JUDICIAL ACTIVISM AS A STRENGTHENING OR EMBATTLING TOOL IN FACE OF THE DEMOCRATIC STATE OF LAW

ATIVISMO JUDICIAL COMO FORTALECIMENTO OU AFRONTA AO ESTADO DEMOCRÁTICO DE DIREITO

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RESUMO

O artigo tem como objetivo investigar o tema do ativismo judicial, ou da judicialização da política, voltado –se a atuação do Poder Judiciário com reflexos na política.
Delimitando o conceito, e sua origem. Na sequência far-se-á a análise do tema do Ativismo Judicial perante o princípio da separação dos poderes, para ao final esboçar duas correntes com robustos argumentos antagônicos entre si: a primeira explora o papel do Poder Judiciário como agente fortalecedor do estado democrático de direito, em oposição a uma segunda, que percebe o Ativismo Judicial como uma afronta ao estado de Direito.

PALAVRAS-CHAVE: Estado de Direito; Ativismo Judicial; Judicialização.

ABSTRACT

The article aims to investigate the issue of judicial activism , or the legalization of politics , ensure focused the work of the judiciary reflected in politics.

Defining the concept , and its origin . In far up will sequence the subject of analysis of Judicial Activism to the principle of separation of powers, to the end sketch two streams with robust antagonistic arguments with each other : the first explores the role of the judiciary as a strengthening agent of the democratic state right , as opposed to a second , you realize Judicial Activism as an affront to the rule of law .

KEYWORDS: Rule of law; Judicial activism ; Legalization .

INTRODUCTION

This article is desideratum investigate the disturbing subject of judicial activism, or the legalization of politics, without attachment to semantic preciosismos, but in the sense of the Judiciary acting reflected in politics.

It starts with the delineation of the concept, identifying its origin and the range which it purchases in the courts, soon to draw parallels between the numerous concepts used by several lawyers on the subject in order to cement a broad view of its importance and meaning. In a second step, it explores the theme of Judicial Activism to the principle of separation of powers, to the end sketch two streams with robust antagonistic arguments with each other: the first explores the role of the judiciary as a strengthening agent of the democratic rule of law as opposed to a second, you realize Judicial Activism as an affront to the rule of law.

However, this diatribe reveals the importance of studying this court of history, seen undeniable be the paradigm shift, scientific and philosophical, law and political science after installed constitutional consciousness, not forgetting that all change brings discoveries beyond limits of concepts, whose effects should be adjusted in society.

The historic building that enabled the architecture of the democratic rule of law and the Constitution as a banner of democracy and realization of the most expensive rights to citizens, are achievements that can not be debased under any pretext.

There is no doubt that the judiciary has constitutional stature to act in defense of the constitutional rule of law and to give effect to fundamental rights there exposed. The critical point is to establish the fine line separating the legitimate role of the judiciary as the largest guardian of the Constitution, the overflow of this illegitimate power over the other powers in order to sully representative democracy.

1. INICIAL REFLEXTIONSABOUT DEMOCRACY AND CONSTITUITIONALISMO

Safeguarding democracy is the Constitution of a country, derived from the result of a political process and basis of the legal system, in which political sovereignty notion becomes legal supremacy. They caution that much the fundamental rights of citizens against any encroachment, private or public, which can threaten them as public space in which they must settle up such conflicts. The constitutions, freedoms assume the meaning of rights; by setting limits as to the action of sovereign power. (TABORDA, 2008)

The concern to legally guarantee the fundamental rights of citizens and legal effectiveness of the rights recognized constitutionally, are core problems of our time, raising the judiciary to higher flights, the challenges it represents.

Pietro Virga complete the rule of law, as opposed to other types of state, as the absolute, it has the need to grant citizens the right to freedom or fundamental rights, which are a safeguard against the abuse of state power; these rights embody the first core of subjective public law, whose theoretical elaboration follows the publicística doctrine. In view of the great political movement against the absolutist system, fundamental rights, in its first elaboration, relate to the individualistic conception of freedom in the state, characteristic of the opposed state-Guy. Later, fundamental rights now have a social content, by introducing, alongside the traditional individualistic fundamental rights, the so-called social rights related to work, care and economic

activity. Comes a new interpretation of the old fundamental right, which happens to meet new social demands. (VIRGA, 1952)

The neoconstitutionalism supplanted the law of the state Legislature and substantiates the constitutional rule of law, so that the conditions of validity of legal norms have come to depend not only on the formal aspect, but also the material compatibility with constitutional principles and rules. (CUNHA JUNIOR, 2009, p. 39) When addressing to the Judicial Activism, it slips on conceptual issues, since not every intervention of the judiciary in politics is disastrous, but a mere reflection of case decisions involving fundamental rights citizen, within a legitimate action aimed at ensuring the rights and guarantees enshrined in the Constitution. The crux of the issue lies in knowing when that interference overflows the limits of the judicial role and starts to defile representative democracy.

The answer comes from the history and philosophy, it is impossible not to notice the change of paradigms, which in the words of Kuhn (Kuhn, 1994, p. 128-232) makes it possible to explain the scientific development as a process that by checking breaks, just as occurred after the war, changing the archetype of the State which has ceased to be normative and rebuilt itself as constitutional state.

After World War II, when observing the law have been used as legitimizing maneuver authoritarian acts, it was possible to return to the philosophy of Kant, arising known 'Kantian turn' (kantische Wende), reconnecting ethics and law, with moral foundation of human rights and commitment to the ideal of justice. The concepts of autonomy and dignity described by Kant expressed that things are priceless, but people have dignity, stating that every person, every rational being exists as an end in itself, not as a means for arbitrary use by others will (KANT, 2007, p. 68 e 71).

Such meditations deeply influenced the thinking and the legal production, which, evolving these concepts, permeated with ideals of law and justice. As it signals the philosopher Jhon Rawls, Kant heavily influenced by his predecessor, Justice should be the first virtue of social institutions, such as the Truth is to the thought systems. So while Kant draws up the outlines of the contents of the Moral Law was in Rawls, with its

political constructivism, who introduced the content of a political conception of justice (Teixeira, 2007), resulting in the enactment of a social nature of constitutions and democratic marked by positivation of legal principles, one of the most expensive and overlapping each other, the Human Dignity and Freedom.

It begins this way, the phase of Constitutionalism Modern, the Constitution recognized as an open system of principles and rules, permeable supra-positive legal values, in which the ideas of justice and realization of fundamental rights play a central role. The principles lend themselves to condense values and give unity to the system, and condition the activity of the interpreter. In Brazil, they emerge the principles of Reasonableness as a means of control of the legislative and administrative discretion, and the Dignity of the Human Person, identified as a moral integrity of space to everyone because simply there, whose core would be the existential minimum . Also stresses the Access to Justice as an instrumental element indispensable to the enforceability and enforcement of rights and can highlight the effective adjudication as a fundamental right under both human dignity and the actual democratic state. (BARROSO, 2001)

As well Hesse says, "it rules fuerza de la constitución es el dynamic institute del fortification de los derechos y de la fundamentales legal transformación de la constitución en una standard exigible court of su cumplimiento". (HESSE, 1983, p. 59-84) Therefore, the Constitution, and not the law, presented as a guarantee of protection for freedom by limiting the intervention of the legislature, so even the normative force is also a constitutional guarantee promotion and fulfillment of the established freedom. It overcomes the classical notion of legal reserve of the least liberal state and take an active concept of rights through delimitation of the Constitution and, failing that, the constitutional jurisprudence that prints constitutional normative force. (Landa 2010, p. 41)

The practical development of the system of fundamental rights implies the recognition of a status activus processualis, which allows citizens access to judicial protection of the courts (Häberle, 1972, p. 82 ff). Consequently, through the

constitutional process, the normative force of Fundamental Rights becomes binding on all public authorities and also the relations between individuals, so that gives it effective to ensure the constitutional order, which achieves the social and economic clauses of the constitutional state. (Häberle, 1972, p. 82 ff)

This long historical process resulted in the institutionalization of democratic rule of law, but the question put relates to the effective mechanisms of protection of fundamental rights which must be protected and promoted by public authorities and society. Being the task of Constitutionalism today seek harmony between the ideals of the democratic rule of law, namely, the fundamental rights and the principle of popular sovereignty, while the constitutional court act as arbitrator in that democratic game. (BINENBOJM, 2014, p. 48) follows the paradigm shift that requires a new state position in all spheres of power in order to achieve the objectives listed in the 1988 Constitution.

At this point is that many divide look at the Constitution. As Ingeborg Maus, there are two ways of thinking about the Constitution: The first is dominated by the idea (originating in Montesquieu) reciprocal control of powers and the distinction between them, without, however, a separation of powers, so that a power may interfere with other powers to control it, as when the constitutional court annuls an Act of Parliament on behalf of different interpretation of certain constitutional rule. This model, which Maus calls constitutionalist, is shared by the American thinkers. They see the existence of political power the main problem and individual rights only instruments to control that power. Hence a negative view of freedom: they define the limits that political power can not overcome without falling into abuse. (BAD 2011, p. 48 ff) In the second model, popular sovereignty, freedoms are seen primarily as a tool which guarantees the individual's participation in decision-making (BAD 2011, p. 48 ff) . In this model, the separation of powers corresponds to a separation of powers: only the Legislature has the power to make laws, while the executive and the judiciary are limited to implementing them. (Pinzani, 2013, p. 135-168)

The debate between these two poles is fierce, and both have reasons of very deep conviction, which this article will attempt to express in brief summary.

2. THE ORIGINS OF JUDICIAL ACTIVISM

The word "Active" derives from the Latin expression activus, which means the power to obrar with diligence, effectiveness, readiness and without dilation. In the legal context, this word may be understood as taking a position on an issue.

For the study of the theme, the word Active is regarding Activism Judiciary expression associated with the position of the judiciary in overcoming their classic activities, determined by Robespierre script and decide monocratic form on the form, scope and applicability of laws. Although the phrase "Judicial Activism" is commonly associated with the positioning of the famous American judge Earl Warren in Brown versus Borrand of Education on May 17, 1954, the design of a judiciary that is not limited to the trial can be traced back much earlier.

Philosophically, the idea of a legal system to distribute power in a logical and pragmatic way can be identified in the Greek conception of justice. The handle on the error in the application of justice, Aristotle says that this "is not the law, nor the legislator but in the nature of the thing itself, since the practical matters of this kind are by nature". (Aristotle, 1987, p. 96) This statement goes to meet with the Greek understanding that established a dichotomy between a natural spontaneous behavior (physis) and the rational convention that men do on this nature (thesis). (GELLIO, 2007, p. 301) Thus, for Aristotle, the state of nature would be the error and injustice, while in the men's convention would be justice.

The Aristotelian idea of a society made by reason has been challenged, perhaps not for the first time, but certainly significantly, the Leviathan of Thomas Hobbes, stating that the reason the man said not respect the experience of the company, but its particular existence, was not logic, but the coercive force of the state (the fear) that it was the social aggregator force "if a large enough power to our security has been

instituted, each trust, and could legitimately rely only on their own strength and ability to protect against all the others. " (Hobbes, 1974, p. 103)

Hobbes was the first of several modern philosophers to confront the idea of the rule of Aristotelian formal reason, including influential scholars such as Immanuel Kant and Friedrich Nietzsche, who briefly and each with their own arguments, criticized the Aristotelian logic by the Will of disregard . The Aristotelian idea of governance by reason, understood strict sense as a logical, was not absolute, and influence, even if diluted, its detractors could be felt later, when discussions on positivism and judicial restraint arise.

In modern times, the first time the phrase "Judicial Activism" was used in an official way, it was in 1947, in the article "The Supreme Court: 1947", published in Fortune magazine in January this year, authored by noted American scholar Arthur M. Schlesinger Jr. In this article, the author makes an analysis of the position of the US Supreme Court judges in various topics using the phrase "Judicial Activism" in describing the conduct of judges Hugo L. Black and William O. Douglas, who worried in use their decisions as social justice purposes, in contrast to his fellow Frankfurter and Jackson, who were described in the "Judicial Self" expression, by restricting to more austere law enforcement. (KIMEC, 2004, p. 14441-1476)

For the doctrine of the law, the subject can be found in the legal philosophy of Herbert Hart. In broad strokes, the system proposed by him exist primary basis of standards that correspond to the standard of care that people follow spontaneously, as traditions or customs, in a pre-legal point of society. The mere existence of these primary standards would bring a lot of problems, which Hart summarizes in three points: I - The scope of these standards, since it did not have any formula to be disclosed and then grupalmente; II - These standards would be static, because it did not have methods for acceptance of that anomalous and divergent, that would be irretrievably deleted, thus allowing any kind of change; and III - The problem of applicability, to have a very rudimentary character, always hover the doubts about the shape and condition that would be applied. (HART, 2012)

These problems would be solved with the application of secondary and progressive standards, reaching so a Judicial moment of Society: The scope of the problem would be solved with the Recognition Rules - Rules of Recognition, or reference source (text) provided authority issued by a competent institution; The static problem would be solved with the change of Rules - Rules of Change, which would be the ability of the authorities who issue the rules to recognize the anomalies and adapt them to their best use; Finally, the problem of applicability would be solved with the introduction of trial rules - Rules of Adjudication, which revisitariam to an individual the authority to decide on the application of the rule in this case. (HART, 2012)

It can recognize this idea the possibility of the Judiciary (Rules of Adjudication) can adapt the rules handed down by the legislator (Rules of Recognition), eventually leading to a change of these (Rule of Changes). This positioning Hart is a project aiming to correct the excesses and failures of Positivism Classic, which was ruled largely in formal reason Aristotelian.

Although "The Concept of Law" work was published in 1961, ie three years after the historic decision of Earl Warren, these ideas had already been exploited since 1952 for several readings taken at Harvard Law School. (HOLMES JR., 2009)

The legalization of politics has been noted in the United States, from the paradigmatic case Marbury v. Madison, where the role of the judiciary in controlling the constitutionality of laws passed to play a prominent role in political and social life of that country. Nevertheless, it was from the twentieth century that the Supreme Court North American revealed a more explicit role in favor of the realization of individual rights through the host's theses in this regard, notably in judicial review of headquarters, marked by Era Lochner and the legendary Warren Court. (NUNES JUNIOR, 2008)

3. THE CONCEPT OF JUDICIAL ACTIVISIM, POLITICAL JUDICIALIZATION AND THE HIPERTROPHY OF THE JUDICIARY SYSTEM

The term "judicial activism", despite its huge popularity, is little understood, their meaning is obscure and its origins have been forgotten. Despite this, more and more discussions about judicial activism (judicial activism) and judicial restraint (judicial restraint) have been debated in the political, judicial, academic or philosophical. The interest is revealed already special that the term judicial activism acquired so many different meanings more likely to obscure more than reveal their real meaning. However, it is not a term that can be simply ignored as intellectually "setting empty," for in his heart there are concerns about the very meaning and survival of the law. The abandonment of the term is not a viable option, since the clarification becomes imperative. (CONDEIXA, 2012, p. 103)

Ambiguities in the meaning of a term are fearful and harmful to the development of any science (MIRANDA, 2002. p.189), hence the need to dissect the concept of judicial activism.

Some authors reject the concept of the modern sense to be incoherent to Judicial Activism, and instead describe a functional concept of this. This position often proves detrimental, since, if widely adopted, the proposal for judicial activism approach can produce clearer perceptions of judicial behavior behavior, thereby reducing destructive schisms between experts and non-experts.

The importance of this looms up discussion on the stage of discussions on the role of the judiciary to the functioning of the legal system, as when, like, judges make many decisions "innovative" without the supervision of other public authorities. These debates - whether they use the word "activism" - illustrate why the concept of judicial activism remains inescapably important. (Green, p. 1195, 2009)

Judicial activism is an elusive term, which seems to have many meanings. Professor Craig Green, American University Temple - Pennsylvania, says that some may define it to express "any serious judicial error" made in the course of judicial proceedings, while others define it as "any decision to invalidate a law." He proposes that "judicial activism should be defined as the abuse of unsupervised power that is exercised outside the limits of the judicial function." Green, worth in Dworkin, records

that judicial activists can go beyond the literal meaning of the law and defend interpretations based on the spirit in which the law was written, and there are cases that the exegesis of the standard to be applied, the judges have no choice but to innovate, using their own political judgment. (Dworkin, 1997)

Dedicated to the theme Luis Roberto Barroso (Barroso, 2009. p. 75 and p. 372), defining Judicial Activism as "an attitude, choosing a specific and proactive way of interpreting the Constitution, expanded its meaning and scope" . As he usually settles "shrinking situations of the legislature, in a disconnection between politicians and civil society by preventing certain social demands are met effectively."

Carlos Eduardo Dieder Reverbel defines activism as the entry of the judge in the policy of the harvest, so running through the right of the field; for him, "this is so among other reasons, by the law of prestige, political inefficiency, difficulty of administration itself, embezzlement of public funds ...". (Reverbel, 2011)

Thus, the judicial activism does not have a determined and finished concept, identified by teaching at least seven dimensions to the Judicial Activism expression as paper published by William P. Marshall (Marshall, 2002, p 101-140.), Namely:) activism counter-majoritarian: marked by the reluctance with respect to decisions of the directly elected authorities; b) non-originalist activism: characterized by the non-recognition of any originalism in judicial interpretation, the most stringent concepts of the legal text and considerations intention of the legislator completely abandoned; c) previous activism: which consists in rejecting the previously established precedents; d) judicial activism: marked by the strength of the courts to accept the legally established limits for their performance; e) creative activism: resulting from the creation of new rights and theories in constitutional doctrine; f) remedial activism: marked by the use of the judiciary to impose positive actions of other branches of government or control them as a stage of a corrective court eg tax) partisan activism: which consists of using the judiciary to achieve specific objectives of a given party or social group. (MADEIRA, p. 338 – 402, 2014)

The search for the conceptual delimitation of judicial activism or the characterization of an adjudicative activist stance should pervade three issues:

abandonment naive or outdated methodological concepts; adaptation to the choices made throughout history and the current feature of constitutionalism and; awareness of the institutional and regulatory framework designed by the paternal order. (Soliano, 2012)

The Democracy and Distrust work of John Hart Ely (. ELY, 1980, p 7), provides a third way to constitutional jurisdiction, marked by division among proposals from originalistas (interpretivists) - for which the judicial task would be to discover the intention of those who wrote the Constitution, or the proposals of non-originalistas (non-interpretivists), for which the judiciary must discover the social values. For the former, judges should be limited to the explicit provisions of the Constitution; while for the latter, the rules to be applied can be discovered beyond the Constitution. (Goncalves, 2011)

Luiz Roberto Barroso believes that, for Legalization means that much social impact issues are being decided by the judiciary and not by the traditional political bodies (National Executive Branch and Congress). The legalization of politics and the judicial activism that although they are not always properly differentiated, do not mix, possessing fundamentals and different implications. (Barroso, 2009)

The difference between judicial activism and legalization of politics is irrelevant, since both reveal the role of the judiciary reflected in politics in order to amass functions that do not fit them if they do not redundasse dysfunction of the other branches, causing hypertrophy Judicial power.

4. THE PRINCIPAL OF THE SEPERATION OF POWER IN PRESENT TIMES

The evolution of the system of separation of powers comes from Aristotle, undergoes Lock, gets hints of Machiavelli, Kant and other thinkers always with libertarian ideal, and the modern system of separation of powers was conceived in the eighteenth century, influenced by the words of Monstesquie whereby

> “when the same person or the same body of Magistrates the legislature is meeting in executive power, there is no freedom; because it is to be feared that the same monarch or senate do the same tyrannical laws, to execute them tiranicamente.Tampouco is liberty if the power of judging is not separate from the legislature and the executive. If you are joined to legislative power is arbitrary power over the life and liberty of citizens; because the judge will legislator. If you are joined to the executive power, the judge could have the force of a opressor.Tudo would be lost if the same man or the same body of principal or nobles or of the people exercised these three powers: that of making laws, the run public resolutions, and that of judging the crimes or disputes of individuals”. (MONTESQUIEU, 2009, p.169)

For Dedieu (. DEDIEU, 1980, p 277) Montesquieu's reflection on the making of laws and the need to safeguard certain rights, makes clear that for the thinker they are superior to any human law, examples being: "freedom individual, the 'tranquility', security, freedom of thinking, speaking and writing. There is freedom, so when on the one hand, there is respect and, on the other, normal development of human rights ". (SILVA, 2007)

The main transformer to the principle of separation of powers in contemporary law - the system of checks and balances (checks and balances) - comes to arise from the combination of three characteristics: the British empiricism; French rationalization; and the American pragmatism. Of the latter, draws up the "check" which appeared in 1803, when the Justice Marshall gave his opinion on the famous Marbury x Madison, declaring the constitutionality of acts of Congress, as a result of the mission of the Judiciary to declare unconstitutional laws that did not keep harmony with the Charter Policy. (SOUZA, 2003)

With the system of checks and counter weights for a reinterpretation of the concept of separation of powers that eat constitutionalization of the right loses its rigidity aiming at the effectiveness of the protection of fundamental rights sculptured in the Constitution, that while "spirit of the people" should not be neglected under any pretext. The reality requires the recognition of the transfer of the "Empire of Law" for the "empire of the Constitution" and must all powers compete for this purpose, as the Constitution is a social contract that represents the sovereign will of the people.

In this tune, the irruption of legal activism can only be understood if related to a deep movement, of which he is only one of the manifestations. It is not a transfer of sovereignty to the judge, but above all a transformation of democracy. The popularity of the judges is directly linked to the fact that they were confronted with a new political expectation, which was anointed as heroes, and who embodied a new way of conceiving of democracy. (CANOTILHO, 1993)

5. THE ROLE OF THE JUDICIARY POWER AS AN STRENGTHENING AGENT OF THE DEMOCRATIC STATE OF LAW

Concerning the concepts of judicial activism, the Judiciary hypertrophy or legalization of politics does not appear as important as knowing the origin of such phenomena, all interwoven with each other, aiming for oblique way the maintenance of democracy, but as the desire to ensure the democratic rule of law can justify the displacement of the judiciary as the protagonist of this yearning is a question that can only be answered by bringing to the fore the reasons that triggered this state of affairs, which seem to culminate in a paradigm shift for both political science and to the right.

It is known that the individualistic democracy is destined to be perpetuated indefinitely. The problem is whether this achievement of modernity, as raised Tocqueville, have the ability to stimulate social progress or otherwise, may produce a form of government which, instead of promoting access for all to the general welfare, lead society to a kind of segregation in the majority over the minority exert an uncontrollable despotism of luck to prevent their participation in decision-making. (MAGALHAES, 2000)

It was Tocqueville who best summed up the decisive importance of the constitutional role the judiciary had come to have on the functioning of American democracy, fulcrada the principles established in the Greater Charter and whose

preservation would depend not only of user institutions "most of despotism" as well as the judiciary, on which said Tocqueville:

> “The third (which serve as maintenance of political institutions of Americans) is in the constitution of the judiciary. It is seen that the courts serve to correct the deviations of democracy and unable to hold the majority of the movements, can put brakes upon them and drive them”. (DE TOCQUEVILLE , 1984, p. 278)

The cause of this fact alone, said the French author, was that US judges have recognized the right to base their decisions on the Constitution, instead of laws. (Garcia, 2007, p. 39-59)

The Tocqueville's thoughts are still being echoed today, among many scholars who, although from different theoretical frameworks, reveal the importance of the judiciary for the achievement of constitutional democracy, it is worth quoting the Pierre Rosanvallon work (Rosanvallon, 2010) Luigi Ferrajoli (Rosanvallon, 2010), the first recognizes that power as an institution of reflexivity of democracy and the second places the judiciary as essential for achieving the fundamental rights.

The idea that democracy means not only universal suffrage and the development of direct representation, is explained by the above mentioned authors.

In Rosavallon vision of the democratic-reflective design, the judiciary, to be a forum to discuss mediated by a third party "not interested", plays the role of "activate the collective memory" and monitor the memory of the fundamental values of democracy, a task that already included in the declaration of human rights and of the Citizen of 1789. It serves, as well as resistance institution against tyranny of any majority, although these have been chosen by immediate interests of the voters. If the decisions of the executive and legislative branches are part of a relatively short time span - correspond generally to the intervals between elections or momentary passions inserted in public opinion by the media - the judiciary, in times of strong constitutional law, it is the function of insert greater timeliness in decision making. (TASSINARI, 2014)

In brasilis land, this phenomenon was accentuated in the last two decades, given the awareness process of fundamental rights by citizens, facilitating access to justice through the public defender, the spread of the special courts, the extent of investigative journalism denouncing misuse of money public Internet access enabling information and training of critical thinking population less legislation's failure to make laws that regulate undeniable social facts, among other factors, emptying into the judiciary a series of demands concerning the pursuit of the recognition of the fundamental rights of citizens .

This state of affairs was crucial to the judiciary judge cases involving pressing concerns of citizens who could not find shelter in the law regarding the constitutionality of the use in scientific research of embryonic stem cells, the possibility of delivery of therapeutic advance in cases of fetal anencephaly, the constitutionality of the founding laws of racial and social quotas, the constitutionality of the law to combat violence against women; the legal recognition of homoafetivas unions, nepotism, demarcation of indigenous lands, rereading of the 1979 amnesty law, among others lite case in the light of constitutional principles.

Notably in performances of this ilk to the body of magistrates who make up the Judiciary fit judicial activist couplet, judicializador political or judicial hypertrophy of facilitator, without even entering these concepts, it follows that once triggered the judiciary, this deflui power -dever to manifest on the questions posed and when such matters involve neglected fundamental rights and constitutionally guaranteed, as a rule the decision there will spill arising in other powers, without this being the intent of the primeval Court.

Therefore, the wait for the publication of laws planned by the Charter Policy, the legislature sometimes undermines the constitution itself, especially in the field of fundamental social rights, fertile in previous legislative omission; Thus, if the fundamental right is not effected before a gap, it is up to the courts enable the right in this case. (CAMBI 2011, p. 290)

The Introductory Law to the Civil Code and it’s art. 4, explains that: "When the law is silent decide the case according to the analogy, customs and general principles of

law", corroborated by Article 126 of the Civil Procedure Code, providing that the judge does not exempt sentencing due to gap or obscurity of the law and must apply at the trial in the absence of law, analogy, customs and general principles of law.

If not guided to this end, the role of the judiciary reflects like a mirror omissions and distortions of other powers, regardless of whether it may not even be omitted to provide the legal protection required by the citizen.

Overcoming the positivist paradigm brought about the need to restore the proper protection of fundamental rights from a new theoretical construct aimed at pursuing the fundamental rights of citizens, with the thread of the highest law and the maintenance of democracy hard-won . As Bobbio asserts, the serious problem of our time with regard to human rights is no longer substantiate them, but protect them. (BOBBIO, 1992, p.25)

For Hirsch (Hirsch, 2004), the more dysfunctional political system is in a particular democracy, the more likely the judiciary to expand policy. Persistent political deference to the judiciary can be seen as an effective way to overcome the "ungovernability" systemic and guarantee the unity and the "normal" functioning of such policies.

What can you talk about Brazil where corruption is a metastatic poorly undermining various government agencies, political parties are recognized by society as corrupt and oblivious to the interests of the population, concentrated in the private interests as well as the clear distrust of population towards Parliament.

In the study produced by Garcia and Zacharias, aiming to bring to light the like of the legislative legitimacy crisis contributes to the judicial activism, the authors raise that one can not deny that the legislature is partisan dispute object, the so-called presidential system of coalition installed on the political scene, fertile field to the ascendancy of the Judiciary, which driven by the principle of the art inafastabilidade. 5, XXV, can not avoid deciding the litigations brought into judgment, with positively valued rule by law or not. (GARCIA, ZACHARIAS, 2014)

And still, citing other authors to assert that the presidential system of coalition is nothing more than meeting forced by physiological interests, groups of political parties, which are united around a stronger party, usually the President of the Republic in a pact of power consolidation, in which it approved the subjects sympathetic to the occasion government program, without the necessary parliamentary debate, crucial to the legitimacy of the nation's fundamental political decisions. (SANTOS, PATRICK, 2014) This subservience of the legislative branch to the executive branch, as mentioned, opens the way for greater judicial activism, it would not be given to the judge to decide a claim about a fundamental right for legal impossibility of the request in the light the modern civil process that disregards the legal possibility of the application as a real condition of the action, being contested by the best doctrine to exclude them from procedural law. (MACHADO, 1997)

Faced with the ineffectiveness of the other branches, the judiciary people who need to see fundamental rights achieved already assured in fundamental agreement and that should have been implemented by other competent authorities for this, as the supply of medicines, the beds in hospitals, the right to education, the right of disabled access to public buildings, among others .for that the judiciary is called upon to exercise social and therapeutic function, correcting deviations in achieving the objectives to be achieved for the protection of fundamental rights. Not for this, more conditional on strict legality (lex sed lex hard), assuming, next to the executive branch and the legislature, the responsibility for the political success of the requirements of the welfare state. (CAMBI, 2008, p.98)

The point is that this entails hypertrophy of the Judiciary, which crams issues that should be resolved at the political level in a satisfactory manner and by omission and disregard for public affairs and the citizens do not, leaving the judiciary to pay faster judicial protection to other cases of eminently legal content. It is not clear that the Law has taken the political, but the political left overflowing the legal demands that fit you and have not been implemented.

Not all legislative omission may be supplied by the judiciary, but those involving fundamental rights can not pass off the judicial review, by the teachings of Sacha Calmon, legislative omission holds degrees. Starting from the idea of the power and duty assigned to parliaments to define rights and duties, by constitutional imperative and not run errands, can occur: a) outright inaction of the legislator; b) Legislative action, however belated and therefore harmless; c) Legislative action on one point, but with compromising gaps rights (partial default). The basis for the controlling activity of the Constitutional Court lies in the fact that the fundamental rights not only mean rights and guarantees of the people against the state, which can be violated by this, comissivamente but of objective principles of government which oblige the State to benefits positive in favor of citizens or people. (S SACHA 1993)

Faced with the frustrations of lack of political representation, the judge becomes, himself, refractory spokesman of an ideology of abuses of power down to "hell of a bewildered democracy" (Paul Ricoeur) and imposing severe commitments to public space and his own institution. The new "citizenship court" has to face old ghosts.

One of the issues pertaining to screen under discussion relates to breach of the principle of separation of powers by the attitude of judges in not respecting this basic principle would be illegitimate.

Judicial activism is but one of the most glaring symptoms of the mass societies of the postmodern era are no longer satisfied with the public service benefits and protection of individual rights even in the manner of the modern state; this proves unable to cope with the needs and demands growing at a frantic pace within their own population. The Policy is affected by bureaucracy - and progressive bureaucratization - the state, the regulatory failure, the gap against the social reality and the legitimacy deficit that Western democracies have compared to the social ideals and popular expectations that their societies design . More than a discussion about the separation of powers, judicial activism in proposing a discussion of which currently represent the limits between Law and Politics. In this scenario, the magistrate, in all judicial bodies, is called to meet demands which high and rising degree of complexização prevents it remains

attached to the standard of legal rationality and the hermeneutical and decision-making techniques, underpinning the era of heyday of Western legal positivism during the nineteenth century and the first half of the twentieth. As a result, traditional elements have changed in its most fundamental conceptions, others have emerged and consolidated, but the circumstantial result of this social process of modifying basic categories of law and policy culminates in a new idea of legal rationality. (TEIXEIRA, 2012)

6. JUDICIAL ACTIVISM AS A CHALLENGE TO THE DEMOCRATIC STATE OF LAW

The counterpoint to what until now was drafted refers to the Judiciary overflow to the other spheres of power, jeopardizing the tripartite system of powers and demeaning the competence of the legislative and executive power, whose members are chosen through universal suffrage therefore legitimate representatives of the people who once elected exercise power in their name.

The completion by the judiciary to empty spaces of other powers and patronizing reflection of their attitudes, comes against the wishes of the population that ultimately enthrone the judiciary, which may cause a concussion on democratic foundations.

It is the accessibility of the phenomenon of judicial spaces, replacing the traditional political representation, where voters demand of their governments the necessary measures for the proper functioning of society. Faced with the frustrations of lack of political representation, the judge becomes, himself, refractory spokesman of an ideology of abuses of power down to "hell of a bewildered democracy" (Paul Ricoeur) and imposing severe commitments to public space and his own institution. (GUERRA, 2008)

Judicial activism is emerging in response to satisfaction of fundamental rights of second generation, neglected by the legislator or administrator, aiming the effectiveness of ordinances, constitucionais.Ainda Habermas warns that:

> "If the Supreme Court has the burden oversee the maintenance of the constitution, it must, first and foremost, pay attention to organizational procedures and standards of which depends on the legitimativa effectiveness of the democratic process. The court has to take precautions to remain intact 'channels' for inclusive process of forming the opinion and will, through which a democratic legal community self-organizes". (HABERMAS, 2003, p. 341)

The question that arises concerns the legal uncertainty that the concentration of power in the judiciary could bring, especially in the economic sphere, since the management of the public budget is not enrolled to this power, as Dworkin warned, the law will be more cost-effective if the Judges are allowed to take into account the economic impact of their decisions; this, however, does not answer the question whether it is fair that they proceed well, or if we consider economic criteria as part of the existing law, or decisions based on economic impact are, therefore, more or less moral weight . (Dworkin, 2002, p. 9)

And predicts Lênio Streck to say that the risk arises of such action is that an intervention of this ride of the judiciary in society has serious side effects. I mean: there are problems that simply can not be resolved by way of an erroneous idea of judicial activism. The judiciary can not replace the legislator (lest we forget, here, the difference between activism and legalization: the first, fragilizador the autonomy of the right, the second contingent). (STRECK, 2011, p. 14-15)

7. THE RELEVANCE OF ACTIVISM FOR THE PRACTICE OF NACIONAL RHETORIC

As seen so far, the proactive approach and policy of the judiciary as an advocate of constitutional order and fundamental rights enshrined in the Federal Constitution, which amalgamated law and morality, stands out as odd mechanism for the recognition of freedom and human dignity in forensic activity. In contrast, this same beehive role of the judiciary implies, likewise, in an extravagant performance and "unnatural" of the judiciary, which often are not prepared to do so.

To brake possible improprieties committed by the Legislature or the Executive, to dictate legal or infra-legal acts that end up tarnishing such constitutional rights, or to act with failure, abuse or misuse of power fit the judiciary to rely on the principle derived from the common law, called substantive due process of law, which combines several principles governing administrative acts such as the legality, proportionality, efficiency, motivation, good faith, among others.

For purposes of understanding the proactive role of judicial activism concerns the principle of due process of law in its substantive sense, that is, an instrument through which it will be up to the courts to act as guardian of the Constitution assuring citizens that the fundamental rights there carved, are observed by the authority in relation State-citizen, avoiding arbitrariness, injustice or unfairness.

As can be seen in the historical introduction of this matter, it was significant the importance of the US Constitution and the Declaration of Men and Citizens (Bill Of Rights) for the solidification of the exercise of democracy in the world. Said US Constitution of 1215, which originally was reserved to protect the interests of the English nobles, led the 5th Amendment to that Constitution dated 1787, by inserting the clause of due process of law, whose transcript of the article is timely, see: " That no man of what estate or condition que he be, Shall be put out of land or tenement, nor taken, nor imprisoned, nor desinherited, nor put to death, without being expresso in answer by due process of law ", which means: "No person, whatever his condition, shall be deprived of their land or their freedom, nor ... nor subjected to the death penalty, without first answer to due process."

The recognition, interpretation and application of substantive due process of law, has occurred gradually, initially any legal argument in this regard was understood as a reference to due process, was later recognized as a principle which provided to the judiciary control of legality, to later acquire the broad sense that includes the other principles governing administrative action, on proportionality, adequacy, efficiency, motivation, all aimed at regulating the discretion within the public administration, translating the idea of freedom and limiting at the same time.

The historic decisions of the Supreme Court of Brazil and demonstrates that evolution Minister Orosimbo Nonato, in 1951, in the celebrated trial of Extraordinary Appeal n. 18,331 to date mentioned in the trial or in doctrine, mentions the principle of reasonableness and proportionality check:

> "The power rate can not reach the inordinate power to destroy, since that can only be exercised within the limits that make it compatible with freedom of work, commerce and industry and how property rights. It is a power whose exercise should not go stick abuse, excess, deviation, and applies even here, the fruitful doctrine of détournement de pouvoir" (Supreme Court of Brazil. Extraordinary Appeal nª 18.331)

In 1961, the excelsior preator, and still hesitating as the scope of the principle in question, stated the following:

> "Iniquity, although patent, is not we the judges can correct "..." as the great Holmes, the Supreme Court of the United States, the judge can not substitute for its legislador.O of the conceptions of justice that judge can do is stop applying unfair law every time your letter or spirit that permit". (First Appeal Turma of Rio de Guanabara, Extraordinary Appeal nª 47.588)

On February 21st, 1968 the Supreme Court declared the unconstitutionality of the provision of the National Security Law, Decree-Law n. 314, 1967 Which preclude the accused who served the practice of any professional or private activity, Recognizing the disproportionality of que restriction can be read in the Following passage of the vote Then Given by Minister Themistocles Cavalcanti:

"Unfortunately we do not have in our Constitution which provides Amendment No. 8 of the American Constitution, which prohibits the requirement of excessive bail, the exceedingly high fines and the imposition of cruel and unusual or measure (cruel and unusual punishment).

Interpreters considered as such, for example, slow death, but also understand that the concept must evolve because "cruel" is not a technical term, with significance defined in law and should evolve with the improvement of man, the demands of opinion public and the proportion between crime and punishment.

It is possible that at some point is reached to condemn the death penalty as cruel (Pritchett, The American Constitution, p. 527).

If Trop vs. Dulles (1958) Justice Warren understood, in my view rightly, that the fundamental idea of Amendment No. 8 is the preservation of human dignity.

We do not have the same rule, however, more generic and capable of wider application, we have to § 35 art. 150, reproduction of previous Constitutions which states: The specification of rights and guarantees expressed in this Constitution do not exclude other rights and guarantees deriving from the regime and principles it adopts.

Now the current Constitution, like its predecessors in the context of individual and social guarantees, tried to follow the man's improvement requirements and respect for their physical and moral integrity. The preservation of his personality and the protection against the infamous feathers, condemnation without adversarial procedure, the deletion of some penalties that were included in our old criminal law, the claim that only the offender can suffer the penalty, without reaching those it depend define an orientation that perfectly describes the regime and the fundamental principles of the Constitution.

The precept comes from the US Constitution, Amendment IX - it was inspired and was introduced in our first Republican Constitution, with the fear that the listing could bring the interpreter to understand that by being discriminated against these warranties others would be excluded.

But the precept is far-reaching because it affects many rights not enumerated and representing achievements of human progress in the field of freedoms. The list of these rights has been growing for centuries.

The purpose of the law was reverse this trend, because it sought to increase the rigor of repression of these crimes, intimidating with measures that affect the individual in his own flesh, the mere suspicion or the beginning of a prosecution based on elements not always safe or suspicions that would be purified in the process.

In this regard, the expression of cruel measure, found in American text and characterizes the rule in question, because with it, take it to the individual possibilities of an occupation that allows you to stay and his family.

Cruel as the disparity between the situation of the accused and the consequences of the measure.

> But not only the art. 150, § 35, it can be invoked. Also the caput of art. 150 interests, because there is assured to all who live here the right to life, personal liberty and property.
>
> Now, make it impossible to exercise an essential activity enabling an individual to obtain the means of livelihood, is to take you a bit of your life, because this does not dispense the material means for their protection*". (Supreme Court of Brazil, Habeas Corpus nª 45.232)*

After the 1988 Constitution, many were judged by the STF who distributed justice under the command of the principle in question, halting the arbitrariness of the state and protecting the fundamental rights of citizens, generating respect and legal security to the people. The well-founded decision handed down by the Supreme Court in Safety Suspension headquarters to 07/04/1999 and portrays the solidification and scope of application of substantive due process of law, in verbis:

> " ADMINISTRATIVE AND CONSTITUTIONAL - RETAILER OF CIGARETTES TRADE - PACKAGE WITH A UNIT score: DECREE No. 2637, OF 06/25/98 - RIPI ..... 3. cigarette trade requirement in packing twenty units that does not meet the test of reasonableness and proportionality with the Constitution that establishes the free initiative of economic order, under the principle of free competition (Art. 170, IV of the Constitution). 4. Actions provided. Granted security. "The Federal Government claims that the immediate implementation of the now questioned decision will involve serious injury to public order, health and public economy. The scholarly Attorney General's Office, in welcoming one of the pleas put forward by the Federal Government opined for deciding the applications for safety suspension (pgs. 246/248) ..... sic ..
>
> Meets emphasize at this point that the clause of due process - express proclamation by art object. 5, LIV, the Constitution, and that translates one of the dogmatic foundations of the principle of proportionality - should be understood in the scope of its conceptual notion, not only from the merely formal aspect imposing ritual character of restrictions on the activities of the Government (procedural due process of law), but above all in its material dimension (substantive due process of law), which acts as a decisive obstacle to issue normative acts resvestidos arbitrary or unreasonable content. The essence of substantive due process of law is the need to protect the rights and freedoms of persons against any form of legislation or regulation that proves to be oppressive or devoid of the necessary coefficient of reasonableness. This means, within the perspective of extension of the theory of abuse of power to the plane of normative activities of the state, it does not have competence to act indefinitely, of intemperate and irresponsible manner, generating with its institutional behavior, normative situations of absolute distortion and even subversion of purpose governing the performance of the state function. ..... sic .....

> On the other hand, the Supreme Plenary Federal court has prestigious standards that do not appear arbitrary or unreasonable in their prescriptions, in its determinations or limitations: "The state standard, which does not convey any content unreasonableness, fits the principle of due process, analyzed from the perspective of its material projection (substantive due process of law). This safeguard clause, by inhibiting the harmful effects arising from the legislative power abuse, emphasizes the notion that the prerogative to legislate granted to the state is essentially limited legal assignment, although the time abstract normative establishment may rest on purely political or discretionary judgment of the legislator. "(ADIn 1407-DF, Rel. Min. DE MELLO CELSO) It follows therefore that if the norm prove tisnada the vice of unreasonableness, remain configured in such anomalous situation, the excess of power that focused on the state, which undermines the very constitutional function inherent in the law positivation activity, because the legal system can not live with coated state acts of arbitrary content. So bearing in mind these reasons, I reconsider the decision of the eminent Minister SYDNEY SANCHES, the possible exercise of the Presidency of the Supreme Court (pgs. 251 and v.), And consequently, indefiro applications for safety suspension formulated by Federal Union, leaving harmed by supervening loss of object, the interlocutory appeal filed by the petitioner part (pgs. 258/283). Communicate (pgs. 256). Archive to the present case. Post up. Brasilia, April 7, 1999. (Supreme Court of Brazil, Securtiy Suspension nª 1319)

The above decision restricts the intervention of the state in private enterprise, it can be seen that the Supreme Court affirming this excelled the perfect fit between the fundamental rights of citizens and state interests, differentiating what is public interest and what interest state, which are not always synonymous. Too often are edited legislative acts, riddled electoral or protectionist interests of the particular economic or social class, these empirical data or predictions may turn out to be the real motivation of a particular act cool or cool below. Several abuse or misuse of powers are committed in the name of the "public interest" and that in fact no more than "state interest." The preservation of private initiative guard intimate correlation with the public interest because through this are generated jobs and wealth that move the country and sustain the population. The principle of substantive due process, originated from US law has served as a guiding principle so that there is a perfect balance between these interests.

The legislative framework, the acts must be issued in accordance with the limits set by the Constitution. And, within these limits, different approaches can be considered legitimate. (ERICHSEN, MARTENS, 1992, p 186.) Veda is, however, too much power in any of its forms (Verbot der Ermessensmissbrauchs; Verbot der Ermessensüberschreitung). Furthermore, the discretionary power to legislate also

contemplates a duty to legislate. The legislative omission (Ermessensunterschreitung; der Ermessensmangel) seems comparable, in this step, the excess legislature. (MENDES, 2001)

It should be noted that the proposed theme, is still undergoing turbulence until settle doctrinal understanding, for now and no claim to close the debate, passes to recognize, as stated elsewhere that the difference between judicial activism and politics of legalizationIt is irrelevant, since both reveal the role of the judiciary reflected in politics, but in order to fulfill the constitutional precepts of suitability of any rule to the same and realization of fundamental rights, is valid for both the substantive due process of law, whereas that principle brings together the duties of the judiciary and its inherent limits.

CONCLUSION

The increasing complexity of human activities, in addition to new paradigms of legal practice, has meant a progressive need for mechanisms enabling them to overcome rigid design, stratified and bureaucratic which constituted the legal model in the pre World War II.

In response to this, rescued in the United States the concept of Kant's Categorical Imperative, applied to a legal framework which allowed the idea of a situational right, imprinted by Herbert Hart in the binomial Rules of Change X Rules of Adjudication. This new positioning resulted in the formation of a new facet to the legal and judicial performance that surpasses the traditional division of state powers.

This new practices Activism judiciary, allowed an approximation of forensic practice the factual reality, and thus emerging as a robust channel for the realization of social principles that are the basis of modern Western legal systems, in particular and specifically the Brazilian.

On the other hand, it was exposed as this inordinate role of the judiciary, however noble it is the motivation behind this positioning, it still results in a system imbalance "weights and chains" and, consequently, an hypertrophied judiciary that challenges democratic state the limits of law, considering principles so dear to land as those who plan to promulgate.

Among the most visible problems that may be listed, exalt to legal uncertainty and the decline in the quality of decisions, see the accumulation of functions for which the patriotic courts are, for the most part, poorly prepared, both technically and in terms of infrastructure, and from where comes the critique of the atypical legal action against its natural functions.

Despite this was transpired by the study that even with systematic nature of problems with the rest of the system, the judicial activism still falls within one of the most powerful tools for the realization of social justice. The critique of atypical function also falls flat in this direction, it being understood that the proactive role of the judiciary is not only expected to post positive models, but are justified both from a philosophical point of view, technical and practical.

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