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JUDICIAL ACTIVITY: CONSTRUCTION AND VARIATIONS OF A CRITICAL CONCEPT OF THE EXPANSION OF JUDICIAL POWER

ATIVISMO JUDICIAL: CONSTRUÇÃO E VARIAÇÕES DE UM CONCEITO CRÍTICO DA EXPANSÃO DO PODER JUDICIÁRIO

ACTIVISMO JUDICIAL: CONSTRUCCIÓN Y VARIACIONES DE UN CONCEPTO CRÍTICO DE LA EXPANSIÓN DEL PODER JUDICIAL

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ABSTRACT

This article intends to critically analyze judicial activism, seeking to delimit its conceptualization and going beyond its frequent imprecise and rhetorical use, by identifying the different contemporary phenomena related to the expansion of the Judiciary. For this, the qualitative bibliographic research starts from the American doctrinal debate on the subject, covering the broad theoretical path, from Arthur Schlesinger to Cass Sunstein, in comparison with the Brazilian doctrine. The theoretical contributions and contrasts on the jurisprudential experiences identified as activists allow differentiating the judicialization of politics from the politicization of justice, phenomena that cannot be confused, leading to the conclusion that the concept of judicial activism is necessarily multifaceted, and must be evaluated contextually, in combination with judicial self-restraint decision-making options and strategies.

Keywords: Judicial Activism. Supreme Court of the United States. Democracy. Separation Powers.

RESUMO

O presente artigo pretende analisar criticamente o ativismo judicial, buscando delimitar sua conceituação e indo além de seu frequente uso impreciso e retórico, ao identificar os diferentes fenômenos contemporâneos relacionados à expansão do Poder Judiciário. Para isso, a pesquisa qualitativa bibliográfica parte do debate doutrinário estadunidense sobre o tema, abarcando o amplo percurso teórico, de Arthur Schlesinger a Cass Sunstein, em cotejamento com a doutrina brasileira. As contribuições e contraposições teóricas sobre as experiências jurisprudenciais apontadas como ativistas permitem diferenciar a judicialização da política da politização da justiça, fenômenos que não podem ser confundidos, levando à conclusão de que o conceito de ativismo judicial é necessariamente multifacetário, devendo

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ser avaliado contextualmente, em combinação com as opções e estratégias decisórias de autorrestrição judicial.

Palavras-chave: Ativismo Judicial. Suprema Corte dos Estados Unidos. Democracia. Separação de Poderes.

RESUMEN

Este artículo se propone analizar críticamente el activismo judicial, buscando delimitar su conceptualización y trascendiendo su uso a menudo impreciso y retórico, mediante la identificación de los diferentes fenómenos contemporáneos relacionados con la expansión del Poder Judicial. Para ello, la investigación bibliográfica cualitativa parte del debate doctrinal estadounidense sobre el tema, abarcando la amplia trayectoria teórica, desde Arthur Schlesinger hasta Cass Sunstein, en comparación con la doctrina brasileña. Las contribuciones teóricas y las contraposiciones respecto a las experiencias jurisprudenciales identificadas como activistas permiten diferenciar la judicialización de la política de la politización de la justicia, fenómenos que no pueden confundirse. Esto lleva a la conclusión de que el concepto de activismo judicial es necesariamente multifacético y debe evaluarse contextualmente, en conjunción con las opciones de toma de decisiones y las estrategias de autocontrol judicial.

Palabras clave: Activismo Judicial. Corte Suprema de Estados Unidos. Democracia. Separación de Poderes.

1 INTRODUCTION

The prominence achieved by the Judiciary in the Brazilian social and political scenario has been notorious, especially in relation to the performance of the Federal Supreme Court (STF) in the face of major national issues.

In the current Brazilian political scenario, the STF seems to be in a very different position from being that "unknown other", as Aliomar Baleeiro (1967) characterized it.

This is not an exclusively Brazilian phenomenon. Internationally, issues considered typical of the political field, such as electoral processes, economic plans, public morality and the use of narcotics, have been taken to the courts, submitted to the judgment of the magistrates.

Thus, the performance of the Judiciary, especially the constitutional courts, has achieved a certain protagonism, through various manifestations, such as (1) expansion of its procedural instruments; (2) suppression by judicial means of legislative gaps; (3) adoption of perfectionist or exhaustive decisions; (4) judicial interference in the functioning of the other branches; (5) little adherence to precedents; (6) use of judicial power by agents and political parties; (7) declaration of unconstitutionality in doubtful situations, of borderline constitutionality; (8) judicial monocratism, when decisions of strong sociopolitical repercussion are rendered by only one member of a collegiate body; (9) predominantly utilitarian decisions; (10) creation of new law by the court; and (11) judicial intervention in the formulation and execution of public policies.

In reaction to this projection of the Judiciary on areas until then predominantly protected from its syndicability, criticism began to be raised of what has been called *judicial activism* or *judicialization of politics*, under the allegation of contradiction with democratic principles and the separation of powers.

In view of the relevance and timeliness of this phenomenon, as well as the criticisms raised against it, the present research intends to contribute to the delimitation of the phenomenon of judicial activism, with emphasis on its differentiation from other recurrent concepts in the public debate and in specialized criticism, such as the judicialization of politics, the politicization of justice and judicial self-restraint. To this end, the research makes special use of the American theoretical and historical critical repertoire, identifying in the United States an important reference for the contextualized evaluation of the dynamics of the expansion of the Judiciary and the reactions to this new posture of the magistrates.

The qualitative bibliographic research, with an inductive method and critical-reflexive bias, makes use of doctrinal, legislative and jurisprudential sources, with emphasis on the academic production of authors who critically analyzed the contemporary phenomenon of the

expansion of the Judiciary, as well as on decisions of constitutional courts accused of activists, especially the American Supreme Court and the Federal Supreme Court (STF). It should be noted that, as a material cut, the research focuses on the scope of constitutional jurisdiction, especially that exercised by constitutional courts.

The research seeks to identify the insufficiency of the decontextualized and excessively abstract criticism of judicial activism, which is commonly developed in the Brazilian doctrine, sometimes based on isolated and conjunctural episodes and decisions. It is believed that the American doctrinal and institutional history on the subject can contribute to a more multifaceted approach to judicial activism, expanding the conceptual repertoire of critical analysis of the performance of the Judiciary in different contexts, such as the Brazilian one.

First, it seeks the conceptual details of judicial activism, differentiating related phenomena, such as the judicialization of politics and the politicization of justice. It also analyzes the construction of conceptual differentiations and doctrinal criticisms developed from paradigmatic or representative judgments to question the limits of the Judiciary's performance in relation to the other Powers. Thus, the choice of the cases worked was guided by their outstanding content of judicial opposition to issues of majority politics, to the role of the other powers and in the face of politically or morally controversial issues, resulting in judgments reputed as activists by their critics. Finally, judicial activism is critically analyzed from its counterpoint with a proposal for judicial self-restraint or self-restraint.

2 EXPANSION OF THE JUDICIARY: JUDICIALIZATION OF POLITICS AND POLITICIZATION OF JUSTICE

In 1995, the American Neal Tate and the Swede Torbjörn Vallinder disseminated the expression *Global Expansion of the Judiciary,* to designate the growing role of the Judiciary around the world in arenas historically reserved for the political powers of the Legislative and Executive branches. In this global process, the Judiciary began to assume a certain centrality in the public debate, with the transfer of part of the decision-making power on issues of high political connotation, previously reserved exclusively to holders of elective mandates, parliamentarians and heads of the Executive (TATE; VALLINDER, 1995).

For the aforementioned political scientists, the expansion is related to the diffusion of judicial control of constitutionality by the most diverse national legal systems[3], with the attribution to the Judiciary of the competence to declare unconstitutionality of acts of the

[3] Currently, about 158 countries provide for some legal instrument to give rise to judicial control of constitutionality. For an analysis of this international scenario, see Brandão, 2012.

Legislative and Executive branches, implying recurrent tensions between these powers such as the Judiciary. As an example of control over eminently political issues, we highlight the decision of the U.S. Supreme Court in the case of *Bush v. Gore* (531 U.S. 98), which confirmed the result of the 2000 elections according to the indirect electoral system in force (UNITED STATES OF AMERICA, 2000), or the decision of the Constitutional Court of South Africa, which rejected provisions of the draft Constitution prepared by the constituent assembly[4] (BRANDÃO, 2012).

However, the expansion of the Judiciary has taken on new features, mainly from the adoption by the constitutional courts of decision-making techniques that are no longer limited to the Kelsenian paradigm of the "negative legislator" (KELSEN, 2003, p. 153), generating more direct clashes between Law and Politics.

Tate and Vallinder (1995) also point to specific historical and institutional factors to explain the expansion of the *judicialization of politics*: (1) the end of socialist regimes in the Soviet Union and in Eastern European countries, with the consequent hegemony of the North American worldview, including its system of judicial control of constitutionality[5]; (2) the emergence of new democracies in Africa and Latin America, which promoted the strengthening of the Judiciary; (3) the construction of international systems for the protection of human rights, through treaties[6] and supranational courts[7]; and (4) the crisis of credibility and representativeness of the Legislative and Executive Branches, in which the Judiciary is seen as a counterpoint to guarantee the rights and social improvements achieved.

In Brazil, the Global Expansion of the Judiciary has as an important milestone the process of redemocratization, culminating in the promulgation of the Federal Constitution of 1988, with the provision of a broad system of judicial control of constitutionality. Under the new Constitution, the STF began to gain increasing notoriety, especially from the 2000s

[4] The current South African Constitution was approved in 1996 and came into force in 1997. Before it, South Africa had a kind of interim constitution, adopted in April 1994. The interim document provided for its replacement by a permanent one, but stipulated a series of principles that should be observed by the definitive Constitution. In this context, the draft permanent constitution was submitted to the scrutiny of the Constitutional Court, which, based on these principles, declared some provisions unconstitutional (BRANDÃO, 2012).

[5] A "North American worldview" not only from the point of view of consumption and customs, but also from the point of view of American political and legal models. The idea of a global constitutionalism was disseminated, which would be marked by the transit of common constitutional ideas and the cosmopolitanism of its values, civilizational paradigms shared by democratic countries. Under this discourse, the US exported its political, legal and constitutional models to the world (BARROSO, 2018).

[6] Examples include: the United Nations Charter (1945), the Universal Declaration of Human Rights (1948), the International Covenants on Civil and Political Rights (1966), and on Economic, Social and Cultural Rights (1966), the European Convention for the Protection of Human Rights (1953) and the American Convention on Human Rights, known as the Pact of San Jose de Costa Rica (1978).

[7] Examples of these Courts are: International Court of Justice, International Criminal Court, European Court of Human Rights and Inter-American Court of Human Rights. Such Courts represent two basic premises of the internationalization of human rights: the limitation of national sovereignty and the recognition that the individual has rights protected at the international level (BRANDÃO, 2012).

onwards, with the use of new ways of making the Court visible, such as the televising of plenary sessions by TV Justiça, combined with the judgment of cases of great political and media repercussion.

Tate and Vallinder conceptualize the phenomenon of the judicialization of politics in a double dimension. In the first, judicialization *from without*, the Judiciary reacts to the provocation of a third party, which seeks to review the decision of a political power. By appreciating and judging the controversy, the Judiciary asserts and expands its power in relation to the other powers. In the second dimension, from *within,* there is the assimilation and use of judicial logic by the public administration, with reinforcement of dynamics and procedures of a jurisdictional nature[8]. Thus, the Public Administration itself begins to incorporate judicial techniques for deciding on political issues.

In this line, the form par excellence of judicialization of *the policy from without* would be the judicial control of constitutionality.

In Brazil, in an attempt at a more synthetic conceptualization, Luís Roberto Barroso also defines the judicialization of politics:

> *Judicialization* means that relevant issues from a political, social or moral point of view are being decided, in a final manner, by the Judiciary. It is, intuitively, a transfer of power to the judicial institutions, to the detriment of the traditional political instances, which are the Legislative and the Executive. This expansion of jurisdiction and legal discourse constitutes a drastic change in the way of thinking and practicing law in the Roman-Germanic world. (BARROSO, 2010, p. 6)

Based on this definition, Barroso understands that judicialization and *judicial activism* are not to be confused, but would be "cousin" concepts (BARROSO, 2018, p. 2181). For him, judicialization is an effect resulting from the institutional design in democratic constitutional regimes, while judicial activism is, more properly, a choice of the Judiciary to interpret and apply the Constitution in a more proactive way (BARROSO, 2018, p. 2182).

Along these lines, an example of the judicialization of politics would be the decision of the Supreme Court of Israel, in 2004, on the construction of the West Bank Wall, separating the Israeli and Palestinian territories. On this politically sensitive issue, the Court rejected two appeals by Palestinian plaintiffs against the construction, allowing the Israeli government to complete the barrier around East Jerusalem. The judges did not limit themselves to recognizing the competence or discretion of the Israeli government, but affirmed the *need to*

[8] For the authors, the from *within dimension* can be identified in the Regulatory Agencies, administrative autarchies that are part of the Executive Branch, which have their own decision-making regime, with peculiarities very close to the exercise of jurisdiction, such as the guarantee of the adversarial and full defense and the pretension of a technical analysis.

prohibit direct passage between the Palestinian neighborhood and Jerusalem *for security reasons* (BARROSO, 2018; HIGH COURT, 2015).

As the conceptual divergences addressed already exemplify, although the term *judicialization of politics* is accepted by most researchers in Law and Political Science[9], it is sometimes considered to be of little precision and functionality, to the extent that "academic production also presents fluidity in the use of the expression, which becomes no more than a name that is taken as a starting point for analyses whose perspectives are quite divergent" (MACIEL; KOERNER, 2020, p. 130).

However, it remains undeniable that Brazilian jurisprudence presents examples of direct tension between the Judiciary, especially the STF, and the other powers in the face of politically controversial issues. In 2016, in a trial of great political, social and media repercussions, Justice Gilmar Mendes issued a monocratic decision that prevented the inauguration of Luís Inácio Lula da Silva as Minister of State of the then President Dilma Rousseff, on the grounds that he was being investigated in the so-called Operation Car Wash[10] (BRASIL, 2016). Until then, the Court's jurisprudence was considered consolidated in the sense of the inindicability of acts of an eminently political nature of the President of the Republic. However, the following year, in 2017, Minister Celso de Mello allowed the appointment of Moreira Franco to the position of Minister of State by then-President Michel Temer, although both were being criminally investigated (BRASIL, 2017).

Although the term judicial activism is often used to designate judicial action in relation to issues less directly linked to the strategies of management of political-institutional power, such as the realization of social rights and the control of public policies, certainly, the erratic or casuistic posture of the STF contributes to the conceptual imprecision.

The theories that seek to delimit and analyze the phenomenon of the judicialization of politics are divided into two currents: the conceptualist and the functionalist (GINSBURG, 2003; HIRSCHL, 2004; BRANDÃO, 2012).

For *conceptualist theories*, judicialization stems from the positivization of new rights in constitutions and international treaties intensified after World War II, causing the fulfillment of certain individual and collective demands to be considered outside the majority political dynamics, and the Judiciary is responsible for guarding its implementation.

On the other hand, *functionalist theories* understand that the judicialization of politics is caused by the existence of points of tension in constitutional designs. A fragmented political arrangement would provide an environment of conflict to be resolved by the Judiciary

[9] On research in political science on the phenomenon of judicialization, see Carvalho (2004).
[10] Subsequently, the judicial process was extinguished without resolution of the merits, due to loss of object, in view of the withdrawal of the aforementioned appointment (BRASIL, 2016).

(BRANDÃO, 2012). In this sense, institutional conflicts arising from federalism, presidentialism and the separation of powers would contribute to the view of the Judiciary as a mediator of institutional clashes.

In another line of functionalist approach, judicialization would result from the Judiciary assuming the function of a kind of *political insurance*. Instead of the culture of rights and the fragmented institutional arrangement, judicialization would be a strategic resource of interest groups. In fact, for Tom Ginsburg (2003), the very insertion of rights protected against majority deliberation works as political insurance. In modern societies, dominant groups seek to ward off political, legal and economic risks by positivizing their interests. Thus, constitutionalization would serve as insurance against the risks of eventual political changes, regardless of the outcome of the elections (BRANDÃO, 2012).

Along these lines, Ran Hirschl (2004) highlights how social elites used the process of constitutionalization to crystallize eminently liberal values, such as private property and free enterprise, in order to protect them against possible electoral upheavals by popular vote.

These theories should not be taken as ready-made models to be irrethoughtfully transposed to any political-constitutional reality, however, they can serve as an initial parameter for reflection on the current role of the Judiciary in different contexts.

Certainly, despite the criticism, the Judiciary's performance on politically controversial issues can imply significant gains. In the U.S. Supreme Court, the case *Brown v. Board of Education of Topeka* (347 U.S. 483), judged in 1954, served as an important milestone for the social and political struggle for civil rights, reverberating in the following decades in the formulation of inclusive public policies (UNITED STATES OF AMERICA, 1954). In Brazil, for example, in 2011, the Supreme Court recognized the constitutionality of same-sex unions (BRASIL, 2012).[11]

On the other hand, omissive positions of the Judiciary, with the refusal to intervene in politically controversial cases, can also have admittedly negative consequences, endorsing violations of fundamental rights (FELDMAN, 2016; TAKEI, 2016). A classic example of undue judicial "self-restraint" can be identified in the Supreme Court's decision in *Korematsu v. United States* (323 U.S. 214), which endorsed the Executive Branch Act that confined American citizens of Japanese descent in concentration camps (UNITED STATES OF AMERICA, 1944).

Therefore, both judicial "activism" and "self-restraint" can have negative or positive social and political results, in addition to the fact that, recurrently, one is disseminated as a reaction to the undesired consequences of the other, depending on the evaluation of its

[11] ADPF No. 132 and ADI No. 4277.

effects. In the jurisprudence of the Supreme Court, it was the culture of judicial self-restraint stimulated by the unfavorable reaction to the activism of the Lochner Era, especially after the governmental threat of the *Court-Packing Plan*, which allowed the economic interventions of the *New Deal*, essential for overcoming the Great Depression (FELDMAN, 2016; TAKEI, 2016).

It can be seen how the judicialization of politics offers relevant risks: (a) to the democratic legitimacy of the decision on socially controversial issues, since judges are not, in general, elected by popular vote; (b) for the Separation of Powers model, since judicial intervention reduces the decision-making margin of the other Powers; (c) inadequate prognosis judgments about the effects of the decision in scenarios of high uncertainty, unpredictable and undesirable systemic effects; (d) frustration of the dialogical and democratic potentialities of social, political and institutional debate by solipsistic judicial judgments, which may assume a certain authoritarian bias; and (e) politicization of justice, to the extent that the excessive transfer of deliberations of a political nature to the Judiciary can promote an excessive immersion of judges and courts in the dynamics of political-party forces and interests (BARROSO, 2010).

At this point, the importance of differentiating the phenomenon analyzed so far, the judicialization of politics, from what is generically called the *politicization of justice, is evident*. While the former manifests itself in judicial interference in political matters, especially contemplated in the Constitution, being institutionally predictable or even expected, the politicization of justice must be seen as a pathology of the system.

In addition to an excess of judicialization of politics, the politicization of justice represents an inadequate exercise of the judicial function. It is the use of jurisdictional power by the magistrate for purposes other than those defined in the legal system, in the name of promoting a particular worldview or a political-partisan agenda, for example, the use of the judicial process to persecute or attack certain political, ideological or partisan groups.

In the recent history of Brazil, the so-called *Operation Car Wash* represents a paradigmatic case of politicization of justice, in the sense referred to, especially by the conduct of judicial proceedings by the then judge Sérgio Moro, in the 13th Federal Court of Curitiba/PR. The operation consisted of a series of investigations and criminal proceedings over allegations of a corruption scheme in the state-owned oil exploration sector.

In conducting the process, the judge adopted several heterodox positions and in disagreement with the legislation and jurisprudence consolidated in the higher courts to the detriment of the Workers' Party (PT) and, notably, former President Luiz Inácio Lula da Silva, who was imprisoned as a form of early or provisional execution of the sentence after

conviction in the second instance. judicial actions with undeniable political repercussions, including for the 2018 electoral process (BRASIL, 2018).

Several actions in the conduct of the Operation Car Wash processes can be identified as expressive of the political instrumentalization of justice, such as: (1) the coercive conduct of Luiz Inácio Lula da Silva, in 2016, without the presence of the legal requirements for this (article 260 of the Code of Criminal Procedure[12]); (2) the public disclosure of audios collected through telephone interception carried out after the deadline established in the court order itself, including conversations between Luiz Inácio Lula da Silva and the then President of the Republic Dilma Rousseff, in violation of the necessary transfer of jurisdiction to the STF; (3) disclosure, less than a week before the 2018 elections, of part of the plea bargain of Antônio Palocci, Lula's former Minister of Finance and Chief of Staff in the Dilma Rousseff government, despite the fact that said plea bargain was preserved by judicial secrecy and was considered useless by the Federal Public Prosecutor's Office (MPF) itself[13]; (4) the refusal of Judge Sérgio Moro to comply with the writ of *habeas corpus* in favor of Lula, granted on 06.08.2018, on duty, by Judge Rogério Favreto, of the Federal Regional Court (TRF) of the 4th Region[14]; and (5) the unconstitutional breach of the telephone secrecy of the defense lawyers of several investigated (NUNES, 2019).

Criticism of Sérgio Moro's performance in Operation Car Wash was accentuated by the revelations made by the magazine *The Intercept Brasil*, in a series of journalistic articles that became known as *Vaza Jato.* The articles revealed private conversations between the magistrate and representatives of criminal prosecution bodies, in an orchestrated and politically selective action in order to achieve the conviction of former President Luiz Inácio Lula da Silva, in violation of judicial impartiality and the accusatorial system. Subsequently, Sérgio Moro left the judiciary to accept the position of Minister of Justice, under President Jair Messias Bolsonaro, which was seen by his critics as confirmation of the political bias of his judicial performance.

From the above, it is possible to assess that the politicization of justice is not a necessary consequence of the judicialization of politics, but rather a pathological and

[12] The legal provision provides for the possibility of coercive conduct only in the face of the reluctance of the investigated party not to attend the appearance of a procedural act once communicated. In 2018, the STF, by a majority, declared the unconstitutionality of the coercive conduction of investigated persons or defendants for interrogation without prior subpoena (BRASIL, 2019).

[13] Gustavo Bebianno, campaign coordinator and former Secretary General of the Presidency of Jair Bolsonaro's government, revealed, after his break with the President, that while still in the role of magistrate, Moro met with Paulo Guedes to negotiate his appointment as minister, at a time contemporary to the publication of the plea bargain (GASPARI, 2019).

[14] The decision of Des. Favreto was doubly breached. First, by Judge Sérgio Moro, who on vacation, disallowed the release. Secondly, by Des. João Pedro Gebran Neto, Rapporteur of the 8th Panel of the TRF4, the competent court for the judgment in the second degree, of issues related to Lava Jato in Paraná. In the end, the Court upheld the arrest (SCHREIBER, 2018).

conjunctural result of this process. In this sense, Boaventura de Souza Santos does not seem to be right when he states that "the judicialization of politics leads to the politicization of justice" (SANTOS, 2003).

The judicialization of politics cannot be confused with the politicization of justice. Although the factors pointed out in contemporary constitutional systems give rise to a certain expansion of the Judiciary, especially with the strengthening of the judicial system of control of constitutionality, a more proactive or activist posture does not necessarily imply (much less justify) the political instrumentalization of the justice system, but rather a pathology or dysfunction to be fought.

3 JUDICIAL ACTIVISM AND ITS OPPOSITE: JUDICIAL SELF-RESTRAINT

Currently, the terms *judicial activism* or *judicialization of politics* have been recurrent in academia, in judicial decisions, in political debate and in media coverage, being used as a form of criticism of the performance of the Judiciary for the most diverse reasons. Sometimes, the meaning of judicial activism seems to be too fluid and imprecise, being handled, not infrequently, for merely rhetorical purposes.

However, in view of the pointed expansion of the Judiciary, judicial activism is undeniably an important concept for the critical analysis of judicial activity, justifying efforts in search of its better delimitation.

A characteristic note of judicial activism is the expansion of the Judiciary to the field of action of the Legislative and Executive Branches, implying an increase in the political-institutional relevance of the judiciary in relation to other state actors, especially political agents (CAMPOS, 2014). This new status of the Judiciary can be seen in the meeting held on 05/25/2018 between the presidents of the Chamber of Deputies Rodrigo Maia, the Senate Davi Alcolumbre (DEM-AP), and the STF Dias Toffoli, with the President of the Republic Jair Bolsonaro, at the Alvorada Palace, in order to discuss a "pact between Powers", whose content would be the implementation of economic policies, for the generation of jobs, a subject or approach that seems far removed from the classic jurisdictional function. On the occasion, Min Dias Toffoli highlighted the importance of "consensus between the powers to respond to priority points, such as Social Security and tax reforms, fiscal and federative renegotiation and the fight against crime and corruption" (PUPO; HAUBERT; ROSA, 2020).

This meeting exemplifies how the STF is called upon to take a position on eminently political issues and proposals, as well as how the other powers seem to rely on the integration of the Judiciary in their institutional planning, although it is not clear what the effects of this integration are on the jurisdictional provision.

Inevitably, and to some extent, as Robert Dahl observed, a country's constitutional court is an essential part of the machinery of governability (DAHL, 1957), as the American experience with the *Lochner Era* (1897-1937) seems to confirm.

In the transition from the nineteenth to the twentieth century, the Supreme Court of the United States began to issue systematic decisions that invalidated interventionist laws in the economy and of a social nature, alleging an affront to individual freedoms. In *the case of Lochner v. New York* (198 US 45), the Court held that the principle of freedom of contract was implicit in the *due process of law* clause, in its material aspect, enshrined in the 14th Amendment. In the case, the Court declared unconstitutional a New York State law that established limits on the weekly working hours of bakers, as it was an "unreasonable, unnecessary and arbitrary" (UNITED STATES OF AMERICA, 1905) limitation on the freedom to contract. The decision was severely criticized, under an accusation by an activist, for expressing an intervention of the Judiciary in a legislative political choice. In practice, based on a vague interpretation of private autonomy and contractual freedom, the Court would have sought to prevent government policies of economic regulation, in the name of the political and ideological defense of economic liberalism.

This activist stance of the Court began to clash systematically with the interventionist economic policy of the *New Deal* as a way to combat the effects of the Crisis of 1929. In reaction, President Franklin Delano Roosevelt proposed the *Court-Packing Plan,* a set of bills that changed the number of justices and brought forward the retirement of Supreme Court members[15]. Roosevelt's plan to "pack" the Court did not have popular support, from Congress, or even from his own party. However, from then on, the Court began to adopt greater self-restraint, reviewing understandings established in the *Lochner Era*, which opened greater scope for political action for the Government in the conduct of economic measures (HIRSCHL, 2004).

It can be seen, therefore, that, in addition to the expansive character of the Judiciary, criticism of judicial activism is usually related to issues characterized by a significant degree of political or moral controversy. In view of these issues, the constitutional provision of certain values is defended as a framework of stability and limitation of political proposals, generating disputes of interpretation that are difficult to resolve objectively (CAMPOS, 2014). As Sarmento (2006) observes, factors such as the semantic openness and ambiguity of

[15] Some examples can be identified in the cases of *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); see also: 300 U.S. 440 (1937), 300 U.S. 515 (1937), 301 U.S. 1 (1937), 301 U.S. 49 (1937), 301 U.S. 58 (1937), 301 U.S. 103 (1937), 301 U.S. 142 (1937), 301 U.S. 548 (1937), and 301 U.S. 619 (1937). For an analysis of this dynamic of action and reaction between the Supreme Court and the Executive regarding the measures of the *New Deal*, see Campos (2014) and Hirschl (2004).

constitutional norms, and the attempt to constitutionally regulate political and morally relevant issues, mean that, in general, judgments criticized as activists are related to the solution of *hard cases.* In this sense, the solution of difficult cases would be the "noble area" of judicial activism.

However, it should be noted that the conditioning factors and the delimitation of judicial activism are essentially dynamic, as evidenced by the change in jurisprudence in favor of and against the Lochner Era, in the name of the sociopolitical demands of the moment. What was previously seen as a defense of the Constitution is now considered judicial activism, according to the social moment and the political predominance of critics. Despite the search for a common core, the phenomenon is a reflection of each historical moment and the political-institutional arrangement of each country.

For example, in Germany, a more expansive posture of the Constitutional Court can be identified both in the politically unstable environment of the Weimar Republic (1919-1933), and after the end of the Nazi regime, under the new Basic Law of Bonn, in order to meet, therefore, the contextualized demands for the affirmation of the Democratic Rule of Law (CAMPOS, 2014). In Dieter Grimm's view:

> For the German Constitutional Court, for example, the experience with the Nazi dictatorship and the failure of the first democratic constitution, and the firm intention to make the post-war constitution matter for political and social life, were much more decisive factors in its activism than the effort to establish a judicial empire and restrict the space of political actors. (GRIMM, 2004)

In the US, in addition to this reactive stance to contextual demands, judicial activism is more directly related to the deviant behavior of the courts in relation to precedents. In comparison, in Brazil, judicial activism is more recurrently pointed out in cases of action by the Judiciary to enforce the Constitution as a way of overcoming the omission of the other Powers in the face of civilizing liabilities (ARGUELHES, 2012).

This difference in approach also has a contextualization. As part of the *Common Law tradition,* the American legal system emphasizes the jurisprudential construction of the Law, with a strong culture of respect for precedents, making deviations from the previously defined parameters be seen as essentially exceptional and controversial. Furthermore, constitutionalization represented the formalization of the sociopolitical achievements of the independence process, being limited to more restrictive guidelines.

In Brazil, the particularities of *Civil Law* and the historical political and institutional instability have made it difficult to form a culture of respect for precedent. On the other hand, the 1988 Constitution implied the establishment of a project to deconstruct historically

sedimented cultures and practices, such as those related to authoritarianism, land concentration, racism, gender inequality, etc. Under this framework, active intervention to overcome this socio-political scenario is an essential part of the demand for constitutional effectiveness.

Certainly, the polysemy and semantic dispute, as well as the contextual nature of the phenomenon of judicial activism, also extend to its counterpoint: judicial self-restraint or *self-restraint,* as a practice of non-intervention by the Judiciary in the scope of the judgments of the other Branches (CAMPOS, 2014).

Certainly, judicial self-restraint does not invalidate the control of constitutionality, rather, it defends its exercise within certain limits, even if this is not the unequivocal assessment of the doctrine. In this sense, in a minority position in the American doctrine, Jeremy Waldron (2006) not only questions the abusive exercise of *judicial review*, but its very existence, regardless of the system that adopts it, the frequency with which it manifests itself and its level of depth.

Judicial self-restraint can be divided into two fundamental nuclei: (1) the deference of the Judiciary in relation to the Legislative and Executive branches; and (2) the prudence of the judiciary, as a mechanism for preserving its authority (CAMPOS, 2014).

Despite the similar practical result, *deference* and *prudence* have different foundations. The first is based on the democratic principle and the separation of powers, since it understands the constitutional project as a political and popular enterprise, in charge of the political dynamics. The second, on the other hand, is based on the institutional preservation of the Court, on a strategy of self-protection, in view of possible attacks on[16] its decisions or on the institution itself, such as those in reaction to the Lochner Era.

Also using the foundations of deference and prudence, Richard Posner (1999) subdivides the phenomenon into: *structural self-restraint*, when restraint stems from respect for the legal-institutional capacity of the other branches, of special importance in the face of technical-scientifically uncertain issues; and *prudential* self-restraint, when resulting from concern with possible political and social reactions to their decisions or their dysfunctions, such as slowness or the accumulation of processes.

Thus, deference and prudence would complement each other to avoid or moderate activist postures, restricting the scope of the judicialization of politics.

[16] Attacks that may arise from society or other Powers. Strictly speaking, prudence seeks to avoid backlash.

Thus, like its activist counterpoint, judicial self-restraint is a complex and multidimensional phenomenon. In practice, a judicial decision can even be the result of weightings between activist and self-restrictivist positions[17] (SCHLESINGER JR., 1947).

For John Roche (1972), regardless of the causes, the analysis of self-restraint must consider two dimensions of the decision-making technique itself: (1) that of *procedural techniques*, such as the control of the trial agenda, the requirements for access to the Court, the temporal modulations of the effects of decisions, and any procedural instrument that aims to restrict the interference of the Judiciary in the decisions of the other branches; and (2) that of *substantial* techniques, such as the degrees of restriction to constitutional textuality, and deference to the decisions of the other Branches (especially in topics of differentiated expertise and on public policies), and the weight of the presumption of constitutionality of laws.

Considering this complexity, definitions such as that of Taquary and Taquary (2017) seem to be reductionist, according to which self-restraint is based on the allegation that the responsibilities of each body are defined by law, and that it is not up to the Judiciary to interfere in political problems, but to act in a manner that is deferential to the will of the legislator. Judicial self-restraint is not only based on material issues, of content sharing, but also involves political and procedural issues, such as the decision-making techniques available to the Court.

In the twentieth century, the interpretation of judicial self-restraint prevalent in the American Supreme Court itself sought to consider the substantial and procedural complexity of the phenomenon, albeit from an essentially deferential and pragmatic perspective. Based on James Bradley Thayer, this interpretation adopted by the Supreme Court was based on the understanding that respect for the other Powers and Democracy requires that the Judiciary can only invalidate a law when its unconstitutionality is *clear and evident*. Thus, if there is doubt, the choice of elected powers instituted by law must prevail (CROSS; LINDQUIST, 2007).

This institutional deference of the Judiciary to the other Powers would be a corollary of democracy itself and the separation of powers, implying substantial limitations to *judicial review* (CAMPOS, 2014, p. 178). Therefore, the semantic openness of the constitutional text, with its vagueness and ambiguity, should be interpreted as granting a margin of choice to the elected powers, which should be respected by the Judiciary (CAMPOS, 2014).

[17] By identifying a wing of the American Supreme Court as activist, Arthur Schlesinger (1947) also qualified some *justices* as "champion judges of self-restraint", a group led by Felix Frankfurter (1882-1965).

Cross and Lindquist (2007) criticize the Thayerian approach for the abstraction and insecurity of the criterion of clarity and evidence of unconstitutionality. In practice, this criterion would not offer any objectivity, opening up a wide semantic spectrum for hermeneutic manipulations and political instrumentalizations of constitutional interpretation.

Similarly to Thayer, Alexander Bickel (1962) defends the exceptionality of the exercise of the control of constitutionality, alleging its opposition to the current will of democratically elected representatives. Exalting *passive virtue* and *political prudence*. Bickel argues that the Judiciary should not intervene in a constitutional issue that is not sufficiently mature in the socio-political sphere, and that it is up to political dynamics and public debate to deal with highly controversial issues.

However, unlike Thayer, Bickel defends prudence and procedural limits as the basis of judicial self-restraint, approaching Posner's prudential self-restraint and emphasizing Roche's procedural techniques. In the face of politically and morally controversial issues, the courts should not intervene in order to avoid a conflict with the other powers. Based on the logic of *passive virtues*, the Judiciary must make use of procedural techniques that allow postponing the judgment of the merits of a matter, such as the recognition of incompetence, active illegitimacy, immaturity of the case or control of the judgment agenda (BICKEL, 1962).

However, currently, another current has been serving as the main paradigm for the practice of self-restraint, replacing Thayer's: *Cass Sunstein's* judicial minimalism.

For Sunstein (2001), in the face of complex moral issues, the Judiciary must make limited and superficial decisions, instead of decisions that intend to be broad and deep solutions to the controversies submitted to judgment, that is, maximalist or perfectionist decisions.

A minimalist decision is limited or *narrow* to the extent that it analyzes one case at a time (*case by case*), avoiding generalizations, and is *superficial* when it does not cling to deep theorizing, notably with regard to fundamental rights (SUNSTEIN, 2001). In the author's words:

> Understanding minimalism helps illuminate a set of important and long-standing ideals in the realm of constitutional law: courts should not decide issues that are unnecessary to the solution of the case; that courts should avoid deciding cases that are not "ripe" for decision; that courts should avoid deciding constitutional issues; courts should respect their own precedents; courts should not issue advice; courts should follow their decisions, but not necessarily the personal opinions of its judges (*dicta*); The Courts must exercise the 'passive virtues' associated with keeping silent on major current issues. All of these ideas involve the constructive use of silence. (SUNSTEIN, 2001, p. 4)

Sunstein's emphasis on judicial fallibility and the preservation of a space for future democratic deliberations are part of an approach of deference and prudence. In this sense, Sunstein's proposal evidences his interpretation of how *judicial review* should be "concerned" with democracy, the separation of powers, and the institutional preservation of the Court, incorporating into his assessment variables already raised by Posner and Bickel.

However, unlike the previous authors, Sunstein (2001) does not defend a refusal to exercise *judicial review*, but its practice is circumscribed to the case under trial, without the pretense of broad restructuring or political, moral or social redirections.

It is clear how this more delimited approach, *case by case,* appears as a proposal for a procedural decision-making technique that offers parameters for the more parsimonious exercise of the control of constitutionality, a mitigated form of deference and prudence. The Court must be aware of its cognitive limitations and of the possible undesirable effects of very prognostic and comprehensive decisions.

Thus, seen as the opposite of activism or its counterpoint, self-restraint represents the situation in which judicial decisions would be more deferential and prudent in relation to the other branches, as a way of making *judicial review compatible* with democracy and the separation of powers, in addition to institutionally preserving the judiciary.

Awareness of the cognitive limitations in the exercise of constitutional jurisdiction should lead magistrates to recognize the inconvenience of the dichotomy between activism and omission. As an alternative to these extremes, Sunstein (2001, p. 263) emphasizes the possibility and advantages of restricted, non-total, non-comprehensive decisions, that is, decisions that do not claim to be the ideal substitute that the Judiciary evaluates should have been produced by the Legislative or Executive Branch.

Sunstein (2001) himself recognizes that, in some situations, minimalism can be a dangerous path, denying the validity of values relevant to the Democratic Rule of Law in favor of slow and unstable political processes. However, this risk is significantly lower when the Judiciary applies its understanding in a circumscribed manner, guided by the characteristics of the concrete case under examination, as such a posture demobilizes a large part of the criticism of activism, as it is a typical and classic configuration of the exercise of the judicial function. Certainly, the doctrine and the system of precedents may expand the effects of the Court's interpretation, according to the continuity of the debates around the constitutional controversy, now qualified by a decision of the Court.

However, Sunstein's caveat highlights that it is impossible to affirm a priori that judicial self-restraint is positive or negative for the constitutional order. Any critical evaluation needs

to consider the context, the values at stake and the socio-political reality surrounding the issue.

If, on the one hand, in *Korematsu v. United States*, the deference of the Supreme Court endorsed the act flagrantly violating fundamental rights, on the other hand, the Court's self-restraint after the attempt of Roosevelt' *s Court-Packing Plan* was essential for the effectiveness of government policies for economic and social recovery in the United States and for the institutional preservation of *judicial review*.

Therefore, it is clear that, in the midst of the same judicial decision, aspects of activism and judicial self-restraint can coexist, as evidenced by the judgment that has gone down in history as the starting point of the judicial control of modern constitutionality, that of the *Marbury v. Madison* (1803) [5 U.S. (1 Cranch) 137].

In this case, President John Adams, defeated in the race for reelection, appointed, at the end of his term, several new judges, as a way to still maintain some influence through the Judiciary, however, some of these investitures had not been formally completed when the elected candidate Thomas Jefferson assumed the Presidency. The new Secretary of State James Madison refused to invest the appointed judges in office, among them, William Marbury, who judicialized the issue. The lawsuit was processed before the Supreme Court, as the case was covered by the original jurisdiction established by the *Judiciary Act* of 1789 (UNITED STATES OF AMERICA, 1803).

In the judgment, in view of the deep political polarization between Adams' and Jefferson's supporters, the Supreme Court would have made a strategic calculation, promoting a significant expansion of its power, while adopting a posture of self-restraint, making use of procedural elements to avoid deciding the disputed merits. The Court affirmed its competence to invalidate acts of the other branches of government for affront to the Constitution, that is, for the exercise of *judicial review*, and, based on this, declared the *Judiciary Act* of 1789 unconstitutional, as it extended the Court's jurisdiction beyond constitutional hypotheses, which led to the denial of the continuation of the action and the frustration of the plaintiff Marbury's claim.

The decision can be considered activist because it recognized the right, without express provision in the Constitution, of the Judiciary to exercise control of constitutionality, but, at the same time, it was self-restrictive, due to the bias of prudence, since it also recognized the political and institutional tension, strategically opting for non-intervention, in order to preserve the Court (and the *judicial review itself*) from possible political reactions.

It is noted that, like self-restraint, judicial activism, in order to be properly understood, must be analyzed from a contextualized approach, either for its causes or for its forms of manifestation (CROSS; LINDQUIST, 2007; KMIEC, 2004; GREEN, 2009).

Therefore, the way in which American authors face the problem of the expansion of the Judiciary offers important contributions to the construction of a satisfactorily developed conceptual and historical repertoire, which allows a critical analysis of judicial action in various contexts, including the Brazilian one. From the contextualized evolution of criticism of the Supreme Court's decisions, from the Marbury *v. Madison case* to more recent cases, it is possible to extract the need to overcome simplistic approaches to the expansive performance of the Judiciary, understanding the exercise of control of constitutionality as a constant contextualized balance between activism and self-restraint, a spectrum in which the judicialization of politics inevitably develops. This comprehensive perception of the phenomenon cannot be ignored, especially in contexts, such as the Brazilian one, marked by great civilizing, political, social and economic liabilities, in which the Constitution presents itself as a reference to be judicially implemented, at the same time that it has to be developed in highly polarized political contexts.

4 CONCLUSION

Certainly, judicial activism imposes challenges to its understanding, but it is possible to gauge from all the above that it is a useful, if not indispensable, concept to adequately analyze the performance of the Judiciary today, especially when the constitutional courts position themselves proactively, whether the American Supreme Court or the Federal Supreme Court.

The term judicial activism expresses the contemporary diagnosis of the expansion of the Judiciary to the traditional field of action of the Legislative and Executive Branches, resulting in a significant increase in the political-institutional relevance of the judiciary over political agents and powers. In fact, as pointed out, the STF is called upon to pronounce on eminently political issues, being an essential part of governability.

In addition to this expansive character of the Judiciary, judicial activism is related to controversial or disputed issues in politics and collective morality, in general, present in the so-called *hard cases.*

Because it is a complex phenomenon and involves acting in controversial scenarios, the more active intervention of the Judiciary requires a multifaceted understanding, avoiding simplistic interpretations of identifying activism with abuse of power, usurpation of competence or violation of the separation of powers.

The multifaceted approach serves to confer objectivity and epistemic quality to the analysis, as well as to provide an analytical tool for the research and critique of judicial practice, notably the constitutional courts.

It is vital for Democracy to have an independent and impartial Judiciary, averse and protected against political instrumentalization. However, the independence and autonomy of the Judiciary cannot be confused with judicial decisions free of arguments of an evaluative nature, which may imply an inevitable advance of the magistrate over concepts that were traditionally reserved for the exclusive deliberation of political agents, but which now enjoy constitutional status and force, conditioning all Powers.

In this sense, the long institutional history and the American doctrinal debate on judicial activism provides important subsidies for a more careful critical analysis of the expansion of the Judiciary in relatively recent constitutional orders, such as the Brazilian one.

From the long course of criticism and reactions to the judicialization of politics, its multifaceted and dynamic configuration can be seen, but which, however, does not allow any confusion with the pathological phenomenon of the politicization of justice. While the former is a structural and even expected consequence in consolidated Constitutional States, with an independent and active Judiciary, the politicization of justice expresses a manipulation of the state apparatus of the Judiciary to achieve political and/or ideological projects, in true violation and perversion of the constitutional system of the Democratic Rule of Law.

On the other hand, from the above, it is also evident that judicial activism cannot be adequately understood from a simplistic approach that ignores its relationship with its opposite concept, that of judicial self-restraint or self-restraint, since the performance of the Judiciary in specific judgments may result from a certain combination between these postures, which tend to function as counterpoints or, rather, as counterweights within the exercise of the judicial function itself, especially in the face of controversial issues submitted to judicial control of constitutionality.

Thus, judicial activism properly understood (and separated from abusive manifestations that are not to be confused with it) is fully compatible with modern constitutional orders, including the Brazilian one, without any prejudice to the Separation of Powers and Democracy, when exercised within the limits of prudence and deference, in comparison with judicial self-restraint.

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