

THE EVOLUTION OF JUDICIAL ACTIVISM IN BRAZIL AND ITS IMPACT ON JUDICIAL DECISIONS AND CONTEMPORARY PUBLIC POLICIES



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ABSTRACT

This scientific article aims to analyze the historical evolution of judicial activism in Brazil and its impact on judicial decisions and contemporary public policies. The choice of the theme was motivated by the need to understand how this practice has shaped the Brazilian

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legal scenario, fundamental to analyze the limits and potentialities of judicial activism. In view of this, the problem addressed is: how does judicial activism evolve in Brazil and what is its impact on judicial decisions and contemporary public policies in the country? The methodology used was based on a qualitative, exploratory, descriptive and documentary approach, with a hypothetical-deductive bias, based on a literature review. This review included the identification of sources available in both digital and printed formats, such as articles and books by Luís Roberto Barroso, official documents such as the 1988 Constitution, the Law of Introduction to the Rules of Brazilian Law (LINDB) and decisions of the STF, as well as online material, such as news and reports from official portals of the STF and the Chamber of Deputies. The results demonstrated that judicial activism in Brazil has evolved over the years, playing a significant role in shaping contemporary judicial decisions and public policies. It is a complex phenomenon, where the proactive action of the Judiciary, when facing legislative gaps and omissions, has proven to be crucial for the safeguarding of essential rights and the promotion of social equity.

Keywords: Judicial Activism. Public Policies. Judgments. Separations of Powers.

INTRODUCTION

Judicial Activism refers to the proactive intervention of the Judiciary in political and legislative issues, with the aim of promoting social justice. In this approach, the courts exert a more significant influence on the legislative and executive spheres. For some specialists, this activist stance is seen as a means of guaranteeing fundamental social rights, while others consider it a risk to the Democratic Rule of Law (BARROSO, 2009).

The term "judicial activism" refers to the innovative role of the courts in contributing to the legal system, defining decisions that relate in a unique way to specific cases and establishing precedents. On several occasions, this occurs even before the creation of new legislation. When demands arise that require a particular interpretation of the legal text, it is at this point that the interpreter's dedication becomes evident. Thus, judicial activism can be understood as the initiative of the courts in the elaboration of Law (MIARELLI; LIMA, 2012).

Miarelli and Lima (2012) point out that the courts play a unique role in justice by establishing their own guidelines, interpreting as jurisprudential precedents situations in which the legislation does not cover the case presented to the judge. The judge's decision can be adopted by other courts.

Unlike what the law provides, judicial activism is practiced by the judge in a broad way, taking into account the social and historical contexts involved in each situation. Article 4 of the Law of Introduction to the Rules of Brazilian Law states that the judge will decide based on analogy, customs and general principles of law, especially when the legislation is silent (BRASIL, 1942).

Judicial activism encompasses a set of interpretations, which contributes to the difficulty in establishing a precise definition. Most specialists in the field tend to give the term an unfavorable connotation, associating it with the idea of judicial decisions that have arbitrary characteristics or with the judge's performance that exceeds the limits of his function. On the other hand, there is a minority group that sees as positive the performance of the Judiciary in promoting the fundamental and social rights provided for in the Federal Constitution of 1988, especially in response to the inactivity of the other governmental powers. Historically, it is noted that with the advent of the Constitutional Rule of Law, the field of Law began to connect more intensely with Politics, resulting in the transfer of decisions of a political nature from the Executive and Legislative Branches to the Judiciary. Thus, political decisions also began to be susceptible to being decided through judicial

processes (RAMOS *et al.*, 2021). In this context, it is relevant to mention a quote from Tate and Vallinder (1995, p. 1909) that clearly reflects this situation: "*nonpolitical*" judges in the exercise of '*political*' discretion".

For Montesquieu (*apud* MARIONI, 2008), the implementation of the Law should be clear and objective, with no room for interpretation. The judge, in his decisions, should only be based on the established norms. He argued that true freedom would not exist if the Judiciary was not independent of the Legislative and Executive branches. If the Judiciary were subordinate to the Legislature, this would make the control over the life and liberty of citizens arbitrary, since the judge would act as a legislator. On the other hand, if he were linked to the Executive, he could become an oppressor with excessive power.

From another perspective, Barroso (2012) states that judges, judges and ministers are not public representatives chosen by vote. Although they have not received confirmation of the popular will, magistrates and courts undoubtedly exercise political authority, including the ability to override actions of the other two branches.

The growing evolution of judicial activism in Brazil highlights the need to understand its impact on judicial decisions and contemporary public policies. The proactive role of Brazilian courts has been fundamental in ensuring the fairness and effectiveness of laws, often anticipating current legislation. Within this context, the following problem arises: How does judicial activism evolve in Brazil and what is its impact on judicial decisions and contemporary public policies in the country?

The justification of this study is based on the need to understand the evolution of judicial activism in Brazil and its impact on judicial decisions and contemporary public policies. Understanding how this practice shapes the Brazilian legal landscape is essential to analyze the limits and potentialities of judicial activism. This study also seeks to contribute to a more informed debate on the role of the Judiciary in today's society, providing a solid basis for future discussions and possible reforms in the Brazilian judicial system. By investigating this dynamic, we can better identify the challenges and opportunities that judicial activism presents, as well as its implications for the structure of the State and the lives of citizens.

Considering what has been mentioned, the general objective of this research was to analyze the historical evolution of judicial activism in Brazil and its impact on judicial decisions and contemporary public policies. This main objective is delimited by the following specific objectives: To demonstrate the roots and historical milestones of judicial

activism in the country, highlighting key moments and emblematic judicial decisions that contributed to its development; Identify concrete cases of judicial decisions considered activist and their effects on the elaboration and implementation of public policies; and Analyze how judicial activism affects the separation of powers and democratic legitimacy, considering the arguments for and against this practice.

THEORETICAL FRAMEWORK

ROOTS AND HISTORICAL MILESTONES OF JUDICIAL ACTIVISM IN THE COUNTRY, HIGHLIGHTING KEY MOMENTS AND EMBLEMATIC JUDICIAL DECISIONS THAT CONTRIBUTED TO ITS DEVELOPMENT

According to Barroso (2009), judicial activism began to manifest itself after World War II, marked by the significant increase in the number of courts acting in the supervision of constitutionality. This phenomenon, known as judicialization, is predominantly observed in Western nations. In a simplified way, judicialization refers to the intense involvement of the judicial system in pronouncing or resolving various issues that are seen as of great importance to the nation.

Luís Roberto Barroso highlights some important moments in history in which courts with functions of control of constitutionality had to pronounce and make decisions on significant issues.

The examples are numerous and unequivocal. In Canada, the Supreme Court was called to rule on the constitutionality of the United States testing missiles on Canadian soil. In the United States, the last chapter of the 2000 presidential election was written by the Supreme Court, in the *Bush v. Gore* trial. In Israel, the Supreme Court ruled on the compatibility with the Constitution and international acts of the construction of a wall on the border with the Palestinian territory. Turkey's Constitutional Court has played a vital role in preserving a secular state, protecting it from the advance of Islamic fundamentalism. In Hungary and Argentina, far-reaching economic plans have had their validity decided by the highest Courts. In Korea, the Constitutional Court restored the mandate of a president who had been removed by *impeachment* (BARROSO, 2009, p. 11)

Barroso (2009) emphasizes that the origin of judicial activism is found in the United States, where the legal system is marked by jurisprudence of great relevance. For the author, something that evidences the imperative and, above all, proactive action of the Supreme Court of the United States is seen in the various decisions taken after the war, which, at first, had a conservative character and challenged the presidents of the period, generating frequent conflicts and evidencing a growing intervention of the Judiciary in

relation to the other powers.

The origins of judicial activism can be traced back to American jurisprudence. It should be noted that the activism was, at first, of a conservative nature. It was in the proactive action of the Supreme Court that the most reactionary sectors found support for racial segregation (*Dred Scott v. Sanford, 1857*) and for the invalidation of social laws in general (*Lochner Era, 1905-1937*), culminating in the confrontation between President Roosevelt and the Court, with the change of jurisprudential orientation contrary to state interventionism (*West Coast v. Parrish, 1937*) (BARROSO, 2009, p. 14).

The term Judicial Activism was introduced by American journalist Arthur Meier Schlesinger Jr. in an article entitled "The Supreme Court: 1947" published in "Fortune" magazine, where he examined the behavior of American judges. He classified as activists those who went beyond legal limits, incorporating their own conceptions of social welfare into their decisions, while those who defended restrictiveness were those who sought to protect the essence of legislation (CONTINENTINO, 2012).

According to Barroso (2009, p 14):

The activist stance is manifested through different conducts, which include: (i) the direct application of the Constitution to situations not expressly contemplated in its text and regardless of the manifestation of the ordinary legislator; (ii) the declaration of unconstitutionality of normative acts emanating from the legislator, based on criteria less rigid than those of patent and ostensible violation of the Constitution; (iii) the imposition of conduct or abstentions on the Public Power, notably in matters of public policies (BARROSO, 2009, p. 14).

Judicial activism gained strength in Brazil after the adoption of the 1988 Constitution, especially with the current composition of the Supreme Court. In recent times, the courts have shown a clearly activist attitude (BARROSO, 2009).

In this context, it is important to highlight decisions that highlight the activist aspect of the Supreme Court:

Party loyalty: even without a legal provision, the STF decided that the politician elected by a certain party, if he changed parties during his term, would lose his mandate.

Declaration of unconstitutionality of the prohibition of progression of heinous crimes: Despite the debate that took place in the two Legislative Houses, among the elected representatives of the people, who edited, by law, the prohibition on the progression of the regime in cases of heinous crimes, the STF, alleging a dense principled basis, understood that such prohibition was unconstitutional.

Prohibition of printed ballots in electronic ballot boxes: once again, after the regular legislative procedure that approved the electoral mini-reform, the STF intervened, in an activist manner, by declaring the unconstitutionality of the printed ballot in the electronic ballot box. A number of principles were also used in an attempt to justify their decision.

Criminalization of homophobia as racism: as repugnant as the crimes of

homophobia and racism may be, this decision of the Supreme Court, in my opinion, is one of the most dangerous for the Democratic Constitutional State and the balance of powers. This is because only by law can a crime be created. And, in this case, the Supreme Court created a crime (MARTINS, 2023, [s.p.], emphasis added).

In recent decades, the National Congress has faced a serious crisis of representativeness and legitimacy. In the midst of this instability, there is an increase in the interventions of the Judiciary, which, through its decisions, seeks to correct gaps left by the legislation and, on several occasions, establishes rules of a general nature. This situation has been driven by the continuous crisis of representativeness and functioning of the Legislature, favoring the Judiciary to act in defense of the Constitution, making up for legislative deficiencies and, sometimes, introducing innovations in the legal structure (BARROSO, 2009).

Former Supreme Court Justice Luiz Roberto Barroso considers this phenomenon quite optimistically. For him, the Judiciary has met social needs that are perhaps being neglected by the Legislature, possibly intentionally. In this context, it is the responsibility of the Judiciary to exercise a function that typically belongs to other powers, ensuring the application of the Constitution (BARROSO, 2009). From this perspective, the relevance of social rights is evident; in view of the lack of action on the part of the Legislative and Executive Branches, it is up to the Judiciary to ensure the minimum necessary for human dignity, as established in the Constitution.

However, significant resistance has been manifested in relation to the proactive intervention of the Judiciary, especially with regard to the compromise of democratic legitimacy. This is because judges are not democratically elected and, by acting in disagreement with decisions legitimately taken by other powers, raise questions. In addition, there is criticism of the Court's function as a legislator, both in the negative aspect, by annulling actions of other powers, and in the positive aspect, by issuing value judgments in the interpretation of laws and principles (GRANJA, 2013).

It is important to highlight the interpretative function of the Constitutional Court. It is known that the interpretation of the law involves the application of the law to specific situations. Even if judges have a certain margin of discretion, the task of transforming a normative text into a norm should not be confused with the creation of new laws. It is crucial to distinguish between the role of the interpreter in the construction of law and creativity in interpretation. One of the main characteristics of judicial activism is the

tendency to replace the constitutional text with the judge's personal convictions of justice, leading this interpreter to create a new normative text (PENNA, 2016).

When an acting judge bases his decisions on his own perception, for the positive or negative side, this results in uncertainty in his deliberations, especially when this uncertainty occurs in the main judicial instance of the country. Such a situation causes significant legal uncertainty, since it is not possible to predict when the Court will introduce a new approach in its assessments (NOGUEIRA, 2019).

Thus, it is evident that the roots and historical milestones of judicial activism in Brazil reveal a complex process of interaction between the powers of the State, reflecting both the need for constitutional oversight and the challenges of the separation of powers. From its origins in the United States to its consolidation in Brazil after the 1988 Constitution, judicial activism manifested itself in emblematic decisions that shaped the country's legal and political landscape.

Decisions such as the criminalization of homophobia and interference in electoral issues exemplify the importance and controversy of this practice. While some argue that judicial activism is essential for the protection of fundamental rights and the promotion of justice, others argue that it can undermine democratic legitimacy and legislative function. Therefore, the balance between proactive judicial action and respect for the attributions of the other branches is crucial to ensure democratic governance and institutional stability.

CONCRETE CASES OF JUDICIAL DECISIONS CONSIDERED ACTIVIST AND THEIR EFFECTS ON THE ELABORATION AND IMPLEMENTATION OF PUBLIC POLICIES

For a better understanding of the effects of judicial activism on the elaboration and implementation of public policies, it is essential to examine some decisions made by the supreme body of the Judiciary, whose main function is to oversee the Federal Constitution of 1988, as established by the Constitution itself in its article 102, which also describes other attributions. According to article 101 of the Constitution:

Article 101. The Federal Supreme Court is composed of eleven Justices, chosen from among citizens over thirty-five and under sixty-five years of age, of notable legal knowledge and unblemished reputation. Sole Paragraph. The Justices of the Federal Supreme Court will be appointed by the President of the Republic, after the choice has been approved by the absolute majority of the Federal Senate (BRASIL, 1988).

Thus, currently, the Federal Supreme Court (STF) is presided over by Minister Luís

Roberto Barroso, with Minister Edson Fachin as Vice-President and Minister Gilmar Mendes as Dean. The other justices include Cármen Lúcia, Dias Toffoli, Luiz Fux, Alexandre de Moraes, Nunes Marques, André Mendonça, Cristiano Zanin and Flávio Dino (Brazil. Supreme Court, 2024).

But, according to Barroso (2017), the term "activism" is often linked to an inadequate application of jurisdiction, which gives it a negative connotation. However, the author points out that, in certain circumstances, the Judiciary must act with moderation, while in others, its intervention may be broader. He proposes that, in order to recognize when judicial interventions are acceptable and necessary, the most appropriate term would be "constructive interpretation".

According to Barroso (2017):

Political decisions must be made by those who have a vote and, therefore, as a rule, the STF must exercise self restraint. This is especially true when topics such as the following are discussed: I- Economic regulation [e.g. Norms for the transition from one currency to another, except in absurd situations]; II- Tax issues [Unless there is an unequivocal violation of any fundamental right of taxpayers]; III- Political-administrative issues [transposition of rivers, demarcation of indigenous lands]. The Judiciary has a limited institutional capacity to deal with issues with this degree of complexity. What it is up to him to do is to verify that the appropriate procedure was followed (BARROSO, 2017, p. 11).

Thus, restraint on the part of the Judiciary is observed in cases where it is not appropriate to act in a more intervening manner. However, as presented, there are circumstances in which the Judiciary adopts a more active stance. According to Barroso (2017, p. 11), "they are those that involve the protection: I- of fundamental rights; II- democratic rules and; III- political and administrative morality".

Barroso (2017), in his role as Minister of the STF, mentions decisions in which the Supreme Court of Brazil adopted an interpretative approach to the Constitution, aiming to safeguard essential rights, democratic principles and ethics in public administration. Thus, it is important to review some examples of judicial activism that have been adopted by the Supreme Court in its rulings. For a more in-depth understanding of the topic addressed in this study, it is necessary to mention some of the decisions made by this court, in which judicial activism is evident.

According to the STF (2015, *online*), the Plenary of the Federal Supreme Court, by unanimous decision in 2015, upheld ADI 4815 (Direct Action of Unconstitutionality). This lawsuit was filed by ANEL (National Association of Book Publishers) (ANEL), which alleged that articles 20 and 21 of the Civil Code imposed restrictions incompatible with freedom of

expression and information. In this context, the central issue involved the dispute between freedom of expression and the right to information, on the one hand, and personality rights, such as privacy, image and honor, on the other. As a result, the STF declared that prior authorization for the publication of biographies is not necessary.

- a) in line with the fundamental rights to freedom of thought and expression, artistic creation, scientific production, declare the consent of a biographee unenforceable in relation to literary or audiovisual biographical works, and the authorization of persons portrayed as supporting persons (or their family members, in the case of deceased persons) is also unnecessary;
- b) reaffirm the right to the inviolability of the intimacy, privacy, honor and image of the person, under the terms of item X of article 5 of the Constitution of the Republic, whose transgression must be repaired through compensation (STF, 2015, p. 118, *online*).

When examining the aforementioned case, considering the characteristics of judicial activism described by Barroso (2009), it can be seen that this action was manifested by the fact that, although articles 20 and 21 of the Civil Code did not explicitly oppose constitutional principles, they prioritized the rights to privacy, image and honor, to the detriment of freedom of expression and the right to information. Faced with this conflict, the Supreme Court, in interpreting the Constitution, took a position contrary to the intention of the legislator of the Civil Code, prioritizing the rights to freedom of expression and information.

Another case in which the Supreme Court's performance was seen as activist occurred during the judgment of Habeas Corpus (HC) 124.306, held in 2016. Although it was a determined case, the First Panel of the Federal Supreme Court decided, according to information from the STF (2016, *online*), to accept the action and revoke the preventive detention of the accused for the alleged occurrence of abortion with the agreement of the pregnant woman and formation of a conspiracy. This decision created a precedent that could lead to the decriminalization of abortion up to the 12th week of pregnancy.

The reason for this lies in the vote of Justice Luís Roberto Barroso, who acted as rapporteur in the case. As stated by the STF (2016, *online*), Barroso not only identified the lack of requirements that allow preventive detention, but also argued that "the criminalization of abortion conflicts with several fundamental rights, including sexual and reproductive rights, the autonomy of women, the physical and mental integrity of the pregnant woman, in addition to the principle of equality" (BRASÍLIA, STF, 2016, *online*).

In this area, Maurício and Jeissielly (2018) highlight that the activism that permeated this decision was based on the understanding that, although the Brazilian Penal Code

classifies abortion as a crime, there are some exceptions, such as in situations of pregnancy resulting from sexual violence, when there is danger to the woman's life, or in cases of anencephalic fetuses. Justice Barroso's vote stressed that he sees the criminalization of abortion in other circumstances as a violation of fundamental rights.

It is also observed the proactive action of the Federal Supreme Court in recognizing the constitutionality of Resolution 22.610/07, issued by the Superior Electoral Court (TSE) in 2008. This resolution establishes rules on the loss of the elective mandate due to party infidelity, until the National Congress can regulate the issue through specific legislation, according to STF (2008, *online*). The court made this decision due to the assessment that the change of party by parliamentarians after the elections would constitute a fraud in the democratic process.

The activism mentioned occurred because there is no provision in our legislation that stipulates the loss of a parliamentarian's mandate in case of a change of party or cancellation of his membership. However, this decision was not consensual; Justices Eros Grau and Marco Aurélio expressed divergent opinions, arguing that the TSE exceeded its function in creating the resolution, interfering in an exclusive attribution of the Legislative Branch (Maurício; Jeissiel, 2018).

However, in 2015, the Plenary of the STF, through a unanimous decision, as recorded by the Federal Supreme Court, when analyzing ADI 5081 (Direct Action of Unconstitutionality), decided as follows: "The loss of mandate due to a change of party does not apply to candidates elected by the majority system, under penalty of violation of popular sovereignty and the choices made by the voter" (BRASÍLIA, STF, 2012, p. 26, *online*).

Thus, the revocation of the mandate due to party infidelity will be allowed only in situations where the position is originated by the proportional system. It is evident that the analysis of the effects of judicial activism on the elaboration and implementation of public policies reveals the importance of decisions of the Federal Supreme Court (STF) that go beyond simple legal interpretation, directly influencing the legislative scenario and social norms.

Cases such as ADI 4815 and Habeas Corpus 124.306 highlight situations in which the STF had to balance fundamental rights and constitutional principles with existing legislation. These decisions highlight the complex task of the judiciary in protecting individual freedoms and fundamental rights, while remaining faithful to the Constitution. By

declaring the unconstitutionality of articles of the Civil Code or deliberating on sensitive issues such as party infidelity and abortion, the STF not only establishes legal precedents, but also plays a vital role in building and maintaining a democratic and just society. Thus, the performance of the STF, often seen as activist, is essential for the evolution of public policies and the strengthening of the democratic rule of law in Brazil.

HOW JUDICIAL ACTIVISM AFFECTS THE SEPARATION OF POWERS AND DEMOCRATIC LEGITIMACY, CONSIDERING THE ARGUMENTS FOR AND AGAINST THIS PRACTICE.

The Federal Constitution of 1988, in its article 1, provides that "The federative republic of Brazil, formed by the indissoluble union of the states and municipalities and the Federal District, constitutes a Democratic State of Law [...]" (Brazil, 1988). This means that it is based on the primacy of law and honors the concept of popular sovereignty. This principle is highlighted in the sole paragraph of this article, which states that authority emanates from the people, being exercised directly or indirectly by them (Brasil, 1988).

According to Silveira (2014, p. 46) "it is in the Democratic State of Law that the Judiciary takes the lead as a central element in the regulation of the system of checks and balances, immersed in the problem of the separation of powers".

It is important to clarify that, according to Article 2 of the 1988 Constitution, "The Legislative, the Executive and the Judiciary are Powers of the Union, independent and harmonious among themselves" (Brasil, 1988). Thus, Brazil adopts the theory of separation of powers, which, in fact, refers to the division of the functions of the State into distinct and autonomous bodies, although the State Power is, in the final analysis, unique and indivisible. However, Lenza states:

The theory of the 'tripartition of powers', expounded by Montesquieu, was adopted by most modern states, but in a softened way. This is because, in the face of social and historical realities, greater interpenetration between the Powers began to be allowed, attenuating the theory that preached their pure and absolute separation (LENZA, 2016, p. 586 - 587).

The Legislative, the Executive, and the Judiciary perform, in addition to their traditional attributions, functions that are not exclusive to their roles (MAURÍCIO and JEISSIELY, 2018). The main purpose of dividing the functions of the State, each under the responsibility of a distinct and autonomous body, is to promote a system of control between

the powers, preventing the concentration of power and, in this way, reducing the risks of abuses.

However, the more assertive posture of the judicial system, observed in its more comprehensive performance, is justified by item XXXV of article 5 of our Constitution, which states: "the law shall not exclude from the appreciation of the Judiciary any injury or threat to the right" (BRASIL, 1988).

The concept of division of powers was elaborated and implemented over many years by various thinkers at different times in history, resulting in legislation that lasts in several countries today. In Brazil, the Tripartite System is adopted, which is organized into three main powers: the Executive, the Legislative and the Judiciary. Although power is unique, it is segmented to ensure the proper execution of its functions: the Legislative creates laws, the Executive puts them into practice and, theoretically, the Judiciary is responsible for applying the norms previously established by the Legislative (COSTA; FERNANDES; MENDONÇA, 2024).

Rodrigo Leventi Guimarães exposes in detail this distinction in the performance of each individual.

Therefore, we understand that the Legislative Branch has the typical function of legislating, that is, of translating, through laws, the social sentiment, it is the *vox populis*, a fact that occurred in society that has high value and brings a social change that needs standardization, and has as an atypical function, that of supervising the other two powers, if they are complying with these rules and manage their own house of laws. The Judiciary has the typical function of applying the law in the concrete case, it exercises a complementary jurisdiction in relation to the Legislative Power, since, while the latter elaborates the law aiming at an abstract case, the former applies the law in the concrete case, and has the atypical function of legislating, in view of being competent to prepare its internal and administrative regulations. The Executive Branch has the primary function of administering, always in accordance with the legislative order, under penalty of the administrative act being "born" null. And its atypical function is the act of legislating through normative acts, that is, Provisional Measures, Delegated Laws, Decrees and Ordinances (GUIMARÃES, 2005).

Thus, each of the Powers has its particularities and restrictions, exercising both traditional and unconventional functions, which need to be observed within the limits established by the Constitution. It is clear that the instituted Powers do not have total freedom in relation to society or among themselves, and it is necessary that they work together to promote justice and social equality.

According to Costa, Fernandes, and Mendonça (2024), the legal context in Brazil has been marked by frequent reports on the judiciary, which frequently issues controversial

and unpopular decisions among many citizens. The Judiciary has ventured into domains that do not belong to it, making choices that should not be made without first consulting or considering the opinions of the other two spheres of power.

In October 2023, the Committee on Social Security, Social Assistance, Childhood, Adolescence and Family (CPASIAF) of the Chamber of Deputies approved a bill that vetoes same-sex unions. This decision was included in the report prepared by Deputy Pastor Eurico (PL-PE), who referred to Bill 580/07 and its associated proposals. The report had 12 votes in favor and five against (BRASIL, 2023).

In 2011, the Plenary of the Federal Supreme Court (STF) unanimously recognized homosexual relationships as a family model. This deliberation took place in Direct Action of Unconstitutionality (ADI) 4277 and in the Allegation of Non-Compliance with a Fundamental Precept (ADPF) 132.

In this context, Costa, Fernandes, and Mendonça (2024) emphasize that the Bill that received approval by the House Commission in October 2023 goes against a 2011 decision of the Federal Supreme Court (STF), which dealt with same-sex marriage. This new bill prohibits marriage, disregarding a decision that has been in force for 13 years and that has been applied in the Brazilian courts. The rapporteur of this project argued that the responsibility for legislating on this issue lies with the legislative branch, and not with the judiciary.

Costa, Fernandes and Mendonça (2024) point out that:

Decisions like this, made by the Federal Supreme Court, have increasingly gained the attention of the eyes of society, which, despite the fact that such a decision, on homosexual unions has been for a long time, the Court is very active, with regard to controversial issues, and that should be debated first in the legislative houses [...].

The relationship between the decisions of the Supreme Court and the legislative branch has generated debates in Brazil. Costa, Fernandes, and Mendonça (2024) underline the importance of maintaining the balance between the powers, arguing that laws on controversial topics should be created by the legislature. This focus underscores the need for parliamentary debates that represent the interests of society, promoting a fair legal system.

About these discussions that dominate the court environment.

Constitutional interpretation should not create rights, these should be literally extracted from the law, that is, the will of the legislator should be adhered to in the normative provision so that this interpretation does not go beyond the judicial

function and enter the legislative one. The reasoning of the judicial decision must observe the reasonableness of the motivation of the constitutional text, avoiding legislative innovations brought from the imagination of the judges. (COSTA, FERNANDES AND MENDONÇA, 2024, *apud* DIAS and OLIVEIRA, p. 159-160).

According to Costa, Fernandes and Mendonça (2024, *apud* DIAS and OLIVEIRA), the interpretation of the constitution must strictly adhere to the legal text, without judges inventing rights. The role of the judge is to implement the legislator's intent as expressed in the laws, preventing his actions from mixing with the legislature's function. The justifications of judicial decisions must respect criteria of reasonableness, strictly reflecting what is enshrined in the constitution, without allowing personal innovations or arbitrary decisions by magistrates.

In this context, judicial activism plays a crucial role in the dynamics between the powers and in Brazil's democratic legitimacy. Arguments in favor point out that judicial activism is essential for the defense of fundamental rights, especially when other powers fail to act. On the other hand, critics argue that this practice can destabilize the separation of powers and weaken representative democracy, by allowing the judiciary to take over functions that should belong to the legislature. The 1988 Constitution establishes a system of checks and balances that requires each branch to operate within the limits of the law, respecting the popular will. Thus, while judicial activism can be seen as a necessary mechanism to protect rights, it is vital that its application is careful not to compromise the integrity of the democratic system and the separation of powers.

METHODOLOGY

The approach adopted for the exploration of the theme was hypothetical-deductive, in which hypotheses were formulated that allow the deduction of the results achieved. The confirmation or rejection of these hypotheses will occur based on the data collected, which were selected from a review of the literature and relevant documents on the topic.

Taking into account the methodology used in the elaboration of the article, the type of study adopted was qualitative research of exploratory and descriptive nature, seeking to analyze the phenomenon of judicial activism in Brazil and its relationship with the protection of fundamental rights and the balance between the powers of the Republic.

For the theoretical foundation and critical analysis, several sources were used. First, articles and books by renowned authors, such as Luís Roberto Barroso, which address topics related to judicialization, judicial activism and democratic legitimacy, were analyzed.

The documentary research appropriated official documents such as the Federal Constitution of 1988, the Law of Introduction to the Rules of Brazilian Law (LINDB) and several decisions of the Federal Supreme Court (STF) that exemplify the role of the Judiciary in relevant issues. Material available online, including news and reports published on official portals of the Supreme Court and the Chamber of Deputies, was also used.

Thus, data collection was carried out through bibliographic and documentary research. Initially, the most relevant works and documents on the subject were identified and selected. Then, a thorough reading of the selected works was carried out, highlighting the main arguments and positions of the authors and institutions. The information collected was recorded on reading cards and organized by topics, to facilitate data analysis and comparison.

The analysis was carried out qualitatively, following some specific steps. First, the data were organized into thematic categories, such as judicialization, judicial activism, and democratic legitimacy. Then, a critical interpretation was carried out, relating the information to the theoretical framework and discussing the implications of the findings for the understanding of judicial activism in Brazil. The different sources and authors were compared, highlighting convergences and divergences in the positions, analyzing laws, and the impacts of judicial decisions in the Brazilian context.

FINAL CONSIDERATIONS

The general objective of this research was to analyze the historical evolution of judicial activism in Brazil and its impact on judicial decisions and contemporary public policies. The main problem addressed was the need to understand how judicial activism evolves in Brazil and what is its impact on judicial decisions and contemporary public policies in the country?

The methodology used in this article is characterized by a qualitative, exploratory and descriptive approach, aiming to analyze judicial activism in Brazil and its relationship with the protection of fundamental rights and the balance between powers. We used several sources, including articles and books by Luís Roberto Barroso, official documents such as the 1988 Constitution, the Law of Introduction to the Rules of Brazilian Law (LINDB) and decisions of the STF. Online material, such as news and reports from official portals of the STF and the Chamber of Deputies, was also consulted.

The theoretical framework of this study included a detailed analysis of the roots and historical milestones of judicial activism in the country, highlighting key moments and emblematic judicial decisions that contributed to its development. Concrete cases of judicial decisions considered activist and their effects on the elaboration and implementation of public policies were also addressed, and how judicial activism affects the separation of powers and democratic legitimacy was explored, considering the arguments for and against this practice.

Returning to the study in question, regarding the evolution of judicial activism in Brazil and its impact on judicial decisions and contemporary public policies, it is clear that judicial activism in Brazil has evolved over the years, playing a significant role in the formation of judicial decisions and contemporary public policies. The practice of judicial activism has been justified by the need to ensure the protection of fundamental rights, even in situations where the other governmental powers remain inactive.

However, proactive action raises questions about democratic legitimacy and the separation of powers, as judges are not democratically elected and can in some cases unduly interfere in legislative matters.

Through concrete cases, such as the criminalization of homophobia, the issue of party loyalty and the loss of mandate, it is possible to observe the impacts of judicial activism on society. Therefore, it is essential to carefully analyze the limits and potentialities of this practice, in order to ensure democratic governance and the institutional stability of the State.

The evolution of judicial activism in Brazil reveals a complex phenomenon, where the proactive action of the Judiciary, when facing legislative gaps and omissions, has proven to be crucial in safeguarding essential rights and promoting social equity. However, this intervention raises important questions about the limits of the separation of powers and democratic legitimacy.

The emblematic decisions of the Supreme Court, which range from the protection of homosexual relationships to the decriminalization of abortion in certain circumstances, demonstrate both the need for a vigilant judiciary and the risk of transgressions that can compromise the legislative function of elected representatives. Thus, it is essential that judicial activism be exercised responsibly, respecting the constitutional principles that regulate the dynamics between the powers, so that it continues to be an instrument for the defense of social rights, without destabilizing the foundations of Brazilian democracy.

Given this, the discussion must move forward in search of a harmonious interaction between the Powers, ensuring that, in favor of justice and equity, none of them exceeds their prerogatives, thus guaranteeing a solid democratic state that respects the diversity and rights of all citizens.

It is important to highlight that this study does not propose to exhaust the analysis of the facts, since the legal and social reality, full of nuances and conflicts, is much richer and more complex than any interpretation that is intended to be presented here. However, the search for an accessible language is emphasized, aiming for this work to be understood by its main stakeholders, such as managers, administrators and researchers, so that they can identify with the narrative presented.

At the center of this narrative, there is a field of tension between the Legislative, Executive and Judiciary Branches, about the limits of the Judiciary's performance and its impact on judicial decisions and public policies. Thus, the role of the Judiciary in decisions considered activist has a direct impact on the elaboration and implementation of public policies, and can provide important subsidies that allow legislators and administrators to make more accurate and fair decisions. Judicial activism, armed with valuable information, directs its interests to the guarantee of fundamental rights and social justice, within a participatory democracy, in the face of the distinct forces present in the relationship between the Powers of the State and civil society.

On the other hand, the subject under discussion points out ways to carry out future research related to the theme with regard to the harmonious interaction between the Powers, State Secretariats and civil society in the preservation of democratic legitimacy, since public policies must be elaborated together with society and competent professionals.

In summary, it is hoped that this study will contribute to the existing literature by highlighting the relevance of judicial activism in the protection of fundamental rights and that the findings of this work will encourage the training and continuous training of more professionals in the area, promoting sustainable development and social justice. Collaboration between the Judiciary, Legislative, Executive and civil society is essential to strengthen the application of laws and ensure the protection of fundamental rights.

It is worth mentioning that the Judiciary's performance is not limited only to the evaluation of concrete cases, but also to the prevention of future injustices. Through their decisions and recommendations, these professionals can guide the implementation of

more equitable practices and the adoption of preventive measures that minimize the risks of rights violations.

The research suggests that the collaboration and integration of technical and scientific knowledge with effective public policies can result in a more robust judicial system capable of facing contemporary challenges. Thus, this study does not intend to exhaust the theme related to the performance of the Judiciary in judicial proceedings involving issues of fundamental rights, but to open paths for new research through a more detailed reading of the bibliography.

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