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DEMOCRACY, PUBLIC POLICIES AND JUDICIAL CONTROL: IS' THERE A WAY TO RECONCILE THEM?

DEMOCRACIA, POLÍTICAS PÚBLICAS E CONTROLE JUDICIAL: HÁ COMO CONCILIAR?

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ABSTRACT

Objective: This study aims to analyze some elements of representative democracy, confronting them with the political functions inherent to the species and the Judiciary. It discusses what would be the limits of the manager in the choice of public policies to be carried out and, in their absence or failure, the limits of the intervention of the Judiciary in this eminently political area.

Methodology: The research adopts a hypothetical-deductive approach, through bibliographic research and concrete cases.

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Results: In a factual scenario in which the Judiciary is increasingly intervening in the political-administrative sphere, influencing decision-making by elected officials, who are now proactively controlled by members of the Judiciary (decisions counter-majoritarian), we observe a crisis of discretion and reversal of institutional roles. Based on the results of the study, it is recognized that judicial control can generate what the doctrine calls judicial activism, through decisions that oppose the constitutional text and that sometimes result in arbitrary or erroneous acts. In the end, it is concluded that to protect the constitutional principles, the application by the Judiciary of the principles of reasonableness and proportionality in the investigation of the specific case occupy a mandatory position.

Contributions: The study addresses a divergent and complex theme, causing the reader to reflect on the consequences that judicial activism can cause in the representative system. Criteria are presented that serve to mitigate the negative impacts of the interventions of the Judiciary on public policies, seeking to preserve the representative system.

Keywords: Representative democracy; Public Policies; Discretion; Judicial Control; Activism.

RESUMO

Objetivos: O presente estudo objetiva analisar alguns elementos da democracia representativa, confrontando-os com as funções políticas inerentes à espécie e o Poder Judiciário. Discute-se quais seriam os limites do gestor na escolha das políticas públicas a serem realizadas e, na sua falta ou falha, os limites da intervenção do Poder Judiciário nesta seara eminentemente política.

Metodologia: A pesquisa adota uma abordagem hipotético-dedutiva, através de pesquisa bibliográfica e de casos concretos.

Resultados: Em um cenário fático em que cada mais o Poder Judiciário intervêm na esfera político-administrativa, influenciando na tomada de decisões por agentes eleitos, que passam a ser controladas de modo proativo por membros do Poder Judiciário (decisões contra majoritárias), observa-se uma crise de discricionariedade e inversão de papéis institucionais. Com base nos resultados do estudo, reconhece-se que o controle judicial pode gerar o que a doutrina denomina ativismo judicial, através de decisões que contrapõe o texto constitucional e que por vezes resultam em atos arbitrários ou errôneos. Ao final, conclui-se que para resguardo os princípios constitucionais, a aplicação por parte do Poder Judiciário dos princípios da razoabilidade e proporcionalidade na averiguação do caso concreto ocupam posição de obrigatoriedade.

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Contribuições: O estudo aborda tema divergente e complexo, fazendo com que o leitor reflita acerca das consequências que o ativismo judicial pode causar no sistema representativo. São apresentados critérios que servem para minorar os impactos negativos das intervenções do Poder Judiciário nas políticas públicas, buscando preservar o sistema representativo.

Palavras-chave: Democracia representativa; Políticas Públicas; Discricionariedade; Controle Judicial; Ativismo.

1 INTRODUCTION

Nowadays there is an interest in public policies and the clear lack (or flaw) of investment in areas that need some improvement, which are the ones that directly affect the poor population and consequently violate fundamental rights. However, it cannot be denied the existence of elaborated electoral procedures to select and elect representatives who, in a certain period, are going to lead social interests (including public policies) in their own way.

Such context provides a representative democracy environment whose elected agents can officially make decisions and have a political role. The political role has management issues such as the liberty to choose areas for investment and the accomplishment of the government plan.

Under such perspective, the question within the following paper is as follows: “How far does administrative discretion when managing public policies go?” Can the political agents do what they please? How can the Judiciary intervene in such cases?

Regardless the answers for the questions asked above, nowadays the Judiciary is extremely active in controlling public policies by imposing certain practices for the agents to follow. Such attitude is present in several levels of jurisdiction and it discusses what would be the limits for such intervention taking into consideration the administrative discretion.

There are arguments for both sides. Thus, the paper is going to show a brief analysis of the arguments that can stop or favor the Judiciary intervention like the existential minimum and the possible reserve as well as an analysis of the

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representative democratic scenario, which gives the political agent the power to make such decisions.

Besides, the judicial control under scrutiny tends to spread activist judicial decisions, which is going to show the need of an investigation if judicial activism is accepted and legitimated by the current constitutional system.

Then, without the pretension of exhausting the issue, the following paper tries to deal with problems related to public policies and the Judiciary, especially when it comes to the possibility, or not, of the acceptance of decisions made by non-elected agents. Such decisions are seen as counter-majoritarian, which goes against democracy. On the other hand, judiciary active actions along with the democratic gaps legitimate such actions as a replacement of the political agents as it is going to be seen along the paper.

2 THE PROCEDURAL REPRESENTATIVE DEMOCRACY

In order to stablish the political and judicial scenario related to public policies issues displayed in this paper, it is paramount to approach, even briefly, some aspects of the representative democracy. Such approach is justified due to the fact that within democratic systems, the elected agents are legitimate elements to make political decisions and that is exactly where public policies are made.

Therefore, according to Giovani Sartori theory, politics is an electoral dispute for positions within the State whose role is to legislate for others (SARTORI, 1994, p. 126). The concept presented by Sartori is extremely important to show, at least in a representative democracy, that the political environment is of representation. It means the elected ones are going to represent the voters as well as represent their interests.

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According to Robert Dahl, representative democracy is the way to overcome problems that obstruct the implementation of a fully participative democracy. According to him, assembly (participative) democracy impedes effective democracy practice[1].

Thus, in 1820 James Stuart Mill described the representation system as “the greatest discovery of modern times” (DAHL, 2001, p. 120) implying that it would be possible to ally democracy to the modern society being set with bigger territories and growing populations. Mill considers representation as the solution to overcome the State size limits and to allow citizens’ participation through representation. Such sliding scale of the democratic system through representation builds a complex state organization network.

The change of the scale and its consequences towards representation as well as the increase of diversity and conflicts helped the development of a set of political institutions that, as a whole, differentiate representative democracy, defined by DAHL as a “polyarchy”, from other older democratic, or non-democratic, political systems (DAHL, 2012, p. 346). The institutions mentioned by Robert Dahl show a State that has its representative operation based on the political system, complementing the division of power proposed by Montesquieu, where Legislative, Executive (Administrative) and Judiciary roles are grouped.

Considering such context and such Democratic State basis, the transference of Estate executory and legislative responsibility withdraws political autonomy from citizens, which is based on legislations approved by representatives. Such legislations are legitimate and are executed through the law. (HABERMAS, 2003, p. 183).

The brief description of some the pillars of representative democracy brings the conclusion that such responsibility transference to the “representatives” is a legitimate procedure. Therefore, it is the political agents’ role to make political decisions like investing and sending funds into health, education, and public safety and others.

Thus, it is paramount to verify some issues related to the political role regarding representative democracy and check if it allows counter-majoritarian decisions made

[1] Robert Dahl in his book "On Democracy”, tries to build a democratic theory, which allows as much representation as citizens’’ effective participation. However, due to this paper proposal, it is going to focus on representation in its simplest meaning to make its proposal feasible.

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by agents who are not chosen through the representative system, which is going to be seen in the next item and it is going to help to consolidate the idea of the following paper.

3 THE POLITICAL ROLE OF CONSENTED REPRESENTATION

As explained in item 2, it is advisable to display some practical and theoretical elements regarding representation to understand the current proposal.

Sartori in his book "The Theory of Democracy Revisited" questions the idea of *demos*, the ancient Greek word for the ordinary citizens of a city-state and the act and role of governing. Thus, it is clear that representation comes under the form of free and just elections, which is a way to legitimate representatives to act on behalf of citizens:

> Governments that are elected because they reflect voters' wishes as well having political responsibility for that, by having other free elections, are the ones that can be named, in a free interpretation, consented governments (SARTORI, 1994, p. 126).

It is clear that representative government portraits people's consent. In addition, they participate in electoral procedures and believe the elected agents make decisions related to the political institutions.

In a contemporary point of view, it is possible to say that citizens elected for representative positions would be responsible to manage the public system. Thus, such elected citizens should apply political-administrative directives according to their government proposals or, at length, according to what is convenient to them.

When it comes to the Executive, where public policies are more common, it is the agent's responsibility the necessary measures to put public management in motion, respecting expenses budget execution foreseen in the budgetary law proposed by such agent. Thus, it is clear that the citizens who grant the agent the power to decide, which ends in its acceptance, accept the operation and practices adopted by the representative.

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Such understanding agrees to Jürgen Habermas in his book “Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy”, which says that one of the presuppositions is the acceptance of the results produced by the elected representatives when they make decisions aligned with what society accepts. The political role of representation, when done correctly, reflects the will of the people and consequently their sovereignty. Even when there is some kind of disagreement, the democratic environment has conflicts of ideas and proposals and it has dispute as part of its essence, which does not exclude the immanent democratic proposal that belong to the consented political role.

However, the consensus is easily visualized in an abstract environment, which, according to Habermas, would validate the system. Thus, consensus should be considered as part of equal opportunities given to whom it may concern and specially to people’s legitimacy will that elects agents to legislate in the name of others. Such idea has some contradictions when there is a “third party” within politics, which is a risk of damaging the democratic system as well as going against will of the people of not wanting non-legitimate individuals.

4 PUBLIC POLICIES AND ADMINSTRATIVE DISCRETION

Discretion belongs to administrative law, which is characterized by a power of decision by the manager; however, it is a much broader concept.

The doctrine is going to connect discretion to several definitions that relate to various themes, as it applicability in regulations and administrative acts, technical appraisals, Public Administration principles, and finally public policies. The authors decided to present the concept of discretion in a superficial way to follow the initial idea of the following paper, which intends to discuss administrative discretion towards public policies.

According to Luiz Manuel Fonseca Pires, even if the initial ideal one might have that discretion is about having the power of choosing, it is always juridically entailed, under strict rules and it is not, in fact, a free power (FONSECA PIRES, 2008,

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p. 149). He also says that discretion is always entailed and consequently not free from legal determinations: “It deals with stablishing attributions, which can make Public Administration to choose one among equally legitimate options or they can previously define one possible option only” (FONSECA PIRES, 2008, p. 149).

Thus, one can understand that discretion is not a manager unlimited power of making decisions in an undetermined way, but like entailed acts have regulations, discretion acts are equally entailed in its area of permissibility.

According to Fernando Saiz Moreno, discretion is limited to the application of non-juridical criteria, while the decision criteria surpasses the juridical area and becomes political (SAIZ MORENO, 1976, p. 312). In the end, as a final concept, it is considered that discretion decision takes place when they happen within one or two solutions, where they are all equally valid for the law (SAIZ MORENO, 1976, p. 304-305). Under such discretion perspective, respecting the legal principles and the peculiarities of the discretion act that is going to be limited to a certain number of options (equal for the law) as well as a choice through a political decision, it is paramount to discuss public policies and the discretion influence.

Public policies are, according to Maria Dallari Bucci, “government initiatives to manage the means available for the State and its private activities to perform the relevant socially and politically determined objectives” (BUCCI, 2006, p. 241). Fabio Konder Comparato claims that public policies are an activity that are set through a group of organized regulations and legal obligations that are united by a purpose, which means an objective previously determined (COMPARATO, 1997, p. 353).

Therefore, public policies hold the idea that a manager, respecting the pertinent legislation and the attributions of each level of government, should direct the resources to specific areas such as health, education, public safety, and others.

It is evident that decisions related to public policies affect Public Administration discretion acts and should focus on public interest as a qualifying element of the public agent choices regardless the constitutional and infra-constitutional legislation. As an

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example, it is worth mentioning article 212[2] of the Brazilian Constitution that says the Federal Government should invest at least 18% of its budget in maintaining and developing education, while States and Cities should invest 25%.

It is clear that there is a constitutional regulation that dictates the minimum resource use in each public policy. If the amount is not enough, the manager has the autonomy to increase it, which is a discretion act. In a representative democracy, the political agent (who, despite participative procedures, is deeply inserted in the Brazilian State) directs investments as he/she pleases.

The political agent, since being elected, has to exert his/her *munus* the best way he/she pleases or respect political party policies of his/her administration. Thus, the agent leads the public policies to areas of his/her convenience. Since the Constitution stablishes minimum amounts of resource investments only in education and health, other investments are in charge of the agent.

There is no way to deny that public policies are management political acts, since there are no legal impediments, therefore prioritizing certain areas would not be illegal. Thus, for instance, if an agent is in favor of an administration, whose proposal is focused more on education; such agent tends to direct more resources to that area than of what is foreseen in the constitution.

However, when the judiciary intervenes and determines that the Government adopts practices related to public policies, potential problems may emerge and maybe such palliative solution turns out to be inefficient as it is going to be discussed on item 5.

[2] CF, Art. 212. The Federal Government will invest, annually, at least eighteen per cent, and States and Cities twenty-five per cent from taxes in maintaining and developing education.

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5 THE JUDICIARY *VERSUS* PUBLIC POLICIES: IS THERE A WAY TO RECONCIALE THEM?

As seen on item 4, public policies are competences of the Executive and the Legislative with their specificities. However, there have been more and more cases of direct Judiciary intervention in order to try to compel government representatives to a certain behavior. There have been recent examples of such intervention like when there is a legal decision to enroll a minor in a day care, when there is the obligation to supply medication to someone or a surgery on the State expenses and so on.

The interesting fact is that in many interventions the attempt to solve the problem might affect higher levels in the administration than only the Judiciary. That was what happened in 2013 in the state of Sao Paulo, where more than 7,400 preliminary order court decisions forced the referred state to enroll children in day cares. As the state had already a waiting line of more than 111,000 children, it enrolled the children contemplated in the court decisions before the ones in the waiting line, which caused an isonomy problem as well as harming the ones who did not sue the state government on such matter[3].

The example mentioned above brings the following question: Has the judicial control (sometimes extreme) solved the problem?

The possible answer tends to be negative. It is known that judicial control is part of the Power Balance, which can be included in the *checks and balances* system. Considering the necessity of controlling both government departments in order to avoid duty deviation and abuse of power, the checks and balances system proposes a relative autonomy for each Power, creating control mechanisms and act correction.

> Due the proliferation of fundamental rights within Constitutions as well as the assumption they are principles that can clash in specific cases, there is a social necessity to maximize the application of each one of the fundamental rights in order to develop a new conception of separation of powers. There is an understanding that law and politics are no longer totally separated areas

[3] *O Estado de S. Paulo* newspaper, June 3 2013: "From January to April, São Paulo City Hall got 7.408 court orders forcing the enrollment of children in day cars. To do that it would need 37 new day cares. The waiting line for day cares is of about 111 thousand children. (P. 1 and Metrópole A14)".

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> and such connection must be repressed for the State to function accordingly. (DE PAULA, 2011, p. 273).

Nevertheless, the question that arises is at what extent the Judiciary is counter-majoritarian and intervene in management issues, especially in a State that needs resources like in Brazil.

It is clear how the judiciary control goes against several principles and institutions such as the popular sovereignty (represented by the separation of powers), the reserve of possible and minimum existential. Pietro Costa understands the difficult mutual compatibility between popular sovereignty and the application of State fundamental rights by other Powers but the State itself since people sovereignty and fundamental rights of the subjects are both principle that cannot be given up and then their coexistence generates a tension hard to overcome (COSTA, 2011, p. 232).

It is fair to say there is a problem between fundamental principles, which must be solved and in order to define of one of them as a default. Two reasons, the reserve of possible and minimum existential theories, can make such solution difficult.

According to Luiz Manuel Fonseca Pires, the reserve of possible is divided into factual and juridical aspects. Factual aspects are related to the material limits to State resources (workforce and financial), which would impede the Judiciary of interfering in public policies as it pleases. The juridical aspects are related to budgetary laws (art. 165 of CF/88) that stablish the use of resources, therefore judicial intervention would go against such legislation and consequently would be illegal (FONSECA PIRES, 2008, p.288).

Regarding the minimum existential, Ricardo Lobo Torres claims:

> The minimum existential does not have its own constitutional characteristic, so it is connected to the idea of freedom, within the principles of equality, having its own legal procedure, within free enterprise, within human rights and citizen immunities and privileges. It lacks specific content and embodies any right, even fundamental ones, like the right to health, food, etc., which are essential and inalienable rights (TORRES, 2009, p. 144).

Such theory is subdivided into several bias and some of them are part of the reserve of possible theory when it comes to idea that the State must guarantee,

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through juridical regulations, the rights to the individual minimum existential, but the application of such rights are no longer directly guaranteed. It is fair to say that such theory assumes that the Judiciary can only interfere in order to provide the minimum existential to life and human dignity.

Such theories go against the Judiciary proactive actions when it influences public policies. The question is, “Wouldn’t the intervention be a way to guarantee the balance of powers and assure, even juridically, access to fundamental rights to the ones affected by it?”.

Empirically, it is clear the existence of State initiatives to provide fundamental rights foreseen in the Constitution, which are provided through public policies. However, misplaced actions, corruption and improbity often obscure (and sometimes suppress) actions that, in theory, should provide such minimal essential or existential.

Under such perspective, both theories may impede a possible public policies intervention, but since they are discretionary in their broad sense, they lose their potential for impeding it. It may look like a circumstance that denies a solution, but it is worth mentioning the “optimism of will” by Norberto Bobbio.

It is important to highlight at least one jurist’s opinion proposal able to balance the Judiciary interventions and the discretion of public policies in order to have a feasible coherent way out in the Judiciary, Legislative and Executive both prerogatives.

Thus, concrete case consideration criteria can be the public policies judicial intervention guiding agent. At first, such consideration should not be done just by the judge who is judging the lawsuit and intends to influence public policies. Such investigation should go further. Firstly, the legitimate agent such as the Brazilian Government Agency for Law Enforcement and Prosecution of Crimes should, before filling the action, analyze questions and facts that justify their attitude.

An elaborate screening before filling the action can help in choosing concrete cases that in fact need to be analyzed by the Judiciary, which at this point should use constitutional hermeneutics and justify its decision since it is not in its area of primary institutional expertize.

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Luiz Manuel Fonseca Pires mentions the consideration in issues that involve public policies:

> The procedure of the theory of principles consideration becomes, once more, a paramount tool to check this public policy administrative discretion legitimate environment. It is the best reserves of possible with fundamental rights minimum essential comparison tool in order to give to such fundamental rights maximum effectiveness. The principle optimizes the right to make fundamental rights to take place the best way possible (FONSECA PIRES, 2008, p. 304).

Thus, a possible way to reconcile the Judiciary, its interventions, and Public Policies from the other Powers is through consideration. Consideration allows the ones responsible for applying the law to verify if the previous budgetary dotation of investing in health, when it comes to the universal access to it, is being properly followed (art.196, CF/88) (FONSECA PIRES, 2008, p. 304).

In addition, such consideration should focus on the reasonability and proportionality criteria. Reasonability, as a hermeneutic vector when it comes to applying proportionality regulation as foreseen in the Constitution as mentioned by Robert Alexy, seeks a fair balance among the desired means and ends (GRINOVER, 2009, p. 43). Such criteria are going to allow consideration to be better applied under specific situations, making it proportional and reasonable, under the eyes of the State as well as the Judiciary.

Finally, it is worth mentioning the democratic representation and Judiciary interventions within majority decisions. If politicians are allowed to do their job, practice politics, and the judiciary interventions are counter-majoritarian, is there the possibility for reconcile them?

Reconciling “public policies and judicial control” can be considered one of the techniques of balancing Powers, which is part of check and balances system accepted by the doctrine.

It is a fact that political agents often deviate from their primary democratic representation attributions, which makes the general population something incidental. Thus, public policies judicial control should be considered as legitimate, even having a

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counter-majoritarian characteristic because it guarantees fundamental rights for under privileged people.

Therefore, judicial control is inherent to the checks and balances system and it generates a phenomenon called judicial activism, which is going to be discussed further in this paper as judicial administrative acts or Judiciary act that can, in the end, overlap institutional prerogatives of other Powers.

6 JUDICIAL ACTIVISM WITHIN THE BRAZILIAN CONSTITUTIONAL STATE

As mentioned before, the Constitutional State by itself has rules that foresee inter power interference, especially when it comes to the checks and balances system and the public policies judicial control.

However, regarding the Brazilian State, the Fundamental Law has stablished elements that make political decisions possible, which are going to influence the decisions made by the elected political representatives.

Some examples can mentioned as the abstract control performed by the Supreme Court regarding Actions for Declaration of Unconstitutionality, Action for Declaration for Constitutionality, Claim of Non-compliance with Constitutional Precept, among others.

The Constitution foresees hypothesis and ways for the Judiciary intervention in other Powers. Would these procedures be the basis for judicial activism?

The doctrine would say it would not. Judicial activism is characterized when there is a full interpretation of the Constitution, which go over the current regulations. It would not be restrict related to a judicial decision, which would be similar to the legislation as for example if a sentence is compatible to the constitution.

According to Strapazzon and Goldschmidt:

> In Brazil, the concept of judicial activism described by Dworkin is the one mostly used in the Legislative, academic means as well as by the press. Judicial activism has a breaking the law connotation. Yet, judicial decisions that refuse the literal interpretation of the constitution, as well as the supposed

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> legislator will, and do not follow canonic interpretation methods or contradict the Legislative constitutional interpretations (Strapazzon; Goldschmidt, 2013).

Thus, judicial activism cannot be confused with the Constitutional Courts primary attributions related to constitutionality control, which will use its control attributions as a checks and balances element. In addition, it works harmonically among the other powers, which is not considered judicial activism strictly speaking.

According to Luiz Roberto Barroso, judicial activism goes beyond mere constitutional hermeneutic:

> The idea of judicial activism is associated to a broader and more intense participation of the Judiciary in performing constitutional means and values having more interference within the other two Powers. The activist posture is seen though different conducts that include: (i) direct Constitution application to situations not contemplated in its text and independently of the ordinary legislator action (ii) declaration of unconstitutionality of the legislator normative acts based on less rigid criteria regarding clear and ostensive Constitution violation. (iii) the imposition of conducts or abstention of the Brazilian Government Agency for Law Enforcement and Prosecution of Crimes when it comes to public policies (BARROSO, 2008, p. 04).

Considering what was mentioned above it is easy to confuse constitutionality control or other Judiciary prerogatives with judicial activism. However, it is worth mentioning that the activism is the result of a full interpretation of the legal text or, on the contrary, from the disregard of normative imperative data that would be a restrictive interpretation of the norm.

Those are the political judicialization (judicial activism) situations as well as a potential collision to the Constitutional and Democratic State since the Judiciary could be invading the jurisdiction of another Power that has representatives elected by the people. That is why one should be careful to analyze judicial decisions fact and juridical circumstances that in the end have political issues.

According to Strapazzon and Goldschmidt, 2013 (*apud* DWORKIN, 2007, p. 451-452) when it comes to judicial activism Ronald Dworkin differentiates judicial activism from a possible arbitrariness occasionally found in decisions, which are very close concepts.

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Activism is a way of juridical pragmatism. An activist judge would ignore the Constitutional text, the history of its enactment, the Supreme Court previous decisions that tried to interpret it and the long lasting traditions of the Brazilian political culture. The activist would ignore everything to impose other Powers, her/her own point of view regarding what justice requires. The right as integrity condemns activism and any other similar constitutional jurisdiction.

Activism by itself, does not violate the Constitutional State. However, the arbitrariness that will be able to be checked in activist decisions is something that can be harmful to the Democratic Constitutional State.

There are several ways of Judiciary intervention that are parallel to the Constitutional State and can be considered as part of a constitutional system. However, the critic is about when the judicial practice has an arbitrary political bias and go over other Powers institutional prerogatives as well as when it imposes, in a coercive way, the Judiciary position regarding issues that do not belong to its jurisdiction without a plausible justification.

Decisions that are made through attribution deviation, abuse of power or violation to society interests can be considered arbitrary and then be considered a judicial activism deceitful tactic.

The Constitutional State embeds several forms of judicial hermeneutic, but all of them must follow the Constitution. Consequently, the Judiciary and its overdone decisions are supposed to follow the judge free convincing principles, nevertheless such judge cannot make a decision that violates constitutional precepts and should always study the case carefully having in mind the reasonability and proportionality principles and considering all juridical and factual situations related to the problem.

According to Ferraz (1994, p. 14-15), the activist judge tends to leave pure legal positivism boundaries, in a more dogmatic point of view, to make a decision more based on political reasons.

Would the free convincing principle have a limit to impede judges from disrespecting the Constitution and consequently the infra-institutional legislation? Such limitation would be within the current Constitutional State principles.

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It is clear that the line that separates judicial decisions from arbitrary decisions is tenuous. In addition, arbitrary decisions violates the Constitutional State and democracy itself.

The task to identify if a judicial decision has overpassed its limits is not easy. Law and hermeneutic can cause a dubious interpretation as well as confuse the determination if a decision would be arbitrary or not.

For these reasons, some parts of the doctrine tend to accept activism as coherent only in cases that the protection of the fundamental rights is necessary, which is the case of public policies judicial interference.

Thus, as it is going to be seen in item 7, when judicial activism is considered legal, it can be considered as a way to fill in the gaps democracy has as well as the gaps caused by elected representatives' flawed decisions.

7 JUDICIAL ACTIVISM AND DEMOCRATIC VOID: IS IT THE OVERCOMING OF DEMOCRACY GAPS?

The following chapter resumes "democracy" as its theme, which was used as the basis for the first topic of the paper. The intention is to end the initial cycle, which was stablished to find solutions for target problem.

One might ask what would the bedrocks that characterize judicial activism. Would they be a democratic deficit?

The study tend to confirm the existence of a democratic void. When the Judiciary activist performance cases are checked, it is clear that there are several situations that it intervenes in administrative issues, management issues and even political issues. Many of such issues belong to the jurisdiction of other Powers.

It was previously mentioned that when it comes to public policies control, there are cases which the Administration is forced to make some decisions, however such situations are not characterized as judicial activism. Nevertheless, in case of an unrestricted, invasive or disproportional performance, the control can be considered activist because such performance would be disproportional to the balance of Powers.

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Under such perspective, there is a common peculiarity to all examples, which is the obligation of the State in providing fundamental rights listed in article 5 of the 1988 Brazilian Constitution.

The Judiciary cannot ignore the social needs regarding the application and efficiency of fundamental rights. Thus, there is a possible democratic *deficit* and, in theory, the State has the institutional obligation to guarantee society interests apart from the Judiciary, except in cases explained previously regarding minimum existential and possible reserve.

The elected representative would be the ones who would allow such Judiciary political performance, which demonstrates that flaws within representation force judges to fill in gaps that are obstacles of providing full fundamental rights and the longed social evolution. On the other hand, if the State, through coherent political decisions, lead public administration to fulfill such requirements there would not be the need for the Judiciary to intervene in other Powers.

According to Joseph Schumpeter, there are flaws in the democratic mechanism that cause problems in fulfilling society needs. “Democracy, in its plenitude, has been showing difficulties in working well due to the social class division, which produces successful politicians, but without the necessary democratic sense” (SCHUMPETER, 1984, p. 165).

The lack of pure “essence” of democracy surely refers to representation virtues that should stimulate certain practices by the political representatives in order to represent society interests and reach State Constitution fundamental rights.

The clear difficulty between sharing society sovereignty and reaching fundamental rights generates tension because to reach such rights the society sovereignty can be changed from its basic concept.

The tension mentioned by Pietro Costa highlights that representation flaws in making political decisions can cause Judiciary intervention. If such demands were “spontaneously” fulfilled by the agents there would not be the need of judicializing politics.

Such judicial activism must follow the consideration, proportionality and reasonability principles, which have been mentioned before.

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There are some cases with judicial arbitrariness, which cannot be confused with judicial activism.

According to Strapazzon and Goldschmidt, these two situations are not similar:

> In fact, wrong judicial decisions (CRFB Art. 5 LXXV) should not be called activist. The mistake can be called illicit or unconstitutional, but not activist. The judicial decision that violates the Court equality right or that violates a binding judicial precedent in a similar topic, should be considered simply as invalid or wrong. Activist, in these contexts, does not help to understand the concept of right or activism (Strapazzon; Goldschmidt, 2013).

Performing policies that allow fundamental rights sovereignty is something expected from elected agents under a democratic perspective. However, the necessary actions are not often taken so that when there are neglects, the judicial activity (activist or not) is an action that tries to compensate the neglects.

Judicial activism is justified when the objective is to compensate democratic gaps and policies that impede the implementation of fundamental rights public policies. It is not going to confuse each Power institutional attributions or violate the Republic *tripartite* system since such practice assumes that fundamental rights are for all society and not only for part of it.

According to Mezzaroba (2013, p. 340), the differentiation of elected agents and judges institutional attributions, when judges are forced to interfere in certain public policies, should take place in order to protect the constitutional assets (fundamental rights).

> Brazilian constitutional judges are an evolution and a consequence of a democratic responsibility time (NOMET; SELZNICK; PHILIP, 1978; DAHL, 1997). However, constitutional judges' work should not be confused with elected politicians' work as the judicial activism critics suggest (RAMOS, 2010). The main theorist of rights and guarantees has not realized that Constitutional judges are different from ordinary judges (FERRAJOLI, 2007, p. 77, v. II, unofficial translation). They are different from elected politicians because they should always decide in favor of protecting constitutional assets (fundamental rights). Besides, they cannot solve the problems as the politicians do, which is through a mediation of interests (FISS, 1979, p. 13-14). They do not relate to the legislated right (as ordinary judges do) nor define the agenda of their decisions (as elected politicians do), which are stablished by judicial petitioners. They do not have the power of defining social priorities

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and then interfere in them (as elected politicians do) because the judicial processes are decided only if society requires justice to them.

Thus, the Judiciary members' decisions should protect the fundamental rights, especially when there is clear omission in implementing public policies that are related to them.

Any attempt by the Judiciary of going beyond such limits is considered illegal as well as invasive and arbitrary.

Contemporary Judicial activism can be considered as a tool from the Constitutional State, which above all assumes the Democratic State fundamental rights.

In order to get and reach such fundamental Constitution elements, there might be the political Judiciary interference. Such interference used to limit itself to pertinent and neutral issues and it considered other Powers management omissions and flaws as democratic gaps to be filled in for the good of society.

If the Executive and Legislative did their job well, the Judiciary would not have to interfere in politics, which has clear democratic flaws when it comes to fundamental rights. They should base their actions in proportionality and reasonability.

7 CONSIDERAÇÕES FINAIS

Public policies, discretion and judicial control are issues that bring discussions, questions and problems. Maybe more problems than solutions. But, it is necessary to verify the State as a whole in order to find a one of a kind solution.

Public policies have discretion characteristics to the eyes of the political agent and they are not exempt of judicial control. However, such control cannot be limitless as public policies and discretion are not unrestrained.

There are limits and impositions for everything in the State and that is why there are concrete case applicable principles consideration criteria as a judicial control guide, which must, by checking specific problems issues, make its decision in order to

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balance the Powers relationship as well as respect fundamental rights and consider the minimum existential and possible reserve. Such consideration should take into account reasonability and proportionality, having fundamental rights as its break-even point.

Democracy, in its representative role, grant political agents the freedom to, at their will, invest resources in several areas. However, such discretion is not exempt, as explained, from attribution deviation and/or omissions control.

The State should work harmonically among its Powers and such harmony can be provided by the judicial control, which is one of the elements of the checks and balances system. Then, a counter- majoritarian decision cannot be considered invalid because decisions made by elected representatives, in a consented representation system, would be absolute and intangible.

Currently politics, in Brazil, is undervalued due to the recent, almost daily, scandals on the news. Therefore, attribution deviation, in many cases, is expected because politicians do not hold representation anymore and their political propositions to get elected is just an excuse to take power over and have their own agenda to represent several other interests, but the population's interests.

It is obvious that there are exceptions, rare ones, and it is necessary to emphasize that discussing the problem minimizes it and stimulates the State to provide fundamental rights to each and every citizen no matter the social class.

Potential Judiciary interference within the Executive is characterized as judicial activism and the doctrine classifies it as a necessary mechanism for the balance of powers. However, activist practices often interfere in politics, which make their relationship conflictive.

In addition, arbitrary or mistaken decisions cannot be considered activist decisions because it would banalize them. It is worth mentioning that activism is coherent when it seeks the reinforcement of State fundamental rights implementation, especially when they are not being properly fulfilled and that is the cause of democratic void. Thus, the Judiciary, using the checks and balances system, should be proactive and balance public attribution performance.

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Finally, the following paper describes the peculiarities of a democratic system, an analysis of elected agents' representation and their obligation of executing public policies that might have a Judiciary intervention.

Such intervention can generate some problems and violations to powers separation and sovereignty, but basically it is necessary for the stablishment of public interest since it follows proportionality, reasonability and eminent consideration under the concrete case perspective.

It is common for judicial intervention to have an activist characteristic, which can cause problems, but if it is applied through the principles previously mentioned it would be necessary action to reconcile the fundamental rights guaranteed in the Brazilian Constitution.

REFERENCE

BARROSO, Luís Roberto. *Ano do STF: Judicialização, ativismo e legitimidade democrática.* ***Revista Eletrônica Consultor Jurídico,*** 2008. Disponível em: http://www.conjur.com.br/2008-dez-22/judicializacao_ativismo_legitimidade_democratica?pagina=4.Acesso em: 10 outubro 2017.

BUCCI, Maria Paula Dallari. ***Direito administrativo e políticas públicas.*** São Paulo: Saraiva, 2006.

COMPARATO, Fábio Konder. ***Ensaio sobre o juízo de constitucionalidade de políticas públicas.*** São Paulo: *Revista dos Tribunais*, 1997.

COSTA, Pietro. ***Soberania, Representação, Democracia:*** *Ensaios de História do Pensamento Jurídico.* Curitiba: Juruá, 2010.

DAHL, Robert. ***A democracia e seus críticos.*** *Trad*. Patrícia de Freitas Ribeiro. São Paulo: Editora Martins Fontes, 2012.

_____. ***Sobre a democracia.*** *Trad.* Beatriz Sidou. Brasília: Editora Universidade de Brasília, 2001.

FERRAZ, Jr, Tércio S. *O Judiciário frente à divisão de poderes: um princípio em decadência?* In: ***Revista Usp.*** São Paulo, nº21. 1994.

Este obra está licenciado com uma Licença Creative Commons Atribuição-NãoComercial 4.0 Internacional.'1

FONSECA PIRES, Luiz Manuel. ***Controle Judicial da Discricionariedade Administrativa.*** Rio de Janeiro: *Elsevier Editora*, 2008.

GRINOVER, Ada Pellegrini. *O controle de políticas públicas pelo Poder Judiciário. In:* ***O processo:*** *estudos e pareceres.* 2. ed. rev. e ampl. São Paulo: DPJ, 2009.

HABERMAS, Jürgen. **Direito e democracia: entre facticidade e validade.** 2. ed. Tradução de Flávio Beno Siebeneichler. Rio de Janeiro: Tempo Brasileiro, 2003.

MEZZAROBA, Orides; STRAPAZZON, Carlos Luiz. *Direitos fundamentais e a dogmática do bem comum constitucional.* ***Sequência (Florianópolis),*** Florianópolis, n. 64, p. 335-372, July 2012. Available from <http://www.scielo.br/scielo.php?script=sci_arttext&pid=S2177-70552012000100014&lng=en&nrm=iso>. Acesso em: 15 outubro 2017.

PAULA, DANIEL GIOTTI DE. *Ainda Existe Separação de Poderes? A Invasão da Política pelo Direito no Contexto do Ativismo Judicial e da Judicialização da Política***.** In: _____ (org.) ***As Novas Faces do Ativismo Judicial.*** Salvador. Jus Podivm. 2011.

SAIZ MORENO, Fernando*.* ***Conceptos jurídicos, interpretación y discrecionalidad administrativa.*** Madrid: Civitas, 1976.

SARTORI, Giovanni. ***A teoria da democracia revisitada.*** São Paulo: Editora Ático S/A, 1994.

SCHUMPETER, Joseph. ***Capitalismo, socialismo e democracia.*** Rio de Janeiro: Zahar, 1984. Parte IV.

STRAPAZZON, Carlos Luiz; GOLDSCHMIDT, Rodrigo. *Teoría constitucional y activismo político: Problemas de teoria y de práctica com derechos fundamentales sociales.* ***Rev. Fac. Derecho Cienc. Polit***. – Univ. Pontif. Bolivar, Medellín, v. 43, n. 119, p. 567-624, July 2013. Available from <http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0120-38862013000200004&lng=en&nrm=iso>. Acesso em: 01 Novembro 2017.

TORRES, Ricardo Lobo. ***O direito ao mínimo existencial.*** Rio de Janeiro: Renovar, 2009.

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