State and society in its social, economic and political aspects, in which the protagonism of the courts is inevitable in the face of a decision that contradicts the liberal-individualist paradigm.

And even in the face of a positivist conception, Streck (2014) sees favorable points, since society fights for more democratic laws and applying the "letter of the law is a considerable advance", if this law is constitutional. To give the constitutional look to the law is to treat the law as a greater instrument than the simple daily legal practice requires, it is

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to leave a comfortable, comfortable environment for the jurist who trusts in the truth of the infra-constitutional law. This happens a lot in the lower courts, where judges prefer not to decide according to the constitution, leaving the discussion to the higher courts.

The Democratic Rule of Law requires a strong, regulatory State and an autonomous Law. Law is a legacy of modernity and today, in the face of a democratic constitution, it must serve as a means for the implementation of modern promises (STRECK, 2014). The struggle of social movements is for the emancipation of the Law, that is, for political or judicial decisions to be complied with in accordance with constitutional provisions and, even political decisions when not aligned with democratic dictates, must be reviewed by the judiciary. Thus, Law matters and is the center of the universe of the three powers.

In fact, Virgílio Afonso da Silva (2008) points to a myth of Montesquieu's theory of the separation of powers. The theory seen as rigid in countries like Brazil, which carried a classical liberal model for a long time and there are still those who defend it, has been losing space to more democratic judicial decisions. Before, it was not imagined that a judiciary would intervene in the implementation of public policies or even in their correction in the excuse of applying the theory of separation of powers, which for the aforementioned author, is a "skewed view of Montesquieu's ideas applied to a presidential regime in a society that is infinitely more complex than the one Montesquieu had as a paradigm" (SILVA, 2008, p. 589).

In Brazil, due to its history of recent democracy, with a Democratic Constitution of 1988, the judicial decisions given in accordance with this constitution are also recent. An example is the decision of the Federal Supreme Court on the time frame for the demarcation of indigenous lands, perhaps the most emblematic decision that society has been able to follow. As a result of pressure from social movements in favor of indigenous peoples, the STF's decision, given in September 2023, "ended" a discussion initiated in a repossession process, a judicial request made by the Santa Catarina Institute of the Environment (IMA), over an area located in part of the Sassafrás-SC biological reserve, declared by the National Foundation of Indigenous Peoples (FUNAI) as a traditional indigenous occupation. The STF ruled against the time frame thesis (from the 1988 Constitution), giving indigenous peoples the right to remain on their lands, a right that, according to Rosa Weber, is traditionally granted by Brazilian law as being prior to the creation of the Brazilian State (STF, 2023).

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In this case, the STF did its part, granting the right to indigenous peoples, however, the National Congress did not take the decision into account and within a month, approved law 14.721/23, parts of which were vetoed by the President of the Republic, including the time frame of October 5, 1988 (date of the promulgation of the Federal Constitution), and soon after, overthrown by the ruralist wing of the same Congress.

In countries with mature democracies, decisions count for more time. Dworkin (1999) addresses some important decisions such as those of Great Britain and the United States in which those affecting everyone become law. The U.S. Court is so important that it has the power to overturn thoughtful and popular decisions of other sectors of government if it finds that they are contrary to the Constitution. In one of the examples given, Dworkin (1999, p. 4) mentions that the American Court decided in 1954 that "no state had the right to segregate public schools by race", leading the country to a "profound social revolution", never triggered by any other institution. Look at the importance of the Judiciary in a country whose democracy has more time, although its liberalism has put this same democracy in check with the insurrection that took place in 2021[5].

For Santos (2011), the judge was an enforcer of the letter of the law and the construction of the State was based on the growth of the Executive and the bureaucracy, with the judiciary being only an arm of this bureaucracy, "an organ for the political power to control", an "institution without powers to stop the expansion of the State and its regulatory mechanisms". In the 1970s and 1980s, authoritarian regimes did not strengthen the Judiciary so that there would be no interference from it in governments, and the left also did not have the judiciary as a means of seeking social justice. But at the end of the 1980s, Latin American countries (and also Asian, European and African countries) began to demonstrate a judicial protagonism more based on the control of legality and even dared to have a certain control of constitutionality, certainly the beginning of a movement to guarantee the constitutional rights of citizens.

Also in Santos (2011, p. 12), the confrontation with other powers, especially the executive, manifested itself in three fields: "in the guarantee of rights, in the control of legality and abuses of power, and in the judicialization of politics". However, it is not possible to universalize the reasons for judicial protagonism in Latin American and European countries, or in African countries. Each one has a different judicial culture and

[5] In 2021, supporters of former US President Donald Trump stormed the Capitol during the insurrection against the election result that elected John Biden.

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has gone through different experiences in their courts with something in common, which is the "dismantling of the interventionist State", whether in peripheral and semi-peripheral countries, or in central European countries, whose welfare state is more advanced.

Many of the lawsuits that generate the protagonism of the judiciary are responses to the absence of the State in economic and social public policies. This scenario is visible in peripheral and semi-peripheral countries such as Brazil and is not observed in central countries, where there are few lawsuits, such as Sweden and the Netherlands. For Santos (2011), the search for the judiciary has to do with legal and political cultures and also with the effectiveness of rights and the administrative structure that guarantees the application of these rights. Thus, in countries with a constitutional guarantee, but with low effectiveness, the judiciary tends to be the means of guaranteeing the rights set forth there. The redemocratization in Brazil opened up several possibilities for intervention by the judiciary. The Federal Constitution of 1988 expanded the forms and the list of institutions with legitimacy to propose actions for control of constitutionality and popular and public civil actions, also began to be more used among the demands in the courts.

Among the lawsuits that circulate the most in the judiciary, requests for medicines and medical treatments that the State denies paying stand out, since it is a positive right that requires a budget. In fact, the State does not make, postpone, or even wait for a judicial decision to carry out a certain action, due to lack of money. But as mentioned, there are other lawsuits of a social, economic, and environmental nature that become major litigations, whose decisions reach society.

The point of study of this research is the discussion about ADI 3865, which deals with the characterization of the social function of land and which was promptly another target of criticism among the defenders of the ruralist wing in Brazil. It is true that the decision reaffirms the relevance of agrarian reform and the judiciary as an intervenor of public policy by demonstrating that land productivity alone does not prevent expropriation. Productivity and social function are not the same thing and this causes too much discomfort for those who only produced and did not care about their environmental reserves or their labor contracts, since the social function has its conceptual breadth based on constitutional parameters, but there is a whole path to be taken into account and that will be analyzed below.

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CONFRONTING THE SOCIAL FUNCTION OF LAND AS A CONSTITUTIONAL GUARANTEE

The social function of land is a much discussed topic in the legal environment, it has been discussed in several jurisprudences and its evolution throughout history has helped to build what exists today in terms of concept. It is notorious that it is not an issue that has been overcome, especially when the focus is on expropriation for the purposes of agrarian reform.

The private property constitutionally guaranteed in Article 5, XXIII, is not today an absolute principle precisely because it is limited by the social function, whose fulfillment occurs through exploitation in accordance with the public interest. Regarding rural property and its social function, the Federal Constitution of 1988, in its article 186 (BRASIL, 2012), highlights:

> Article 186. The social function is fulfilled when the rural property simultaneously meets, according to criteria and degrees of demand established by law, the following requirements:
> I - rational and adequate use;
> II - adequate use of available natural resources and preservation of the environment;
> III - compliance with the provisions that regulate labor relations;
> IV - exploitation that favors the well-being of owners and workers.

Failure to comply with the precepts of the social function leads to the expropriation of rural property under the terms of article 184 of the Federal Constitution of 1988 (BRASIL, 2012):

> Article 184. It is incumbent upon the Federal Government to expropriate for social interest, for the purposes of agrarian reform, rural property that is not fulfilling its social function, upon prior and fair compensation in agrarian debt securities, with a clause for the preservation of the real value, redeemable within a period of up to twenty years, from the second year of its issuance, and whose use will be defined by law.
> Paragraph 1 - Useful and necessary improvements shall be indemnified in cash.
> Paragraph 2 - The decree declaring the property to be of social interest, for the purposes of agrarian reform, authorizes the Union to propose the expropriation action.
> Paragraph 3 - It is incumbent upon the complementary law to establish a special adversarial procedure, of summary rite, for the judicial process of expropriation.
> Paragraph 4 - The budget shall annually establish the total volume of agrarian debt securities, as well as the amount of resources to meet the agrarian reform program in the fiscal year.
> Paragraph 5 - Operations of transfer of properties expropriated for the purpose of agrarian reform are exempt from federal, state and municipal taxes.

But there was a long way to go to reach the current constitutional precepts in Brazil and in other countries.

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The land is a precious commodity, because it is from it that human sustenance is drawn. Thus, humanity depends on the land to eat, clothe, and survive in general. Every process of transformation of natural wealth comes from the land and the nature that accompanies it. Land is also a coveted asset in the midst of growing capitalism and, in this sense, John Locke already established that the cultivation of land and its dominion are the same thing and thus, one should not have as property more than enough to "plough and use" (MARÉS, 2003, p. 181).

The way in which land was distributed in the world is John Locke's great question. The philosopher of Modernity uses the theory that God gave the world to men in common for sustenance and existence. And, thinking from this side, everything that the earth has already produced and produces, belongs to humanity in common, "because they are the spontaneous production of nature; and no one originally possesses the private domain of any party, excluding the rest of humanity, when these goods are presented in their natural state" (LOCKE, 2001, p. 97-98). But if man transforms this natural good, by his strength and labor, it must belong to him without the consent of the rest of humanity. For the philosopher, "the work of removing them from that common state in which they were fixed the right of property over them" (2001, p. 99)

> Thus this law of reason gives the Indian the deer which he has slain; it is admitted that the thing belongs to the one who has consecrated his work to it, even if before it was the common right of all. And among those who count as the civilized part of mankind, who have made and multiplied positive laws for the determination of property, the original law of nature, which authorizes the beginning of the appropriation of the formerly common goods, remains ever in force;

It is noted that the appropriation of a certain space is justified by the modification that individuals have been making in nature. This idea is what gives rise to the right to property and at the same time the obligation to dispose of the occupied space. The modern view that we have about the evolution of property law is that if someone put their labor power to survive in a certain space, it should belong to them. This same idea arising from modernity transformed land into a commodity when it allowed its transfer to those who do not give it a destination. In this sense, Marés (2003, p. 182) points out that

> Before the modern invention of individual land ownership, its use was determinant. That is, for someone to consider themselves the owner, or at least entitled to the land, they had to use it. And to use it, in the concept of the time, was to plough it, to make it produce consumable goods that for capitalism would be called a commodity.

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It is important to note that in the sesmarial regime[6], which lasted from 1375 to 1822, the land was granted under the condition of cultivation and its non-use was a reason for return to the King's Sesmeiro. The requirement of proper use of land is not consistent with the concept of private property in the modernist period. The jurists of the time understood that the owner could use or not use the land according to his interest and not because using it was his obligation. This liberal position gave rise to the defense of an absolute right to property, free from state intervention in which the owner could dispose of the land without running the risk of losing it (MARÉS, 2003).

The primary meaning given to property is developed in such a way that it makes it individual (private) and without any risk of democratization. David Hume (2009, p. 344), defines property as "that type of relationship between a person and an object that allows that person, but prohibits all others, the free use and possession of that object, without violation of the laws of justice and moral equity", and can be seen as "a particular kind of causality", if you consider the freedom to act that the owner has and the benefits that he extracts from this object.

Moving on to the legality of property, the first concept is observed in the French Civil Code in its article 544, in which "property is the right to do and dispose of things in the most absolute way, provided that they are not used prohibited by laws or regulations", leaving the use to be a basis for deriving from property. In Brazil, as already mentioned, the Sesmarias were for centuries a means of acquiring property, but with limited access, and only friends of the King or those who had the capital to hire workers or had both requirements could acquire them at the same time (MARÉS, 2003). Whoever acquired the land and produced it, confirmed the ownership and could dispose of it. In 1850, Law 601 (Land Law of the Empire) began to recognize the sesmarias confirmed by production as property through the institute of the concession of vacant lands.

The non-use of land did not generate consequences until the end of the nineteenth century, when the State began to interfere in private property. In Europe, with the growing wave of hunger, liberal ideals lose strength and the State, concerned with the advance of socialism, the trade unions and workers' organizations, becomes an intervenor, but to protect liberalism and capitalism. The creation of laws to protect workers and limit the

[6] Sesmaria was a plot of land distributed to a beneficiary, in the name of the king of Portugal, with the aim of cultivating virgin land. Originated as an administrative measure in the late Middle Ages in Portugal, the concession of sesmarias was widely used in the Brazilian colonial period.

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absolute character of property would be ways to correct the failures of capitalism (MARÉS, 2003).

A constitutionalist wave of the early twentieth century changes the conception of property and the Weimar Constitution in Germany, promulgated on August 11, 2019, imposes that its use must be intended for the common good, obliging the owner in article 153. Another example is the Mexican Constitution, which in its article 27, provides for the possibility of expropriation of land through compensation, in addition to the protection of small property and the social function of property (ANDRADE, 2020).

But the reflection of the changes does not make property less allied to capitalism, on the contrary, it has been maintained as a commodity whose productivity becomes the obligation of the owner and use a right. Returning to use as a requirement for maintaining property was a risk for the liberals who defended the idea that the land had economic value and could be disposed of as the owner saw fit. The Weimar and Mexican Constitutions, which served as the basis for others, such as the Brazilian one, were a stumbling block for the capitalists, either because the former applies sanctions in breach of the obligation to property, or because in the latter, the State takes control of the land.

The fact is that capitalism needed to find a solution so as not to lose the absolute character of property and the legal obligation to produce, was the way. Production kept the land and the earnings in private hands, nothing more conducive to capitalist machinery, until productivity ceased to be the only qualitative element of property. The evolution of property rights is now perceived from a social perspective. Land can no longer be seen only as a market instrument, it must also perform its social function. This is based on the need for State intervention in private property.

In Brazil, the social function gained greater relevance in the Land Statute in 1964. Previous constitutions allowed the State to intervene in private property in a subtle way, with the purpose of promoting public policies in areas already affected by the State, with emphasis on the 1946 Constitution, which in response to society's dissatisfaction with land issues, made mention of the social function and enabled the expropriation of land for social interest, being regulated in 1962 by law 4132/62 (ROMES, 2022). But it was at the beginning of the dictatorship that agrarian reform was first regulated, and its concept was set out in article §1, 1 of the Land Statute:

> Art. 1 This Law regulates the rights and obligations concerning rural real estate, for the purposes of implementing Agrarian Reform and promoting the Agricultural Policy.

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> Paragraph 1 - Agrarian Reform is considered to be the set of measures aimed at promoting a better distribution of land, through modifications in the regime of its possession and use, in order to meet the principles of social justice and increased productivity.

And the social function of land has its parameters, listed in article 2, in the following terms:

> Article 2 - The opportunity to access land ownership, conditioned by its social function, is guaranteed to all, in the manner provided for in this Law.
> § 1 - Land ownership fully performs its social function when, simultaneously:
> a) favors the well-being of the owners and workers who work there, as well as their families;
> b) maintains satisfactory levels of productivity;
> c) ensures the conservation of natural resources;
> d) observes the legal provisions that regulate the fair labor relations between those who possess and cultivate it.

Marés (2003, p. 192) points out that agrarian reform in the dictatorial period had a confusing objective and in fact, productivity was charged through the ITR (Rural Territorial Tax) and in this way, "the high the less productive the property. The analysis and possible sanctions for non-fulfillment of the social function would be in the background, hidden, once again under productivity." As a result, the social function of land, even though it was provided for in the legislation, was "hidden under productivity", left in the background. In fact, the military period did nothing to achieve the principles of agrarian reform, they simply failed to apply the law and instead developed a policy of encouraging the use of pesticides, mechanization and capitalization of the countryside, called the "green revolution". The sanctions that should be applied for non-fulfillment of the social function were replaced by financing, more seen as a "productivity bonus".

The confusion instituted between productivity and social function in the military period was remedied by the Federal Constitution of 1988. With the new constitution, property, whether urban or rural, is allied to social interests in several provisions and even though the ruralists have instilled productivity in article 185, once again in an attempt to confuse it with the social function, this is clear when the constitution places it as a requirement to avoid expropriation. In addition, article 186 and its subparagraphs give the social function a character that differs from productivity, since its fulfillment is now in line with environmental needs and in accordance with labor laws.

In this sense, Federal Law 8629/93, called the Agrarian Reform Law, enshrined the social function by literally transcribing article 186 and the items of the Federal Constitution of 1988.

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Finally, since the constitutionalization of the social function of land, the STF has given relevant interpretations regarding the social function of land, and there are several, but the present study will use the last one (September/2023), which is very important, since ADI 3865, gives an interpretation in accordance with the constitution to articles 6 and 9 of Law 8629/93, putting an end to the discussion between progressives and ruralists about whether or not productivity is sufficient to avoid the expropriation of land for the purposes of agrarian reform.

THE DECISION OF THE SUPREME COURT IN ADI 3865 AND THE POSSIBLE CONSEQUENCES FOR AGRARIAN REFORM POLICY: LEAVING HEGEMONISM BEHIND

The social function of land was the focus of discussion in the Supreme Court and by an ADI filed by the Confederation of Agriculture and Livestock of Brazil in 2007. The lawsuit with a preliminary injunction dealt with the unconstitutionality of part of articles 6 and 9 of Law 8629/93 and the outcome, affirms the social function as a requirement to avoid expropriation, even if productivity is proven.

It is worth quoting the excerpts from the aforementioned articles, whose excerpts were questioned in the lawsuit:

> Article 6 - Productive property is considered to be that which, economically and rationally exploited, simultaneously achieves degrees of land use and efficiency in exploitation, according to indices established by the competent federal agency.
> Article 9 [...] § 1 It is considered rational and adequate the use that reaches the degrees of land use and efficiency in exploration specified in paragraphs 1 to 7 of article 6 of this law.

In the lawsuit, the CNA asks for the unconstitutionality of the expressions "economically and rationally exploited", "simultaneously" and "use of the land" in article 6 and article 9 of the expression "and efficiency in exploitation", in the justification that such expressions and for the plaintiff, such articles end up making article 185, item II of the Federal Constitution, "dead letter" in the justification that by requiring the social function for productive lands, imposed the same treatment as that given to unproductive lands (STF). In this sense, article 185 of the Federal Constitution of 1988 provides:

> Article 185. The following are not susceptible to expropriation for the purposes of agrarian reform:
> I - small and medium-sized rural property, as defined by law, provided that its owner does not own another;
> II - productive property.

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> Sole Paragraph. The law shall guarantee special treatment to productive property and shall establish norms for the fulfillment of the requirements relating to its social function.

The CNA states that there is confusion between the degree of land use (GUT) and the efficiency in its exploitation (GHG) and its simultaneous requirement "whether for the conceptualization of productive property, or for the characterization of the social function", is impossible (STF).

It is noted that at this point in the discussion, the existence of the social function of land is legally overcome, paving the way for the policy of agrarian reform, however, the defenders of the ruralist wing in Brazil still insist on ignoring the social evolution of property. This hegemonic thinking is incompatible with democracy that, even after so many years of the citizen's constitution, is the object of legal action. And the judicial decision by requiring the fulfillment of the social function of land on rural properties, based on democratic principles, reinforces the possibility of social transformation through law. It is required that the public policy of agrarian reform take into account whether or not the property is carrying out agricultural activity in accordance with articles 134 and 136 of the Federal Constitution, regardless of proof of productivity.

It must be considered that article 185 of the 1988 Constitution was a ruralist and not a progressive conquest, because the Constitution is environmentalist and the introduction of productivity only served to confuse the concept of social function (MARÉS, 2003). But the decision in ADI 3865 confirms the existence of the social function as a requirement, that is, from the publication of the decision, the possibilities for agrarian reform policy are expanded. It is worth adding that the Presidency of the Republic requested the dismissal of the action, based on other jurisprudence of the STF that had already declared the constitutionality of the simultaneous requirement of the GUT and GHG, provided for in article 6 of Law 8629/93 and also because it is not an action aimed at concentrated control, since the request deals with excerpts of article and not with the entire rule. (STF). The preliminaries, however, were rejected.

In the vote, Justice Edson Fachin goes back to that old idea that proper use is what legitimizes property and since the constitutional norm is allied to environmental needs, articles 184, 185 and 186 of the Constitution must be applied together. In turn, article 185, which prohibits the expropriation of productive lands, also refers to the observance of the fulfillment of the social function, that is, the constitution itself already clearly determines the

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establishment of the requirements of productivity and social function of the land for the purposes of expropriation. In this sense:

> [...] Rather, the full compatibility of arts. 6 and 9 of Law 8.629/93 is due to two reasons: the first is that the constitutional text itself unequivocally requires the fulfillment of the social function of productive property as a simultaneous requirement for its unexpropriability. The second is that, even if the unequivocality is rejected, it would be necessary to recognize, at least, that the constitutional text contains a pluri-signification. By virtue of this plurality of meanings, the legislator's choice, among the possibilities opened by the constitutional text, for an interpretation that harmonizes the constitutional guarantees of productive property with the social functionalization required of all properties (STF) is in line with the Constitution.

Also following the vote:

> [...]This perspective underlines what the Constitution itself had foreseen when it stated that "property shall serve its social function", or, simply, as the German Constitution of 1949 stated in a felicitous formula: "property obliges".
> This means that the social function is not consistent with the essence of property, but with its use. It is through socially appropriate use that property is legitimized. The consequence related to the non-compliance with the obligations imposed on the owner is expropriation with payment through public debt securities, in the case of urban properties, or agrarian debt, for rural properties. It should be noted that the consequence of the non-fulfillment of the social function is not expropriation, that is, the antithesis of property, but expropriation, which aims to compensate the owner for the loss of his property.
> It is precisely in the notion that "property compels" that the social function is translated. And it obliges in the sense that the owners are co-participants in the task of achieving the fundamental objectives of the Republic (STF).
> The interpretation postulated by the initial envisions, in the provisions of article 185, II, of the CRFB, the possibility of exempting productive property from expropriation provided for in article 184 of the CRFB. However, it is the sole paragraph of the same article 185 that defines the scope of the guarantee provided for productive property: the law will establish rules for the fulfillment of the requirements related to the social function of productive property.
> It is known, under the terms of article 184, caput, of the CRFB, it is only the "rural property that is not fulfilling its social function" that is subject to expropriation for social interest. The insusceptibility of expropriation can only refer, therefore, to productive rural property, if the legal requirements of its social function are met.

But, what is using the property properly? Ribeiro (2016) explains that the social function, first of all, passes through the notion of collectivity and as for the land, the owner is conceived as having the duty to allocate it to human, family and social purposes with efficient and correct cultivation of the land. Thus, if the use of rural property is inappropriate or irrational, or when the use of available natural resources generates environmental degradation, or exploitation does not favor the well-being of workers and owners, the social function of the land is not fulfilled.

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Seen in this way, there is, for example, no way to protect the crop that uses pesticides to feed the population, even if this land is producing. Likewise, there is no protection of productive property through slave labor (remembering that there are many cases in Brazil reported in the year 2023). These examples give rise to the non-fulfillment of the social function of the land, and may be expropriated, after observing the legal procedures.

It should be taken into account that the provisions referring to expropriation do not apply to small and medium-sized rural properties, in view of the constitutional reserves provided for and by a decision of the Court itself that reinforces this removal.

The decision of the STF is important in the sense of enforcing the real intention of the Federal Constitution of 1988. Before the decision, in practice, the property that declared itself productive did not suffer expropriation. The National Institute of Colonization and Agrarian Reform (INCRA), responsible for controlling compliance with constitutional requirements, defined in infra-constitutional law, only took into account productivity through GUT and GHG, leading to the false idea that the social function of land was achieved by productivity (RIBEIRO, 2016).

Finally, the truth is that the social function of land is a theme provided for in legislation before and after the 1988 Constitution, but its recognition by the State has been flawed all along. Agrarian reform policies are the result of social struggles and the pressure for them not to occur is so old that what was supposed to be the rule became the exception and what was the exception became the rule, even though this has violated the constitutional norm for so many years. It is hoped that with the interpretation given in ADI 3865 the social misconceptions will be corrected and the constitutional rule will no longer be neglected.

FINAL CONSIDERATIONS

The purpose of this article was to analyze the decision of the Supreme Court in ADI 3865, which can be considered as being another instrument of social transformation through law. This transformation is because it faces a whole hegemonic thought to determine that the agrarian reform policy cannot be stopped by the misinterpretation of both the Federal Constitution of 1988 and the infra-constitutional law that regulates agrarian reform.

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In the Constitution, it is articles 184 to 186 that support the right to land and the ways in which rural property can be expropriated. The social function of land, a constitutional requirement for the permanence of property, was the focus of the discussion that generated the aforementioned ADI. Before the decision given on September 1, 2023, productive properties were not subject to expropriation, based on the interpretation given to article 185, II of the Federal Constitution, which, in its wording, keeps productive property free from expropriation.

However, the sole paragraph of the same article determines the observance of the social function of the land, according to regulation in an infra-constitutional law. Now, it would not even be necessary to go to Law 8629/93 (Agrarian Reform) to know that the social function of land is inherent to rural property, since the constitution itself in articles 184 and 186 already provide for it as a requirement for the purposes of expropriation.

From article 184 of the Federal Constitution, it is possible to extract the concept of social function of land, namely: rational and adequate use; adequate use of available natural resources and preservation of the environment; compliance with the provisions that regulate labor relations; exploitation that favors the well-being of owners and workers. The Agrarian Reform Law also associates productivity with the social function, when it mentions that the use of property must be adequate and rational.

Thus, the sections that precisely establish the social function of land as part of the property, had their constitutionality questioned by the Confederation of Agriculture and Livestock of Brazil in the aforementioned ADI. The decision given by the STF was based on the idea that property is only legitimized by its proper use, meaning that the social function is not associated with property, but with proper use. As a result, the Plenary of the STF unanimously dismissed ADI 3865, to consider productivity and the fulfillment of the social function as essential and cumulative requirements to avoid land expropriation, a point that deserved to be analyzed as transformative in this article.

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REFERENCES

1. Andrade, O. M. de. (2021). The Mexican Constitution of 1917: From the liberal state to social protection. Revista Direitos, Trabalho e Política Social, Cuiabá, 7(12), 381–408.

2. Brasil. (2012). Constitution of the Federative Republic of Brazil: Promulgated on October 5, 1988 (14th ed.). São Paulo: Saraiva. (Original work published 1988)

3. Dworkin, R. (1999). Law's empire (J. L. Camargo, Trans.). São Paulo: Martins Fontes.

4. Hume, D. (2009). A treatise of human nature (2nd ed.). São Paulo: Unesp.

5. Locke, J. (2001). Second treatise on civil government: An essay on the origin, limits, and true purposes of civil government (M. Lopes & M. L. da Costa, Trans.). Petrópolis, RJ: Vozes.

6. Marés, C. F. (2003). The social function of land. Porto Alegre: SAFabris.

7. Ribeiro, D. A. (2016). Agrarian law and property rights: Aspects of administrative servitude in properties that fail to fulfill their social function. Revista de Direito Agrário e Agroambiental, 2(1), 1–22.

8. Santos, B. de S. (2011). Toward a democratic revolution of justice (3rd ed.). São Paulo: Cortez.

9. Silva, V. A. da. (2008). The judiciary and public policies: Between social transformation and obstacles to the realization of social rights. In C. P. de S. Neto & D. Sarmento (Eds.), Social rights: Foundations, judicialization, and specific social rights (pp. 587–599). Rio de Janeiro: Lumen Juris.

10. Streck, L. L. (2014). Legal hermeneutics in crisis: A hermeneutic exploration of the construction of law (11th ed.). Porto Alegre: Livraria do Advogado.

11. Supremo Tribunal Federal. (2023). STF rejects the temporal framework thesis for the demarcation of indigenous lands. Available at: https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=514552&ori=1. Retrieved January 2, 2024.

12. Supremo Tribunal Federal. (2023). Social function is a requirement to prevent the expropriation of productive lands, STF decides. Available at: https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=513467&ori=1. Retrieved December 23, 2023.