




THE DEMOCRATIC DILEMMA: THE COUNTER-MAJORITARIAN ROLE OF THE SUPREME COURT AND ITS LEGITIMACY IN OVERCOMING LEGISLATIVE OMISSIONS¹

 <https://doi.org/10.56238/levv16n47-078>

Submitted on: 22/03/2025

Publication date: 22/04/2025

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ABSTRACT

This research problematizes the counter-majoritarian role of the Supreme Court and its legitimacy in overcoming legislative omissions to ensure the fundamental rights of minority groups. Our main objective was to analyze how judicial activism can fill the normative gap left by the legislator and promote social justice. We use a qualitative approach based on bibliographic research and case studies, investigating emblematic decisions that address topics such as homophobia, transphobia and racial injury. The results indicate that the intervention of the Supreme Court is essential for the protection of constitutional rights and for the promotion of equality in contexts of legislative omissions, even in the face of criticism related to the separation of powers. We conclude that judicial activism is a legitimate and necessary response to correct legislative failures and enforce fundamental rights, contributing to the consolidation of a Democratic Rule of Law. This research reinforces that the performance of the Federal Supreme Court, based on the defense of the principles of equality and dignity, is a fundamental instrument for social transformation.

Keywords: Judicial activism. Federal Supreme Court. Legislative omissions.

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INTRODUCTION

This article addresses the counter-majoritarian role of the Federal Supreme Court (STF) in overcoming legislative omissions, with a special focus on its legitimacy to guarantee fundamental rights of minority groups. The discussion revolves around judicial activism, understood as the performance of the Judiciary in gaps left by the Legislature, and its relevance in providing social justice in a Democratic State of Law.

In contemporary times, legislative omissions have had profound impacts on the guarantee of fundamental rights, especially for sociological minorities, such as the LGBTQIA+ population and historically marginalized ethnic groups. The inexistence or inadequacy of specific norms on sensitive issues often forces the Judiciary to intervene, assuming a function that, at first glance, may seem contrary to popular sovereignty. However, in situations of legislative inertia, the action of the STF becomes indispensable to correct structural inequalities and promote the dignity of the human person.

The choice of this theme is legally justified by the relevance of understanding the role of the Supreme Court in democratic societies. Socially, because of the impact that the decisions of the Superior Court have on the lives of vulnerable groups. And personally, because of the importance of reflecting on how the judicialization of politics can protect rights that would otherwise remain neglected.

The key concepts addressed in this work include counter-majoritarianism, understood as the action of the Judiciary to protect fundamental rights against the will of the majority. Judicial activism, as a mechanism for correcting legislative omissions. And fundamental rights, especially in the context of sociological minorities. These central categories support the analysis of concrete cases and theoretical debates that underlie the present study.

The guiding problem of the present work is to answer the following question: To what extent is the counter-majoritarian action of the Federal Supreme Court essential to guarantee fundamental rights in contexts of legislative omissions?

The main objective of the article is to analyze the role of the STF's judicial activism in the face of legislative omissions in guaranteeing fundamental rights for minority groups. The specific objectives are: to understand the impact of these omissions on the social life of minorities; indicate the role of constitutional courts in the realization of these rights through judicial activism; and to examine the legality and effects of judicial decisions in concrete cases. To achieve these objectives, the article is divided into three sections: the first addresses the impact of legislative omissions; the second explores the role of the Supreme

Court and judicial activism; and the third analyzes exemplary cases, such as ADO 26 and HC 154248.

The methodology adopted for the research combines a bibliographic approach, based on doctrinal works, academic articles and relevant court decisions, with a detailed case study. The qualitative analysis seeks to understand how the STF's performance is justified and legitimized as an instance of protection of fundamental rights, filling legislative gaps and promoting equity in a democratic system.

THE IMPACT OF LEGISLATIVE OMISSIONS ON THE PROTECTION OF THE FUNDAMENTAL RIGHTS OF MINORITY GROUPS

The Federal Constitution of 1988, the legal framework of the Democratic Rule of Law in Brazil, establishes in its article 5 that "everyone is equal before the law, without distinction of any kind". This principle, reinforced by article 3, item IV, which determines as a fundamental objective of the Republic "to promote the good of all, without prejudice of origin, race, sex, color, age and any other forms of discrimination", evidences the constitutional commitment to the protection of fundamental rights and the promotion of material equality. However, the legislative inertia in regulating constitutionally provided rights has generated significant impacts on the lives of minority groups, such as the LGBTQIA+ population, indigenous peoples, those with African ancestry, and quilombola communities.

Legislative omissions, by failing to regulate fundamental rights, create a normative vacuum that compromises the effectiveness of constitutional guarantees. Luís Roberto Barroso, in his work "Counter-majoritarian, Representative and Illuminist: The Roles of Constitutional Courts in Contemporary Democracies", points out that "the absence of legislative action on sensitive issues often forces constitutional courts to assume an active role, filling gaps and promoting social justice". This action, although necessary, causes debates about the balance and separation between powers and the legitimacy of judicial activism.

In the Brazilian scenario, the judicialization of politics has been a response to legislative omissions, especially in issues related to the rights of sociological minorities. Emblematic decisions of the Federal Supreme Court (STF), such as the Direct Action of Unconstitutionality by Omission (ADO) 26, which recognized homophobia and transphobia as crimes of racism, show how the Court's counter-majoritarian action can guarantee fundamental rights in situations of legislative inertia. This decision, based on Article 5 of the

Constitution and Law No. 7,716/1989, demonstrates the essential role of the STF in protecting vulnerable groups and in trying to promote material equality.

In addition, legislative omission not only compromises the protection of rights, but also perpetuates structural inequalities. The absence of regulation in areas such as health, education and security for sociological minorities reinforces social exclusion and hinders the implementation of the principle of human dignity, provided for in article 1, item III, of the Constitution. In this sense, the action of the Supreme Court becomes indispensable to ensure that fundamental rights are not just normative promises, but concrete realities.

The analysis of the omissions in the legislation reveals a pattern of historical neglect in relation to social minorities. A clear example of this is the delay in regulating the territorial rights of indigenous and quilombola communities, which has generated conflicts over land and violated their cultural and environmental rights. Article 231 of the Constitution already recognizes the rights of indigenous peoples over the lands they traditionally occupy, but the lack of effective regulation has made it difficult to enforce these guarantees. This gap in legislation highlights the need for firmer action by the Judiciary to protect these groups.

Another relevant example is the absence of specific legislation to combat violence against the LGBTQIA+ population. Although the Supreme Court has recognized homophobia and transphobia as crimes of racism, the lack of a specific law demonstrates the inertia of the Legislature in facing issues of discrimination and violence. This legislative omission not only compromises legal certainty, but also perpetuates the vulnerability of these groups, which continue to face high rates of violence and social exclusion.

The counter-majoritarian action of the STF, in this context, plays an essential role in correcting these flaws and ensuring the protection of fundamental rights. As Barroso points out, "the constitutional courts not only interpret the Constitution, but also perform an enlightened function, promoting values such as equality, freedom and human dignity". This perspective reinforces the legitimacy of judicial activism in situations of legislative omission, especially when the rights of vulnerable groups are being violated.

Finally, it is important to highlight that legislative omission is not only a technical failure, but also a political issue. Often, the absence of regulation reflects the resistance of political majorities to meet the demands of minority groups, perpetuating inequalities and exclusions. In this scenario, the role of the Constitutional Court becomes even more relevant, as it acts as the guardian of fundamental rights, ensuring that social justice prevails even in the face of legislative inertia.



THE FEDERAL SUPREME COURT AND JUDICIAL ACTIVISM IN THE GUARANTEE OF FUNDAMENTAL RIGHTS

Judicial activism, as a legal and political phenomenon, has been widely debated in contemporary democracies, especially in contexts of legislative omissions that compromise the protection of fundamental rights. In Brazil, the Federal Supreme Court (STF) plays a central role in this scenario, assuming a counter-majoritarian function that seeks to guarantee the effectiveness of the rights provided for in the Federal Constitution of 1988. This action, although necessary, raises debates about its legitimacy and the limits of judicial intervention in a democratic system.

According to Luís Roberto Barroso, the STF plays a supplementary role, acting as an instance for the protection of rights when traditional bodies fail in their representative function. In these circumstances, the Court becomes the legitimate space to ensure that certain groups have their rights assured and safeguarded.

"Until the necessary political reform comes, the STF will have to continue to play, with intensity, the two roles that brought it here: the counter-majoritarian, which is important in establishing limits to majorities; and the representative, which consists of responding to social demands not satisfied by traditional political instances" (BARROSO, 2013, p. 42).

Luís Roberto Barroso, in his work "Counter-majoritarian, Representative and Illuminist: The Roles of the Constitutional Courts in Contemporary Democracies", highlights that the constitutional courts exercise three main functions: counter-majoritarian, representative and enlightened. The counter-majoritarian function, traditionally recognized, refers to the protection of fundamental rights against decisions or omissions of political majorities. The Enlightenment function, on the other hand, highlights the role of the courts in promoting universal values, such as equality and human dignity, especially in plural and complex societies. In the Brazilian context, the STF's performance exemplifies this dynamic by guaranteeing fundamental rights in cases of legislative inertia, such as in the Direct Action of Unconstitutionality by Omission (ADO) 26, which recognized homophobia and transphobia as crimes of racism.

Barroso argues that, in contemporary democracies, the judicialization of politics is a natural consequence of social complexity and the inability of the Legislature to meet all the demands of society. Barroso (2018, p. 222) argues that the rise of the Judiciary, judicialization, and judicial activism are driven by several causes.

The first of these was the recognition, after World War II, of the importance of a strong and independent judiciary as an essential element of modern democracies, for the protection of fundamental rights and the rule of law. The second cause involves a certain disillusionment with majoritarian politics, due to the crisis of

representativeness and functionality of parliaments in general. There is a third: political actors often prefer that the Judiciary be the decision-making body of certain controversial issues, in relation to which there is reasonable moral disagreement in society. With this, they avoid their own wear and tear in the deliberation of divisive issues, such as same-sex unions, abortion or even the decriminalization of soft drugs, such as marijuana.

In this sense, the STF assumes an essential role in the protection of vulnerable groups, acting as a guardian of fundamental rights and promoting social justice. This perspective is reinforced by Ronald Dworkin, who, in his work "Taking Rights Seriously", argues that fundamental rights should be treated as "trump cards" against majority decisions that may compromise justice and equity.

For Dworkin, judicial activism is not a choice, but an ethical and legal commitment of the courts to the protection of citizens' rights. He argues that, in a Democratic State of Law, the courts have the responsibility to ensure that fundamental rights are respected, even when this means going against the will of the majority, in this sense Dworkin (2005, p. 101) states that:

My view is that the Court should make decisions of principle, not politics—decisions about what rights people have under our constitutional system, not decisions about how best to promote the general welfare—and that it should make those decisions by elaborating and applying the substantive theory of representation, drawn from the basic principle that government should treat people as equals.

This view is particularly relevant in the Brazilian context, where the Supreme Court has taken an active role in the judicialization of public policies, promoting social justice, and combating structural inequalities in specific cases. Decisions such as ADO 26 and the recognition of same-sex unions illustrate how the Supreme Court has used its counter-majoritarian function to protect fundamental rights and promote social inclusion.

John Rawls, in turn, offers a philosophical basis for understanding the role of judicial activism in promoting social justice. His work "Theory of Justice" proposes that institutions must guarantee equity and the protection of fundamental rights, especially for the most vulnerable groups. The principle of distributive justice, central to Rawls' work, underpins the STF's action in decisions that seek to correct structural inequalities and promote social inclusion. Rawls argues that a just society is one that ensures that fundamental rights are respected and that institutions act to correct the inequalities that compromise human dignity.

In the Brazilian context, the performance of the STF as a counter-majoritarian body is often the target of criticism, especially by those who defend a more restrictive interpretation of the role of the Judiciary. However, as Barroso points out, "constitutional

courts not only interpret the Constitution, but also perform an enlightened function, promoting values such as equality, freedom and human dignity."

Daniel Sarmiento and Cláudio Pereira de Souza Neto, when discussing the counter-majoritarian challenge, recognize constitutional jurisdiction as an instrument of inclusion, guaranteeing the protection of the rights of minorities in the face of the will of the majority.

"And it is no less true that democracy is not limited to respect for the majoritarian principle, but also presupposes compliance with the rules of the democratic game, which include the guarantee of basic rights, aiming at the equal participation of the citizen in the public sphere, as well as the protection of stigmatized minorities" (SARMENTO; SOUZA NETO, 2012, p. 35).

This perspective reinforces the legitimacy of judicial activism in situations of legislative omission, especially when the rights of vulnerable groups are at stake.

The STF's performance as a counter-majoritarian body and promoter of social justice is, therefore, based on a solid theoretical basis that combines legal and philosophical elements. This function, although often the target of criticism, is indispensable to ensure that fundamental rights are effectively protected, even in the face of resistance from political majorities. By balancing constitutional principles and promoting social justice, the STF plays an essential role in the consolidation of Brazilian democracy.

THE ROLE OF THE JUDICIARY IN COMBATING HOMOPHOBIA AND STRUCTURAL RACISM: REMARKABLE CASES

The judicialization of social issues, especially in the area of the fundamental rights of minority groups, evidences the response of the Judiciary in the face of legislative omissions. In the Brazilian scenario, decisions of the Federal Supreme Court have served as a compensatory instrument when Congress does not advance on crucial issues, such as the specific criminalization of acts of homophobia and transphobia or the adequate typification of the crime of racial injury. In this way, judicial activism emerges as an important mechanism for protecting the rights provided for in the Constitution.

The decision rendered in the Direct Action of Unconstitutionality by Omission (ADO) 26 is a notorious example of this phenomenon. Due to the legislative omission regarding the creation of a specific criminal type for acts of homophobia and transphobia, the STF understood that these conducts should be framed in Law No. 7,716/1989 – the legislation that defines crimes of racism – until the Legislative Branch manifests itself. Such a stance evidences the Court's commitment to protecting the dignity and equality of citizens, especially those inserted in contexts of vulnerability, even if this implies a temporary expansion of the normative interpretation to cover new forms of prejudice.

The decision of ADO 26 not only corrects a legislative gap, but also delimits the role of the Judiciary as guardian of fundamental rights. By recognizing the legislative delay for the criminalization of homophobic and transphobic conduct, the STF reaffirms the constitutional provisions that enshrine protection against discrimination. This measure, although criticized by some who see it as excessive judicialization, strengthens the principle that fundamental rights cannot remain ineffective in the face of the legislator's omission, constituting an urgent response to the demands of historically marginalized groups.

Another important decision-making milestone in the fight against racism and discrimination was reached with Habeas Corpus (HC) 154248, in which the STF recognized that the crime of racial injury should be interpreted as a kind of crime of racism. In establishing this equivalence, the Supreme Court not only valued the constitutional repudiation of racism, but also outlined the protection against the offense to honor and human dignity with an imprescriptible character. This decision reinforces the idea that, even in the face of legislative gaps, the legal system must be interpreted in such a way as to materialize the fundamental rights provided for in the Constitution, therefore, by recognizing the seriousness of racial injury, the STF provoked a legal reassessment that required a concrete response from the legislator.

It was from this understanding that Law 14.532/2023 emerged, which equates racial injury to the crime of racism. Before, this crime was treated differently, affecting only one individual, while racism referred to discrimination against a group or collectivity. With the new legislation, racial injury became non-bailable and imprescriptible, with an increased penalty of two to five years of imprisonment. This move demonstrates the relevance of Supreme Court decisions, which not only interpret the Constitution but also drive legislative changes to strengthen fundamental rights and combat discrimination more effectively.

The analysis of the decisions in the ADO 26 and HC 154248 cases reveal that, in the absence of specific regulation, the STF resorts to an expanded interpretation of existing laws to fill the legislative vacuum. Through this action, the Court ensures that the State's responsibility for the protection of minority groups is not neglected, contributing to social transformation. This function is vital in a society where structural prejudice and violence are perpetuated through discriminatory practices. In essence, the decisions of the STF function as temporary devices that, while stimulating legislative action, promote the immediate protection of the fundamental rights of vulnerable groups.

From a legal point of view, such judicial interventions highlight the balance between the powers provided for in the Constitution while signaling the dynamic character of the Law itself. The performance of the Judiciary, by interpreting dispersed norms in a systematic and

constitutional way, reflects the need to harmonize the principles of equality, dignity and social justice. This dynamic strengthens the constitutional pact itself, demonstrating that the protection of fundamental rights can transcend formal limits when the State is inert.

However, this judicial practice is not without controversy. Critics point out that the equalization of conducts – through an extensive interpretation of the Racism Law – can cause conflicts regarding the separation of powers, since a typical function of the Legislature would be to expressly regulate the topics under debate. Even so, the STF's stance can be understood as an emergency response that, far from being arbitrary and unreasoned, aims to preserve democratic order and the protection of fundamental humanitarian rights, especially when specific legislative measures prove to be slow or non-existent.

In summary, the decisions related to ADO 26 and HC 154248 illustrate, in a striking way, the function of the Federal Supreme Court to act as an agent of social transformation when there is a legislative omission. These measures show that, in the search for the realization of fundamental rights, the Court exercises its counter-majoritarian role, reaffirming constitutional values and contributing to the construction of a more just and inclusive society. This action is expressive for the fight against homophobia, transphobia, the various forms of structural racism, in addition to any other forms of discrimination, advancing the materialization of the precepts of equality and dignity that govern our constitutional order.

CONCLUSION

In summary, the present study showed that, in the face of legislative inertia, the counter-majoritarian action of the Federal Supreme Court (STF) emerges as an indispensable mechanism for safeguarding the fundamental rights of minority groups. From the theoretical analysis based on the teachings of Luís Roberto Barroso, Ronald Dworkin and John Rawls, it became clear that judicial activism does not constitute a mere distortion of the normative function of the Judiciary, but rather an emergency and legitimate response to the slowness or absence of legislative action that puts at risk the effectiveness of constitutional precepts.

As highlighted in the first section, legislative omissions have direct impacts on the protection of minority rights, by creating gaps that can compromise the dignity and material equality guaranteed by the 1988 Constitution. This normative fragility highlights the need for judicial intervention capable of filling the void left by the legislator, ensuring that

constitutional values, such as protection against discrimination and the promotion of social justice, prevail in practice.

The analysis of the performance of the STF, addressed in the second section, brought to light the theoretical foundation that justifies the counter-majoritarian role of the constitutional courts. Barroso emphasizes that the enlightened function of the courts involves not only the interpretation of the Constitution, but also the promotion of universal values that transcend mere legal formalism. From this perspective, the position of the STF, supported by the defense of rights as "trump cards" against a potentially discriminatory majority — as asserted by Dworkin — and on the search for distributive justice, as articulated by Rawls, proves to be not only legitimate, but also necessary to ensure the protection of fundamental rights.

In the third section, the analysis of concrete cases, such as ADO 26 and Habeas Corpus 154248, demonstrated in practice how the STF has acted to correct legislative omissions that directly affect historically vulnerable minorities. These decisions exemplify that, even in the face of criticism regarding the separation of powers and the excessive judicialization of politics, the intervention of the STF is a vital instrument to combat racism, homophobia and other forms of discrimination. Such measures not only guarantee the realization of fundamental rights, but also encourage the legislator itself to act, by publicly evidencing the urgency of filling the existing normative gaps.

Therefore, the work reaffirms that the role of the Federal Supreme Court, in intervening to make up for legislative omission, is crucial for the consolidation of a Democratic State of Law. By ensuring that the values of equality, dignity and social justice are effectively implemented, the STF acts as a fortress against discriminatory practices, being essential in the protection of minority groups. This dynamic, which manifests judicial activism in its most legitimate sense, highlights the importance of a legal interpretation that privileges the effectiveness of fundamental rights in the face of legislative slowness, contributing to the construction of a fairer and more inclusive society.



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