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DEMOCRATIC CONSTITUTIONALISM AND THE BACKLASH EFFECT

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ABSTRACT

The study is an analysis of the dialogical judicial activism within the scope of the Federal Supreme Court, which by issuing certain decisions causes an impact within society and provokes social reactions of discontent recognized as aspects of the backlash effect. The research is justified due to the observance of imbalance in the institutional scenario presented by the three powers in the face of social and economic instability, in which political decisions end up being judicialized. From then on, the objective is to analyze the legal-social fabric in the context of the backlash effect of the decisions rendered by the STF, as a way of exercising its attributions, based on dialogical judicial activism. It also seeks to understand the phenomenon from a democratic point of view and how situations of apparent conflict between the powers can strengthen democracy as a whole. The deductive method, bibliographic, and jurisprudential research were used.

Keywords: Judicial Activism. Backlash. Democratic Constitutionalism. Democratic Rule of Law. Federal Supreme Court.

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INTRODUCTION

In a settled context, the Brazilian constitutional regime highlighted democracy as a way to help achieve rights, a logical corollary of the ideal of equality and justice among people. Vectors like these are essential for the intertwining of this bundle of achievements that have been added over the years and that are still in the process of maturing.

Given certain facts, the present research intends to analyze some of these rights that are sometimes weakened or even removed and sometimes exalted, and for this reason, it is necessary to remain vigilant to prevent this oscillation from representing, in fact, the distortion of rights.

Given the constitutional system on which our Constitution is based, it moves away from the dogmatics of classical constitutionalism, which reduces the Constitution simply to a legal instrument, to approach it in a broader context, divorcing itself from the context given by Lassale that it would be just a sheet of paper.

Within its dimensions, political and legal, there is no denying the alternating preponderance of both, according to the classical or social moment of constitutionalism. Thus, it is necessary to recognize that among such parameters, when they dominate the space of reflection individually, they can lead to damage and insufficiencies.

The research intends to dialogue with judicial activism and the *backlash effect*, as two strands of democratic constitutionalism linked to the performance of the Federal Supreme Court in the judgment of controversial and complex cases. It is based on doctrine and jurisprudential understanding to make considerations about the institute, and how it has been perceived in society.

It points out its foundations in the principle of separation of powers, in the harmonious and dialogical coexistence between them, and in the Democratic Rule of Law as vectors of orientation for society and for those who hold power, whether temporarily or for life. Given these premises, it analyzes the constitutional context in which the decisions are inserted, as well as the reactions under the *backlash effect*.

DEMOCRATIC CONSTITUTIONALISM: THE SUPREME COURT AS GUARDIAN OF THE CONSTITUTION

Brazil has the Federal Constitution of 1988 as a milestone of democratization, and it was through it that the strengthening of powers and the definition of their attributions took place to form a specific field of limits for possible mutual interference.

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Society, the main component of the structure that sustains the State, came as the recipient of decisions whose constitutional interpretations interfere in its way of life, but do not always provide it with the necessary and unanimous comfort for all.

This same constitutional advent attributed the Federal Supreme Court a central role in the Brazilian political system, played mainly when issues that should have been resolved by the other powers, jointly or separately, end up being judicialized. Vieira (2018, p. 161) warns that "all the most relevant issues discussed in Brazilian society seem, sooner or later, to demand a decision by the STF, making their presence a constant in our public life". There is an overexposure of the STF in the just political scenario, and it ends up acting as the ultimate arbiter of the great institutional conflicts.

Emerging in the Middle Ages, constitutionalism had its importance in the fight against absolutism, "giving birth to a formal expression of political principles and objectives in 1215, when the barons of England forced King John the Landless to sign the Magna Carta, swearing to obey it and accepting the limitation of his powers" (Dallari, 2014, p. 197-198).

The separation of powers, not only as a formal subdivision but as a limitation of action and material scope, was consolidated in the sense of removing the absolutist roots and later perfected to fight against dictatorships.

Over time, modern societies have been perfected, to achieve a Democratic State of Law, in which democratic and liberal principles could be united. The strand led by the STF has been much criticized in the face of decisions in which the Court takes a position on delicate issues, in which the concentration of powers in the judicial sphere is observed.

The premise of Democratic Constitutionalism, according to Pimentel (2017, p. 193) "resides precisely in the fact that the authority of the Constitution depends on its democratic legitimacy, which occurs at the moment when citizens recognize the Constitution as their Constitution".

What can be said about this is that the traditions of popular engagement do not always mean that the citizen makes a correct interpretative reading of the Constitution, or even that it places it as the supreme law and that it should consolidate the rights of the whole society.

Most of the time, people tend to bring the decisions handed down by the STF to personal contexts and convictions, and not understand them, in the face of diffuse rights and opinions. Pimentel (2017, p. 193) asserts:

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> Within Democratic Constitutionalism, strongly marked by the pluralism of political positions and the possibility of debate about the interpretation of the Constitution (as has happened in Brazil today), it becomes unquestionable that popular manifestations and/or reactions contrary to a certain constitutional interpretation made by the Judiciary enhance the legitimacy of the legal system.

Another underlying issue that opposes the role of the STF is the counter-majoritarian one, in which the members of the Legislative and Chief Executive are agents elected through popular vote.

However, the members of the Judiciary, who submit to public examinations and tests and titles, are at the mercy of the fact that they accumulate among the competencies of the judiciary, the one that concerns the invalidation of the acts of the other powers, and, therefore, suffer from the accusation that they lack a fair democratic title. From this perspective, Barroso (2017, p. 173) unravels:

> Where would be the basis for the Judiciary to superimpose its will over that of the elected agents of the other branches? The answer is already matured in constitutional theory: in the confluence of ideas that produce democratic constitutionalism. In this model, the Constitution must play two major roles. One of them is to ensure the rules of the democratic game, providing broad political participation and majority rule. However, democracy is not limited to the majoritarian principle. [...] This is the second great role of a Constitution: to protect fundamental values and rights, even if against the circumstantial will of those who have the most votes.

The logical consequence is the interference of the Judiciary in the political sphere as the guardian and defender of the Federal Constitution and for exercising a somewhat decisive role within society. Therefore, when judging political issues, based on the idea of a Judiciary that acts through precedents, the Courts act based on the assumption of uniformity of the jurisprudential understanding, so that society can predict in which sense the decisions will be, perhaps something close to what is imagined is legal certainty.

However, although the three powers are responsible for safeguarding the constitution, the role played by the Judiciary becomes even more incisive, while it is the responsibility of applying the constitutional text to the concrete case. In this vein, some maintain that "[...] the Judiciary cannot abandon political autonomy or think that constitutional enforcement is simply a legal matter (a process cannot become the only or most important instrument for the enforcement of the constitution)" (Albuquerque, 2013, p. 60).

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The most expressive protagonism is through the Federal Supreme Court, even though other bodies are already launching themselves into this movement. As a consequence, Barroso (2017, p. 233) points out "[...] almost all issues of political, social or moral relevance have been discussed or are already being judicially raised, especially before the Federal Supreme Court".

The judicialization of political issues receives fierce criticism and defenses of equal kind, with different arguments and with a certain reason in both. Tomelin (2018, p. 80) argues that the judicial protagonism of the Supreme Court manifests itself in a healthy way within the constitutional evolution and that dealing with this action through the term "judicial activism" is a deleterious form since it carries a built-in criticism.

However, the one that comes closest to the constitutional model adopted in Brazil is the one that defends the path of dialogic activism, as a tool for promoting equal opportunities and the search for the realization of fundamental rights. But it is important to remember that:

> Since the administration of justice is one of the functions of the State, non-delegable and indisputably linked to the effective validity of the constitutional rule of law, one cannot fail to recognize that the performance of the highest court of a republican State has a clear political profile. This is so, because, if the characteristic of the concept of politics, as inherent to the action of state power, can be summarized as the ability to condition the community in which it exercises, inducing behaviors and prohibiting them, the Supreme Court of Justice, through the acts within its competence, determines the scope and limits of the current legal system. (Albuquerque, 2013, p. 92).

It is salutary to remember that Brazil has a constitutional system mixed between the welfare state and the search for economic development, which inevitably stops at the exploitation of the less favored classes. This understanding is the result of what is observed in the face of the protagonism or reserve of the Judiciary in the face of cases that are put to resolution.

It should be noted that several cases cause a lot of social instability, as they constitute facts that the law, by itself, cannot solve. The correct interpretation aimed at the well-being of society, in addition to benefiting the parties involved, defines situations that can serve as a model for others, the same or similar.

One cannot escape the premise that the control of constitutionality operated in the Brazilian legal system is responsible for curbing serious violations of the constitutional text, which ends up slipping into the possibility of finding equal violations of fundamental rights.

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Within society, it cannot be denied that many roles must be exercised by the Public Power and in a more effective way, to avoid such unconstitutionality, even if it is known that there can't be full and unrestricted coverage of the rights enshrined therein. As Oliveira and Dias (2017, p. 166) teach, it is necessary to remember:

> [...] that the constitutional interpretation of constitutionality carried out by a Superior Court does not distort the control of constitutionality carried out by judges and lower courts. Both media work concomitantly in favor of the constitutionality of laws. [...] While the Superior Court does not express its opinion, this attribution will be up to the other judges and courts.

It is important to highlight that the indication that the Supreme Court is the guardian of the Constitution stems from the constitutional text itself, conferred in Article 102. From it, the function of defending it also arises, constituting the STF's most responsibility. The STF, and from which he cannot resign.

Any failure in the performance of the granted assignment could weaken it, and therefore, weaken the entire structure of the State. The political system is the guarantee that the powers will be in harmony, and that, in its primary function, the STF will assume the role of protecting its integrity and public freedoms, to maintain the stability of the normative order of the State.

For this reason, many times, the reaction of the Judiciary to the unraveling of the cases that are put before it can be taken on decisions of an activist nature, not because of its primary intention, but because it is an inevitable analysis in the face of the elements that form it. Streck, Tassinari and Lepper (2015, p. 56) assert:

> [...] Activism is gestated within the legal system. It is a conduct adopted by judges and courts in the exercise of their duties. That is, the characterization of judicial activism stems from the analysis of a certain posture assumed by an organ/person in making a decision that, by form, is invested with legality. With this, a step is taken that is beyond the perception of the centrality assumed by the Judiciary in the current social and political context, which consists of observing/controlling which criterion is used to decide, since judicialization, [...] demonstrated, presents itself as inexorable.

As a premise to enter the theme of judicial activism that will be dealt with in the next topic, some considerations were made by the authors, to direct the studies to a context that has been gaining strength over the years and subverting itself in several questions.

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DIALOGIC JUDICIAL ACTIVISM IN THE SUPREME COURT AND THE SYSTEM OF CHECKS AND BALANCES

Given the impossibility of the legislator to discipline all acts arising from social relations, the jurisdictional activity has become salutary, since the legal interpretation is given through the equitable and proportional evaluation of the judge. Having as a prerogative the action of mediation between the parties, the judge, when launching himself in the wake of judicial activism, must commit, first of all, to faithful compliance with the Federal Constitution. One of the major questions found in the theme related to judicial activism is the possibility, albeit unpretentious, of invading the sphere of primary competence of the other powers.

However, in the face of massive and serious violations of fundamental rights in Brazil, the Judiciary acts as an interpreter of constitutional norms, through constitutional jurisdiction, where it often ends up altering social reality by issuing decisions that require effective actions from other powers.

According to the teachings of Campos (2016, p. 277), about dialogical structural judicial activism, "the Supreme Court must issue flexible orders, which leave space for the political and administrative apparatus of the Executive and Legislative Branches [...]", because, according to him, "[...] the complexity of the orders will be inevitable, proportional to the size of the problem."

It is important to mention, in light of the teachings of Oliveira and Dias (2017, p. 159) that:

> Before worrying about an activist Judiciary, it is necessary to remember that someone needs to defend the Constitution above the entire legal system. And that such a function, although it belongs to everyone, could not have its control attributed to any other Power other than the Judiciary. [...]. And, despite a logical formula for the problem of activism, it is evident that constitutional interpretation should not have the power to create a right that does not result directly and automatically from the reading of the provision, under penalty of interfering in the legislative function.

The scope that is aimed at in the request contained in the lawsuit reverberates through the competence of other powers, and it is there that there is the modulation of judicial activism, when they are called to dialogue. The judicial activity in the interpretation of constitutional norms is shown to be an alternative to meet the desires that emerge from society.

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It should be noted, however, that this activity does not aim to annul the other powers in their typical functions, it must highlight and summon the other powers to dialogue so that the actions necessary to solve that problem are discussed. For Nobre Júnior: (2011, p. 97)

> In this scenario, it cannot be obscured that the Constitution, whatever the nature of its provisions, has an undeniable normative component, with the directive and informing effectiveness of the other state functions. The conception that it would be a mere document containing vague political intentions was abandoned.

Legal activism in Brazil emerged, therefore, amid some factors such as the population's access to justice, full and unrestricted coverage of the State, international agreements on human rights to which Brazil is a signatory, in addition, of course, to the social abysses faced, combined with the fact that public policies are inefficient or even non-existent.

These, among other factors, are responsible for demands that are renewed within risk situations and issues that have been with us for a long time. The question that permeates judicial activism is whether it exists in Brazil and whether the Judiciary, through the decisions it renders, somehow extrapolates its competence and enters the sphere of other powers, unbalancing the principle of separation of powers.

Notwithstanding, the search for solutions to problems that involve a large number of people, in a serious, permanent, and generalized way, the Judiciary plays an important role in the implementation of these constitutional dictates, calling the other powers to dialogue and investing in more effective solutions than those that are being presented to the population.

The objective of dialogical activism is to call the other powers to dialogue – and hence the term – to try to solve, without the coercion that some decisions achieve, but with the primary purpose of giving effectiveness to what has been brought to the attention of the Judiciary.

It is important to mention that there are criticisms of this type of activism, which are opposed to pathological activism, and that is limited, in general, to mention the absence of democratic legitimacy and the lack of technical capacity for the action of the Judiciary about its institutional limits. In addition to the two mentioned, there is a third hiatus in dialogical activism, which is the inability of the Judiciary to, in particular, promote the intended changes.

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Judicial decisions are often seen by the other powers as excessive and unfounded arrogance. In the lessons of Oliveira (2015, p. 167), "Montesquieu's Judiciary, within the idea of assigning typical functions, saw fit to inherit the 'application of the law', as in an industrial process in which vials are labeled", and adds, later, that "to the ears of this doctrine, the Judiciary would never create the Law. Time has shown, [...], that the process of 'application' of the Law involves, at the same time, to a greater or lesser degree, the 'creation' of it". (Oliveira, 2015, p. 167).

The issue of the separation of powers is the one that has the most weight in the understanding contrary to judicial activism. It is believed that this way of acting allows the Judiciary to position itself as a superpower, without limits in its actions and in a way with irresponsible decisions.

He even abuses interpretative creativity and starts to manipulate the constitutional hermeneutics to his will, without worrying about the impacts that this illegitimate construction of judicial activity is employed. Barroso (2017, p. 172), however, understands that:

> Activists and non-activists, however, do not contest what is called judicial supremacy: the recognition that the Judiciary should have the last word on the interpretation of the Constitution and the laws. It is, therefore, a question of calibrating the performance of judges and courts. Different is the thesis defended in recent years by some American constitutional theorists, called popular or populist constitutionalism, which defends a still undefined "withdrawal of the Constitution from the courts" and consequent revaluation of genuinely political spaces of public deliberation.

The combination of positive and restrictive forms of judicial activism are beacon for determining the limits of magistrates' actions, as there are still no parameters to define them. According to Bulos (2014, p. 443), "the challenge, therefore, is to find the borderline zone for the exercise of constitutional jurisdiction, establishing the limits of constitutional interpretation, construction, and manipulation", because there is difficulty in establishing this parameter that is still a difficult issue to be understood.

However, some limitations can be observed when imposing parameters for judicial grounds, which can be visible through the principles of reasonableness and rationality. As Albuquerque (2013) ponders, rationality means that the decision must be based on the law, and must meet the criteria of legal logic, while reasonableness, "[...] is characteristic in certain judicial decisions in which it is possible to choose several rational solutions, so that, given reasonableness, only one of them is justified" (Albuquerque, 2013, p. 49).

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There is also a nuance that must be considered, which is that the dimension of judicial activism correlates with the deference of the other branches, that is, that there is only room for the protagonism of the STF due to the parsimony of the others.

The authors consider that "the Courts and the judges end up not considering the decisions/expressions of the other Powers and institutions, that is, the judicial decisions become substitutive and overlap with the decisions of the other Powers". (Andrade; Brasil, 2018, p. 3285).

This deference that does not expressly result from the law, as is the case with binding precedents, is not necessarily illegal, but it does mean that there is no security in judicial decisions, which often prove to be contrary. These nuances, in addition to the problem itself that can cause excessive judicial activism, can be more commonly observed when it comes to fundamental rights. For this reason, as stated by Bulos (2014, p. 443) that judges:

> [...] It is acceptable for them to act creatively, filling legislative naps, eliminating eloquent silences, and seeking to remedy the difficulties provided by the legal system itself, which is incapable of predicting, normatively, the unanimity of the situations to be regulated.

However, Andrade and Brasil (2018, p. 3286) understand that, in this regard, "the overcoming of precedents is also a dimension of judicial activism to be observed, [...]", a fact that goes against the comparison of judicial decisions that guarantee a certain legal certainty. This is because, when entering a field not yet frequented, the magistrate will have the opportunity to apply the rule to the concrete case that may often be similar but is not the same.

This means that activist judges do not stick to the precedents already established in the face of the need that may arise to overcome that understanding so that there is an adequate interpretation of the Constitution in their time (Andrade; Brazil, 2018).

In popular belief, the delivery of this judicial commandment by itself is capable of affecting a leading Constitution such as ours, even though the confluent opinion is the one that gives importance to the Judiciary for its implementation.

But these incursions of the judiciary, even under the prism of dialogue, involve many pitfalls, since the very idea of constitutionalism, and the resulting political discussion within the courts ends up turning all judicial issues into political issues, given their constitutional

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bias. Therefore, activism is centered on resolving political issues, in which there must necessarily be a proactive posture of one or the other powers of the Republic.

There is no fear in printing this statement because, according to Oliveira and Dias (2017, p. 149) "[...] when one imagines that the Judiciary should not overcome the interpretative barrier that replaces it in the creative sphere, one has to ask, what, after all, is a 'political question', beyond hermeneutical limits? And what, by the way, isn't?"

Therefore, in response to this question, it is difficult to define what is not a political question, since what is seen is an intention to hermeneutically separate what is a political question and an electoral question, leaving aside the fact that a political question is "[...] everything that involves a decision-making aspect beyond legislative texts". (Oliveira; Dias, 2017, p. 149).

Thus, before stating that there can be activism in any political issue, it is necessary to define it. The doctrine, with a certain redundancy, has positioned itself in the sense of recognizing that a political issue is neither legal nor judicial.

That is, it is neither a personal or private matter, nor is it a demand that requires recognition or reaffirmation of a right, of course, in addition to other interpretations. Streck, Tassinari, and Lepper (2015, p. 56) explain that:

> One cannot disagree with the reading of the phenomenon of the judicialization of politics as a product of the transformations that occurred in Law with the advent of a new constitutional text. In other words, it is known that one of the marks of the transition from the conception of the Social State to that of the Democratic State of Law is precisely characterized by the displacement of the pole of tension from the Executive to the Judiciary.

Oliveira and Dias (2017, p. 151), in a salutary lesson, teach that "in *hard cases*, it is unlikely not to extract a political guideline from the votes." In difficult trials, in which there is televising of the sessions, there are barbs between the members of the highest Brazilian court and a boring number of unnecessary theses and discussions, even though society must follow the judgment of interests that are put up for consideration. However, this scenario impairs the judgment of the facts, since they end up inflating discussions that end up being located strictly in the political sphere.

It is a tormenting issue, because, as we have seen, delimiting the boundary between political and electoral (or ideological) issues, especially when there is a worsening of tempers, exalted by television, makes it practically impossible to apply the principle of

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judicial self-limitation, which, according to Oliveira and Dias (2017, p. 151) allows them not to evade the need to impose limits on their limits.

In spheres of power in which there are, at certain times, accumulated powers in the face of serious and difficult issues, it is indispensable that their members be as impartial as possible. This does not mean that the existence of political-evaluative judgments in the interpretation of the Constitution should be prevented, which would be humanly impossible, since we are social beings whose understandings and opinions are formed throughout life, as a result of all family, social and cognitive experience. But what is meant is that this thinking should guide decisions, and not control them, within the framework of social understanding that aims at social well-being.

In the same way, the defense that individual rights would be "[...] excluded from the political field, not only because the effectiveness depends on public policies, but also because, not infrequently, such rights are associated with others, eminently political". (Oliveira; Dias, 2017, p. 155).

The fact is that any of these interpretations could lead to the understanding that the concept of politics refers to collective goals, whose social objects demand programs or public policies, typical of a democratic state of law. In fact, according to Barboza and Kozicki (2012, p. 72):

> It should also not be overlooked that it is through collective public policies that the Brazilian Constitution intends to ensure that fundamental social rights are realized and guaranteed. These are rights that concern the whole of society, considered in its collective form and not just guarantees of individual rights, and therefore the need for macro policies for their realization, taking into account the needs of the people, as well as the capacity of the State.

Judicial activism has crucial barriers, since, despite the absence of sufficient budgetary resources, the State would be unobliged to promote public policies that guarantee and promote fundamental social rights. However, for Barboza and Kozicki (2012, p. 73), and with due reason, "from the moment the Constitution establishes that public policies are the appropriate instruments for the realization of fundamental rights, it is certainly a constitutional matter subject to the control of the Judiciary."

Despite recognizing this fragility, some situations become debased, as with the other powers, the function of maintaining the balance between the powers stems from the system of checks and balances. This theory, also called "*checks and balances*", in these terms, comes from American Constitutional Law and refers to how the competencies of

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each power were arranged, according to the distribution of attributions that resulted in a mechanism of reciprocal limitations.

In the United States, the system of checks and balances, according to Levitsky and Ziblatt (2018, p. 99) "[...] It was designed to prevent leaders from concentrating and abusing power, and for most of American history, that worked." In the face of constant conflicts, natural in the face of the maturation of American democracy, they led to the strengthening of containment institutes over the years.

That is why it is said that the Constitution of the United States is a brilliant document, in which one also sees the exercise of democracy, carried out under written rules and arbitrators, personified by judges in the courts. Levitsky and Ziblatt (2018, p. 103) explain:

> [...] Written rules and arbitrators work better, and survive longer, in countries where written constitutions are strengthened by their own unwritten rules of the game. These rules or norms serve as flexible bars of protection for democracy, preventing the day-to-day political competition from turning into wrestling.

The French Constitution of 1971, as a constitutional philosophy, represented the conquest of the people over the state, as well as ensuring a climate of freedom, as a conservative principle of citizens' rights. Thus, under French influence, this system was inserted into the Brazilian legal system through the Imperial Charter and later reiterated in the Republican Constitution of 1891.

The other constitutions, in express or non-express terms, in the American or French style, maintained the consecration of the separation of powers and, with greater or lesser intensity, the system of checks and balances, or, in a constitutionalist way, the principle of the balance of powers.

There is a fear that there is a judicial supremacy, which can suffrage illegitimate evidence above the other powers. However, as Campos (2016) points out, it is clear that structural judicial activism carried out in a dialogued manner through flexible structural remedies and periodic deliberation during the monitoring of the implementation of decisions, satisfactorily addresses concerns about the risks of judicial supremacy. Judges and courts that adopt an activist and dialogical stance recognize the existence of a critical situation of ineffectiveness (ECI), highlight the widespread violation of fundamental rights resulting from structural omissions, especially failures in public policies, but leave it to the political powers to define the details and specificities necessary to resolve this situation.

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It is the alleged unconstitutional state that worries the whole of society, and instead of thinking that the Judiciary is launching a race for supremacy, space is given for the practice of dialogical judicial activism, to promote political and institutional unblocking and greater democratic deliberation (Campos, 2016).

Preventing the judiciary from exercising the supervisory role before the other powers, in the sense of dialoguing with them about the problems of society is an anti-democratic attitude, at the same time that gives rise to unnecessary demands under the speck of diffuse rights involved in political issues is an attitude contrary to the desire to have a more egalitarian country that is more concerned with its people.

THE *BACKLASH EFFECT* ON THE JUDICIAL DECISIONS OF THE SUPREME COURT

The *backlash* effect is the result of hermeneutic constructions that formalize a new constitutionalism, with a contemporary bias, and compose the new enunciations guided by everyday events. In the definition of Marmelstein 92016, p. 03) "the backlash is an unwanted adverse reaction to judicial action. To be more precise, it is, literally, a political counterattack to the result of a judicial deliberation."

Initially raised in the face of the controversy involving the Roe vs. Wade case, judged in 1973 by the American Supreme Court, *the backlash*, in this case, was in the face of the discussion around abortion, and for which it was decided whether to allow it to be performed. The reaction of American society was based on arguments in favor of life, and as in Brazil, the issue of the interruption of pregnancy and the legalization of the procedure also provoked different reactions in society.

The decision of the American Supreme Court in the paradigm case, within the expected context, "caused a strong reaction in American society of pro-life groups that mobilized and ended up years later, passing state laws that, in practice, restricted abortion in situations in which it was previously admitted", as Zagurski observes (2017, p. 89).

Originally, it is an expression of a democratic nature, in which there is a challenge to the performance of one of the tripartite powers in the interpretation of the rule. Given this, the public seeks to influence the content of constitutional interpretation, demonstrating that another bias could benefit them in some way. But all of this is part of what is understood, contemporaneously, as constitutionalism in the Democratic State of Law.

In practice, it demonstrates the social reactions contrary to the decisions of the Constitutional Courts on controversial issues, whose effects reach a specific popular issue.

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It is, as Nunes Júnior (2019, p. 95) points out, "[...] it is nothing more than a strong reaction, exerted by society or by another Power to an act (law, judicial decision, administrative act, etc.)".

Given what de Silva (2013, p. 67) understands:

> The relationship between constitutionalism and democracy clashes two supposedly different movements: one of the notions that power would belong to the people, understood as a majoritarian rule that would always (and without limits) govern the destiny of society; the other, that this same power would be limited by norms established by previous majorities, imposing limits on the will of a majority government.

The differentiation between judicial activism and a greater role of the Judiciary is a prerequisite for understanding the scope of the expression *backlash*, which would be a reaction to this activism, seen as an exacerbated protagonism, which challenges the violation of the separation of powers.

The performance of the Judiciary can be understood as an advance in the implementation of fundamental rights, as well as in the control of public policies, at the same time that it acts in the achievement of its counter-majoritarian function, "ensuring the fundamental rights of a minority, even if against the will of an episodic majority". (Nunes Júnior, 2019, p. 95).

Some recent decisions of the Federal Supreme Court have caused the commented backlash effect in society, being for some examples latent judicial activism. Issues such as the one about same-sex unions, resulting from the judgment of ADI No. 4,277 and ADPF No. 132, in which it was recognized as a family entity, as well as ADI No. 4,983, which recognized the constitutionality of Law No. 15,299/2013 of the State of Ceará, which regulates the activity of vaquejada.

When commenting on the decision that recognizes the legitimacy of same-sex unions, Jeveaux and Karninke (2020, p. 307) assert:

> It should be noted, however, that such proactive conduct was only adopted by the Supreme Court because it was "recognized" the delay of Congress in criminalizing homotransphobia, the delay being unconstitutional, and therefore, an interpretation by the Constitution was defended: as long as there is no specific legislation, it is the responsibility of the Legislative Branch, which is why it determines that the National Congress must be informed so that it can proceed with the preparation of a normative diploma on the issue.

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What can be seen is that the questioning about the role of the STF infers questions of social order, when problems that arise within society are analyzed and decided from the perspective of the interpretation of the STF. Marmelstain (2016, p. 02) points out that, "in the contemporary constitutional experience, it is possible to perceive a clear movement of hyper-judicialization of ethical and political issues".

This response that society gives to the decisions handed down by the STF allows the powers, everyone, including the Judiciary itself, to dialogue, and verify how the laws are being received by the population and whether they are being effective in the specific case. When this dialogue occurs, it can be said that judicial activism is in the field of debate, in which the Judiciary listens to stakeholders and takes into account their concerns.

This is the panorama in which the *backlash* for democratic constitutionalism is inserted, in which there is the expression of constitutional dialogue, sustaining the essence of its proposals. Zagurski (2017, p. 96) explains that backlash "[...] corroborates the thesis that there is no last word in matters of controversies around fundamental rights, for example, to be manifested by the Judiciary".

The understandings may even change over the years, completely altering the plot, but "mechanisms are needed that favor dialogue between the Powers of State, and between them and society, precisely to avoid this type of reaction", in the view of Zagurski (2017, p. 96).

However, at the most recent date, one dares to disagree with the author's understanding, in the sense that these reactions, pluralized by the *backlash effect,* are healthy for the democratic process and should exist, should not be avoided. The peaceful social dissatisfaction in which society positions itself on the performance of one of the powers is one of the elements of the realization of the Democratic Rule of Law, as it is an active participation of society that inserts itself in the democratic framework and imprints its position on the social fabric.

This fabric is formed by the set of all the fundamental and constitutional elements that govern the legal system and regulate life and relationships between people. Preventing there being a reaction, considering that people have different understandings, beliefs, ideologies, cultural positions, professions, in short, different ways of thinking, and cannot express themselves from them goes against all the freedom guaranteed in the constitutional text.

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Here the fact that *backlash* and its various reflections can reveal a harmful bias is mentioned when this effect is an attack and not the legal basis of the judicial decision. In it, an ideological factor is inserted, which camouflages a conservative or progressive bias, depending on the public reached. The reactions, however, need to be moderate, otherwise an unnecessary and anti-democratic power will be rising.

In the wake of this, Marmelstein (2016, p. 01) ponders:

> The *backlash effect* can raise doubts about the real benefits of constitutional jurisdiction in the struggle for the implementation of fundamental rights. In other words, even those who advocate liberal theses must be aware of the risks arising from the forced imposition of a pro-fundamental rights solution in the judicial process.

The performance of the courts should not be conditioned to the spur of popular reactions, under penalty of reducing the effectiveness of their decisions, even if democratically coined. It should be noted that the mere risk of a conservative political reaction should not justify the abandonment of the judicial arena as a space of struggle for the implementation of rights, at the same time that this same space is open to imposing limits on their exercise.

Given this finding, Marmelstein (2016, p. 01) explains that "there are several other examples that demonstrate that the *backlash effect* does not always cause harm to the group benefited by the judicial decision", as is the case, for example, of the struggle for sexual equality, the liberation of the cultivation of marijuana for medicinal purposes, or even cultural issues such as the case of the value-adds suffrage by the Law of the State of Ceará.

Discussions about judicial activism, even in its dialogical modality, are still far from being ceased, and this is not even the objective of democracy. As long as the debate is healthy and the ideas are placed respectfully, the discussions will be part of the constitutional plot and the struggle for the qualification of rights.

CONCLUSION

Currently, what is seen as the dominant opinion about judicial activism is that it brings an exacerbated protagonism, overlapping or distorting the important role given to it by the Federal Constitution. The expression has temperaments and should be analyzed from the perspective of the realization of constitutional rights and the safeguarding of

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society in a macro context, in which the Judiciary must guarantee them when the other powers are inert.

However, in a conflictual situation, the call of the parties to dialogue between both the constituted Powers and society does not always have effects but provides the opportunity for their voices to be heard. The proposal to dialogue was even well accepted by the interested parties, however, the *backlash* effect, at first glance, prevents further debate on the matter.

It is important to say that there was no evidence that this whole scenario arose as a way for the Powers to duel for the supremacy of one of them. On the contrary, what was verified was that the great strength came from the people, driven by the knowledge of constitutional rights, which culminated in greater popular participation.

As it is an expression coined in the American mold, its implication in Brazil still bears temperaments, but it is inserted in the democratic context and reveals a greater democratic participation of the population. However, it is noted that the *backlash effect* is not valid for violent reactions and disorder, as it is allocated in the field of ideas, giving rise to the placement of contrary opinions.

The analysis of dialogical judicial activism in the Federal Supreme Court (STF) about the system of checks and balances reveals a complex and multifaceted dynamic, which is inserted in the context of the relations between the powers of the State and the realization of fundamental rights.

In a scenario where legislative gaps and omissions in public policies become increasingly evident, the Judiciary assumes a leading role in the defense of the Constitution, seeking to ensure the effective application of enshrined rights.

However, this activism should not be interpreted as an invasion of the competencies of the other powers, but rather as an invitation to dialogue and inter-institutional collaboration in the search for solutions that meet social demands.

The proposal of a structured and dialogical judicial activism, as supported by Campos and corroborated by other authors, emphasizes the importance of an action that respects constitutional limits, promoting the balance between powers and avoiding the exacerbation of supposed judicial supremacy.

In this sense, the effectiveness of constitutional norms and the construction of a robust system of checks and balances are essential to ensure that the Judiciary, when

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acting in defense of fundamental rights, does not exceed the limits of its function, but collaborates constructively with the other powers.

The backlash phenomenon, in turn, imposes a critical reflection on social reactions to judicial decisions, evidencing the need for a democratic space for debate and divergence. The judicialization of social and political issues should be seen not only as a challenge but as an opportunity to strengthen democracy, where citizen participation and the response of the powers are fundamental for the improvement of the rule of law.

It is therefore imperative that dialogic judicial activism continues to be monitored and analyzed so that its implications are understood to their full extent. The balance between powers, the protection of fundamental rights, and the promotion of constructive dialogue are essential pillars for the consolidation of a healthy and functional democracy, where the Judiciary, far from becoming a superpower, establishes itself as an agent of social transformation that respects and values the plurality of voices and interests present in society.

Thus, the construction of an effective and participatory constitutional law becomes not only a goal but a reality in constant evolution, which requires commitment and responsibility from all actors involved.

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REFERENCES

1. BARBOZA, Estefânia Maria de Queiroz; KOZICKI, Katya. Judicialization of politics and judicial control of public policies. **Revista Direito GV**, São Paulo, p. 59-86, jan./jun. 2012, p. 73. Available at: https://periodicos.fgv.br/revdireitogv/article/view/23970/22728. Accessed on: 20 Jan. 2025.

2. CAMPOS, Carlos Alexandre de Azevedo. **The Unconstitutional State of Affairs**. Salvador: Jus podivm, 2016.

3. DALLARI, Dalmo de Bareu. **Elementos de Teoria Geral do Estado**. São Paulo: saraiva, 2014.

4. JEVEAUX, Geovany Cardoso; KARNINKE, Tatiana Mascarenhas. John Rawls' theory of justice, affirmative action, and judicial activism through the Supreme Court. **Argumentum Magazine**. Marília, v. 21, n. 1, pp. 295-313, Jan./Apr. 2020. Available at: https://periodicos.fgv.br/revdireitogv/article/view/23970/22728. Accessed on: 22 Jan. 2025.

5. LEVITSKY, Steven; ZIBLATT, Daniel. **How democracies die**. AGUIAR, Renato. (trans.). How democracies die. Rio de Janeiro: Zahar, 2018.

6. MARMELSTEIN, George. **Backlash Effect of Constitutional Jurisdiction: Political Reactions to Judicial Activism**. 2016. Available at: https://www.cjf.jus.br/caju/Efeito.Backlash.Jurisdicao.Constitucional_1.pdf. Accessed on: 22 Jan. 2025.

7. NOBRE JUNIOR, Edilson Pereira. Judicial activism: possibilities and limits. **A&C Journal of Administrative & Constitutional Law**, Belo Horizonte, year 11, n. 43, p. 91-117, jan./mar. 2011. Available at: https://www.revistaaec.com/index.php/revistaaec/article/view/229. Accessed on: 21 Jan. 2025.

8. NUNES JÚNIOR, Flávio Martins Alves. **Course on constitutional law**. São Paulo: Saraiva Educação, 2019.

9. OLIVEIRA, Emerson Ademir Borges de. **Judicial Activism and Control of Constitutionality**. Impacts and Effects on the Evolution of Democracy. Curitiba: Juruá, 2015.

10. OLIVEIRA, Emerson Ademir Borges de; DIAS, Jefferson Aparecido. **Civil jurisdiction, activism, and economic order**. Rio de Janeiro: Lumen Juris, 2017.

11. PIMENTEL, Mariana Barsaglia. Backlash to the decisions of the Federal Supreme Court on same-sex unions. **Journal of Legislative Information**. Brasília, a. 54, n. 214, p. 189-202, Apr./June 2017. Available at: https://www12.senado.leg.br/ril/edicoes/54/214/ril_v54_n214_p189.pdf. Accessed on: 22 Jan. 2025.

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ISSN: 2358-2472

12. SILVA, Diogo Bacha. **Activism in the control of constitutionality**: the transcendence of determining motives and the (il)legitimate appropriation of the discourse of justification by the Federal Supreme Court. Belo Horizonte: Arraes Editores, 2013.

13. STRECK, Lenio Luiz; TASSINARI, Clarissa ; LEPPER, Adriano Obach. The problem of judicial activism: an analysis of the MS3326 case. **Brazilian Journal of Public Policies**, Brasília, v. 5, n. 2, p. 51-61, May/Aug. 2015. Available at: https://www.publicacoesacademicas.uniceub.br/RBPP/article/view/3139. Accessed on: 23 Jan. 2025.

14. VIEIRA, Oscar Vilhena. **The battle of powers**: from democratic transition to institutional malaise. São Paulo: Companhia das Letras, 2018.

15. ZAGURSKI, Adriana Timoteo dos Santos. Backlash: a reflection on judicial deliberation in controversial cases. **AGU Journal**. Brasília-DF, v. 16, n. 03, p. 87-108, jul./set. 2017. Available at: https://www.cjf.jus.br/caju/Efeito.Backlash.Jurisdicao.Constitucional_4.pdf. Accessed on: 24 Jan. 2025.