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Transforming Politics: Intersection of Judicial Power, Activism and Legislative Decline in Brazil

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Abstract

The paper analyses judicial activism and the judicialization of politics as a probable result of legislature's inactivity. Using a methodology based on a both qualitative and inductive perspective, research aims to answer if Brazilian parliament omits itself from its constitutional duties thus allowing a dramatic political transformation through which the Supreme Court can disguise constitutional interpretation to enforce nonpreviously written rules out of political process and without check, transforming politics. Based on the socio-legal-critical method, this research adopts the exploratory technique, aiming to define and clarify conceptual frameworks and ideas that already exist in the literature, without, however, disregarding the explanatory, bibliographical and jurisprudential techniques, essential for the accomplishment of this work.

Keywords

Judicial Activism, Judicialization of Politics, Legislative Omission, Transforming Politics

1. Introduction

Judicialization of politics and judicial activism are, in the past few years, occupying a much more prominent space among journalists, academics and society when it comes to understand the institutional crisis somewhat caused by judicial review in constitutional courts.

A driving factor of this phenomenon that deserves better analysis is the supposed legislative atrophy, a cause through which judicial activism would be a

concrete consequence of a parliament retraction, a state of institutional paralysis, either engaged by political convenience, reticence or inability.

Legislative atrophy, in principle, means that the legislator does not do something that was required by the constitution. It is not, therefore, a matter of simply not doing something; it is, rather, a matter of not legislate on a subject that politicians were constitutionally obligated to.

In contexts like this, legislative non-making would allow for judgment discretion in its broadest sense which, coupled with too much constitutional principality, would drive the Supreme Court not only to act as a negative legislator, but to determine public policies for the satisfaction and primacy of constitutional values to ensure the normative force of the Constitution.

Therefore, to investigate the relevance of this perspective on the object of judicial activism, adopting a qualitative methodology, marked by an inductive bias, this paper is structured in two sections: in the first, it presents a theoretical study on the concept of judicialization of politics and judicial activism. In the second and last part, finally, it analyses representative cases of how legislative inaction in Brazil can transform politics.

2. Judicialization of Politics and Judicial Activism: Is the Judicial Branch Overtaking the Legislative?

Initially, it is important to understand the phenomenon not only from the standpoint of the judicialization of politics, but as a true judicialization of life, to the extent that ethical, political, economic, and social issues inserted as superior norms are submitted, to a greater or lesser extent, to the interpretation of judicial instances.

According to Teubner (1987: p. 7), this is the purest manifestation of "true social juridification", that is, a process of constitutionalizing a series of rights and needs that depend on public policies and programs for their materialization.

The problem seems to reside when judicialization turns to the sphere of political decision making. As a rule, in order to interpret a given constitutional rule with open content, the interpreter-judge may impose important changes in the way the State is governed, without, however, such an understanding being vested with representative-democratic legitimacy, nor being subject to a process of reversal or modification.

According to Tate and Vallinder (1995: p. 24), in this context, the judicialization of politics means both the transfer on the authority to decide what the law is from political to judicial bodies and "the incorporation of judicial methods and procedures by administrative institutions".

According to the authors, the judicialization of politics is a phenomenon that has historical-international origins. One of the most important factors refers to the political hegemony of the United States of America and its influence over other American countries, such as Brazil.

With the collapse of the communist model, represented by the USSR's disintegration, the United States emerged as a great superpower, which propitiated, in

the legal field, "the expansion of the country's [jurisdictional] model", especially "the judicial control of political bodies" (Tate & Vallinder, 1995: p. 28) and its diffusion around the globe.

Another important factor for the judicialization of politics is the existence of vague political rights. According to Ramos and Diniz (2015: p. 192) and Tate and Vallinder (1995: p. 28), for example, it is very common for courts to be vulnerable to the instrumentalization of political, social, and economic interests of influential groups.

Besides these, the ineffectiveness of majoritarian political institutions is another determining factor for judges and courts to change or prevent changes in a public policy through constitutionality control, or even to create a new public policy through jurisprudence. In these cases, the incapacity of representative institutions ends up transferring to the judiciary the fulfillment of social demands.

Regarding this perspective, Ramos and Diniz (2015: p. 196) notes precisely that judicialization is not the result of a methodological option of courts but stems from the very institutional design adopted by most democratic and western countries.

Barroso (2013: p. 12), in converging with Ramos' understanding, considers that "judicialization does not stem from the will of the judiciary, but from the constituent himself." However, given that the phenomenon of judicialization implies an undeniable loss of scope for the Legislative and Executive branches to formulate public policy, why would the Constituent want this to happen to a lesser or greater extent?

That is, how to explain that the extension of the power of the judge that is so criticized today almost always comes from a delegation of political power itself? It is possible to foresee, albeit preliminarily, at least two possible answers. The first, based on Ronald Dworkin's vision of law as source of integration, the projected loss legislative's scope of action would translate into gains in the protection of the fundamental rights of minorities.

In this case, the judicialization of public policy would be a way to prevent the political wills of majority institutions from being able to significantly reduce or nullify fundamental rights, which is why judicial institutions, since they are not representative, could analyze issues with a lower degree of "influenceability". The other answer, however, comes from the more pragmatist model proposed by Tom Ginsburg to whom American constitutional doctrine attributes the "insurance model of judicial review".

In his theoretical proposal, followed by authors such as Hirschl (2004: p. 37) and Chavez (2006: p. 82), (non-representative) judicial instances with review powers are created when potential political players envision future electoral losses and thus articulate the creation of a non-majoritarian forum in which they can verbalize their opposition.

According to Ginsburg (2003: p. 41), "if political power is diffuse or even fragmented by the political parties existing when the constitution was created,

less influential political players tend to favor judicial revisionism as a means of confronting or limiting majoritarian public policies after post-constitutional elections." It means that the constitutional courts, in this perspective, can be seen as a kind of last resort to defeat. Ginsburg's view, in this respect, is very innovative because it departs from the traditional understanding that courts are insular institutions removed from political influences.

In fact, by sharing the author's perspective, it is possible to understand that judges and courts, although not designed to deal directly with public policies, especially in democracies whose political representation is divided into several political parties, as in Brazil, are directly susceptible to being instrumentalized, to some degree, as a last forum for (re)debate.

Not infrequently, courts and judges cease to serve as a last resort, and, under the pretext of interpreting the indeterminate nature of the constitution, begin to create public policy. That is, they cease to be merely a negative legislator, with the role of annulling the rule of doubtful constitutionality laws, to create the law from the start.

After the political, moral, and values discussions reach the courts, the judiciary may adopt one of two views: the first more deferential to the other branches of government, and the other, more proactive. The first, followed by magistrates with a restrained profile, is aimed at adopting an institutional dialogue, refusing the "juricentric" view that gives the Courts almost a monopoly on all constitutional discussion, rejecting the idea that the constitutional court has the last word through judicial review.

The second position is that of magistrates predisposed to judicialize, that is, to interpret in a proactive way, enhancing the reach of constitutional norms, often beyond what the ordinary legislator has established. This growing involvement of judicial institutions and their members in political matters, very often to the detriment of other spheres of government, does not necessarily mean judicial activism.

This is because the latter phenomenon is characteristic of being a true option whereby courts choose to adopt a freer interpretation model of the constitution and other norms. According to Ramos and Diniz (2015: p. 198), by the activist posture, the judiciary assumes a function that "is not its own: that of legislating, either positively or negatively," that is, determining the realization of public policies that it understands to be pertinent to its interpretation of the constitution, or even eliminating from the legal system normative acts that compromise fundamental rights and guarantees.

Jeremy Waldron, on the subject, presents important considerations regarding this role, making interesting distinctions. According to the Author, judicial review as a modest power of control of the judiciary over the other branches of government can be fully viable in today's democracies, as an important way to ensure checks and balances.

However, the notion of judicial revisionism as judicial supremacy must be

absolutely avoided, because it implies allowing the judiciary an exacerbated protagonism in institutional politics: the Courts, in this perspective, would be sovereign to all other branches of government. To allow the Courts, and therefore judges, to exercise revisional power indiscriminately means to displace self-government, because, judicial elites, intellectually gifted and directly influenced by political interests, would take away from the democratic representatives the power to deliberate and decide on policies to the extent that by controlling without proportional and symmetrically inverse control, the judiciary would become a derivative constituent, deciding on the direction of the other institutions.

In principle, the dysfunctions that can be observed are negative to the functioning not only of the judiciary but also of the other branches, which allows us to conclude that judicial supremacy brings with it undeniable damage to constitutional democracy.

The posture adopted by the interpreter-judge that is more detached from the literalness of the norm, however, is very curiously linked to the semantic style of structuring the law adopted by post-modern society. Recalling Garapon's criticism (1996), it is clear to recognize that the indeterministic methodology adopted by the legislator when creating the norm has a cost, and this cost is represented by the irresponsible free exercise of interpretation.

Note that it is not being understood here that the authentic interpreter is that of the style idealized by the Baron of Montesquieu, that is, the "mouth judge of the law" whose view of the law is too limited by the grammatical extension of the text. This should not be admitted insofar as "the limiting function of the text is not identical to the concretization function of the grammatical element, so that the decision does not necessarily have to result directly from the literal content of the normative precept" (Müller, 2005: p. 69).

However, every interpretation activity is also cognitive, and, therefore, presupposes knowledge of something that precedes it, that is, something previously established that, in case of deviation, allows one to state whether the interpretation is correct or not, since the normative text is both a starting point and a marker of the adequacy of its results (Canotilho, 2003: p. 1208).

Larenz (1969, p. 365) explains that the judge who interprets a law implicitly affirms that it should be interpreted "correctly" in all its future cases and not otherwise. The judge's interpretative activity is, just like that of science, subordinated to the requirement of the "correctness" of its results, "correctness" in the sense of sufficient reason of knowledge. In this regard, it is not only a matter of logical-formal correctness but also correctness, or rather, material correctness, in the sense of knowledge that is correct in its content.

What seems commonplace, however, is that current constitutions, in the arduous and complex task of regulating many divergent subjects and at the same time avoiding too much anachronism, express their interface in a textually very open manner. This preference creates an area of discretionary understanding of meaning for the interpreter who, faced with non liquet, decides in this or that

direction, depending on how he or she understands the connections between the various meanings of the word.

Heck (1947: p. 51) clarifies that the "connection between the various elements that determine the idea contained in the word is variable," there being a central point, the proper sense, and (...) a periphery that establishes the gradual transition to other ideas that the word already does not translate, which is why the greater the normative employment of plurissemantic words and extensive programs, the more indeterminism and, therefore, the more freedom the interpreter will have to decide.

On the contrary, the more the normative text is cast in an objective and precise manner, the less freedom there is for interpretations and, therefore, the less discretion the applicator will have when interpreting it, which may promote gains in terms of security and predictability.

2.1. Limits of Constitutional Hermeneutics and Self-Government

Initially, it is important to understand the phenomenon not only from the standpoint of the judicialization of politics, but as a true judicialization of life, to the extent that ethical, political, economic, and social issues inserted as superior norms are submitted, to a greater or lesser extent, to the interpretation of judicial instances.

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2.2. Interactions often Occurred among Institutions of the Political and Justice System

The first concerns the competence of the Constitutional Court to conduct incidental or abstract control of legislation. The second deals with the legislature's ability to introduce substantial reforms in the legal system. Finally, the third and most intriguing factor concerns the influence that the jurisprudence of the constitutional court exerts on a certain theme of the constitution.

Thus, e.g., in political systems that have courts with the prerogative of controlling constitutionality and that have legislative majorities capable of introducing substantial reform legislation, judicial protagonism is more likely to occur. In such cases, "the more the political opposition requires court intervention, the more judicial revisionism is exercised, a process that tends to repeat itself" (Sweet, 2000: p. 567).

Garapon (1996: p. 56), by the way, highlights that "activism is more clearly evidenced when, among many possible solutions in view of the petition, the judge's choice is fueled by the will to accelerate social transformation or, on the contrary, to stop it.

An interesting case that occurred during the 1980s illustrates the issue well: different French governments tried to pass new antitrust laws in the field of communication media. The first of them, according to Stone Sweet, was largely modified due to the debate that took place, still in parliament, about its constitutionality. The proposal, in short, was rejected in its entirety in the conservative Senate because of its unconstitutionality.

Eventually, the assembly overrode the veto, and the opposition appealed to the Council (France's constitutional court of judicial review), which eventually overrode much of the legislation. Later, government legislators adapted a new legislative proposal, containing the Court's view on the points that made it unconstitutional, so that only then, once the court's view was incorporated, would the legislation be considered valid. This exemplary case that has taken over the French debate highlights how organizational structures condition the interaction between judges and legislators.

It is important to note that judicial revisionism, in this context, by allowing political minorities to use the judiciary as a new forum for debate about the limits and interpretation of rights, increases the chances of judicialization of the

legislative process. In other words, by claiming the judiciary's view," the parliamentary minority forces the court to intervene, at which point it gives the court the chance to be 'activist'.

Thus, if other instruments are made available to these groups, or even if these instruments become less costly (such as articulating to overturn a certain bill still in committee or seeking a presidential veto) it is very likely that judicial review will no longer be a primary alternative.

The question, by its amplitude, can indicate that activism is not restricted to one normative system or another, being present from mature democracies to newly democratized states. It is in this perspective that authors such as Garapon (1996: p. 46) rightly understand the issue of activism as a true sign of change in today's democracies.

For what it proposes, in the face of public, rigid, structured procedures, removed from the common disapproval of the immoral view of legislation, the judiciary in the 21st century represents a new ethic of collective deliberation through which recipients can more directly access a representative form of state instance, thus the evolution of the expectation of political accountability.

Perhaps it would be appropriate to add to Garapon's understanding that this phenomenon intends, in truth, to dispel the shadow of political irresponsibility, insofar as the judge is called upon to come to the aid of a democracy in which there is a weakened legislature and executive, obsessed by continual electoral failures, occupied only with petty, short-term issues, "striving to govern, day by day, indifferent and demanding citizens, concerned with their private lives, but expecting from the politician that which he is unable to give: a moral, a great project" (Bredin, 1994: p. 81).

From an essentially organic and normative perspective, legislative overcoming of decisions by the Federal Supreme Court is not at all unlikely; on the contrary, it is quite possible. This is because decisions that declare a normative act of the congress incompatible with the constitution in direct constitutional review, although endowed with binding character concerning the Public Powers, do not prevent the federal Legislature from 1) deliberating again on the reinsertion of the challenged norm into the legal system, 2) accepting the Court's reasons for unconstitutionality and promoting modifications to the law or act in question, or even 3) changing, when not hindered by an unalterable constitutional clause, the normative constitutional parameter used by the Court to declare unconstitutionality.

For example, the Federal Supreme Court, when interpreting the fundamental norm in tax matters, understood that the progressiveness of the Urban Property Tax (IPTU) would only be viable to conform the use of the property to its social function, which was later entirely modified by the Legislature. Although this was an isolated case from a historical period of approximately two decades ago, there is a consensus in Brazilian doctrine about the possibility of legislative overcoming of judicial decisions. However, it is necessary to conduct a more recent survey of the actions judged by the Federal Supreme Court to then assess and define

whether there is or is not a prominent action of the Constitutional Court and what position the National Congress adopts regarding it.

3. Legislative's Institutional Atrophy in Brazil

From the moment that it is analyzed in an organic perspective, it is possible to notice that judicial activism is driven not only by reasons endogenous to the Judiciary, having roots sometimes in the action of minority political groups that instrumentalize it for a new round of debates, sometimes in political omission in regulating important issues of life, so that it is possible to conclude, at this point, that activism, to a greater or lesser extent, is directly linked to the institutional performance of the Legislature.

It is this element that, in the best judgment, deserves further investigation because it appears to be one of the intensifying factors of the activism studied. In the Brazilian case, authors such as Ramos (2015: p. 303) and Mendes (2011) believe that the inefficiency of the political-representative system is one of the causes to which the increasing judicial intervention can be attributed.

The inability of the Brazilian government apparatus to meet the normative production identified as necessary by the representative Powers themselves is evidenced "by the fact that the cycle of major constitutional reforms initiated in 1995 has not yet been completed" (Ramos, 2015: p. 351).

After more than thirty years since the promulgation of the constitution, there are still countless provisions lacking regulation by the National Congress, such as, for example, 1) the protection of places of religious worship and their liturgies (art. 5˚ VI); 2) the entry, exit, stay and transit of any person in the country in times of peace (art. 5˚ XV), 3) the creation of cooperative entities (art. 5˚ XVIII), 4) regarding the organization of jury courts (art. 5˚ XXXVIII), 5) about extradition of naturalized Brazilians in case of common crimes before naturalization or trafficking in human beings (art. 5˚ XVIII). 5˚ XVIII), 6) on the organization of the jury court (art. 5˚ XXXVIII), 7) on the extradition of a naturalized Brazilian in case of a common crime before naturalization or drug trafficking (art. 5˚ LI), 8) on flagrant imprisonment for transgression or military crime (art. 5˚ LXI), 9) on dismissal from work arbitrarily or without just cause (art. 7˚ I), 10) additional remuneration for hazardous, unhealthy or dangerous activities (art. 7˚ XXIII), 11) labor protection against automation (art. 7˚ XXVII), 12) creation of municipalities (art. 18 §4˚), 13) a strike by public employees (art. 37), 14) regulation of elections for president and vice-president of the republic in case of vacancy in the last two years of the mandate (art. 81 §1˚), 15) of the tax on great fortunes (art. 153 VII), 16) of the exchange transactions between organs and entities of the Union, States, Municipalities and Federal District (art. 163 VI), 17) assistance to heirs and dependents in need of a person who is a victim of a felony crime against life and 18) demarcation of all indigenous lands (art. 67 of ADCTs).

The reasons for this inefficiency have been the subject of intense discussion in

political and academic circles. However, despite the different views on the issue, several are those who understand that the proactive attitude of the judiciary is a way "not only to realize the constitution, but also to pressure the Legislature to attend to, to do what the Constitution recommends" (Mendes, 2011).

But, after all, in face of the sensibly large number of normative acts issued by the National Congress, is it possible to affirm that the Brazilian Legislature is negligent? That is, would the political sector sin by the lack of legislation more than by its excess?

In order to understand the problem of the Legislative institutional performance as a factor that induces Judicial activism, it is necessary to understand it in two major interrelated categories: legislative hypertrophy and legislative atrophy.

This is because, as is typically identified in countries endowed with ruling constitutions, as is the case of Brazil, the State is called upon to intervene in various areas, such as, e.g., the economic, social, political, and educational spheres, which requires a significant complex of norms that command conduct.

In this context, contrary to what may seem ab initio, the excess of infra-legal rules regulating the constitution, can further accentuate judicial activism if they are constructed with the analyzed style of vague or excessively ethereal language.

The linguistic-structural indeterminism of the command allied or not to the contradictions of the normative programs is a great deal directly proportional to the comprehensive discretion of the interpreter-applicator, that is, the more open legislations that are in force, the greater the interpretative margin when resolving the concrete case and, therefore, the greater the protagonism of the judge in defining the real will of the legislator.

Campilongo (2013: p. 87) argues that the hypertrophy of legislated law strengthens the possibilities of judicial law. The expansion of judicial powers and attempts to implement binding precedents transfer political criteria to the legal system, leading to an incompatible "desdiferenciação" with modern democracy's complexity. These characteristics are typical of a peripheral modernity, violating the autopoietic nature of both systems and reinforcing reciprocal impediments.

Thus, by creating a considerable number of declaratory or merely enunciative laws, in disregard of the establishment of mechanisms for their practical materialization, everything "ends up being taken to the Judiciary, which is forced to resort to judicial discretion to solve the problem" (Sodré, 2011: p. 180).

Therefore, when the judiciary faced with a hypertrophy of rights, with open, vague and indeterminate legal concepts, decides in an overly discretionary or activist way, instead of mitigating it, it ends up increasing a democratic deficit "since judges only have a technical understanding of legal operations and can only see politics through the eyes of the law, without understanding the dimensions in which social conflicts proper to this type of arena are inserted" (Sodré, 2011: p. 189) nor the exogenous systemic effects of each conflict resolution.

On the other hand, the Brazilian experience also seems to be marked by the

absence of legislation that guarantees the facticity or the materialization of the values institutionalized in the text of the Constitution. This means that the legislative atrophy, as well as the indeterminist hypertrophy, has as a result the judicial protagonization.

In turn, legislative atrophy or omission means that the legislator does not do something that was positively imposed on him by the constitution. It is not, therefore, just a simple negative failure to do something; rather, it is "a failure to do that which, in a concrete and explicit manner, it was constitutionally obliged to do" (Canotilho, 2003: p. 331).

In contexts such as this, legislative non-making allows for discretionary judgment in its broadest sense which, coupled with too much constitutional principality, pushes the Constitutional Court interpreter to not only act as a negative legislator, but to devise public policies for the satisfaction and primacy of constitutional values.

The use of the writ of injunction by the Brazilian Constitutional Court clearly shows how dysfunctional legislative omission can be. Traditionally, since the first ten years of the Brazilian Constitution, the Federal Supreme Court refused to exercise normative competence in the writ of injunction, and the orientation established in the judgment of the Injunction Mandate n. 107-3/DF prevailed.

Based on it, the STF admitted the possibility of providing a precarious normative supply only for the specific case submitted for judgment, making it possible to exercise the constitutional right affected by the legislative omission.

However, in the judgment of the writs of injunction nos. 670-9/ES, 708-0/DF and 712-8/PA-819, referring to the legislative delay regarding the public servant's right to strike, which, by the way, has already been declared by the Court, the Federal Supreme Court assumed an avant garde posture regarding the normative supply through injunctions.

According to the reflections proposed when the Injunction Mandate 1090/DF was debated, the then Justice Marco Aurélio Melo and the president of the Court, the Justice Luiz Fux, considered that although concrete action "would challenge the representatives of the people and the States to legislate on the matter, the call for the legislative to act unfortunately is not working" (Brasil, 2013: p. 3) as some matters are still, as seen, homeless after almost three decades of constitution.

From then on, the Court understood that it was up to it to proceed, subsidiarily and provisionally, to regulate the exercise of the right with binding effect for all, not only defining "decision norms, but enunciating the normative text that was missing to, in this case, make viable the exercise of the right to strike by public servants" (Brasil, 2007: p. 32), in a clear legislative activity that, when compared in light of the separation of Powers, reveals itself not concretist, but truly, activist.

If Congress had assumed its institutional role in good time, certainly not even the Court would have room to act as legislator. It should be noted, lamentably, that even fifteen years after the judgment of the injunction in question, the Bra-

zilian Congress has still not remedied its legislative delay.

Deliberative Omission

The issue of omission or free parliamentary deliberation for not acting is a very curious one because, strictly speaking, the legislative process, conceived as "the set of coordinated acts aiming at the creation of legal rules" (Ferreira, 2001: p. 341), has a beginning (the presentation of a proposal) and an end, its voting.

Even if to reject the discussed proposal, an end, a conclusion, is to be expected from this procedure.

However, especially in Brazil, it is not unusual for the legislative process to deviate from this logic. There are propositions that, despite going through all the legislative phases, are neither deliberated (approved or rejected), nor filed. There are many examples.

At the moment, in order not to make the text too long, I will limit myself to mention only four cases: 1) Bill no. 6.129/1990, which establishes guidelines for a National Rural Housing Policy and other provisions (whose reporter was only designated on May 7, 2019 and whose time of proceeding at the present date is 12.015 days or 32 years), 2) Bill no. 1.314/1988, which provides for the concordat of the mini, small, and medium rural producer, had its discussion reopened on 09/11/1997 in the plenary of the House of Representatives and whose time of proceeding to date is 12.517 days or 34 years), 3) Bill N˚. 6132/1990, which regulates the exercise of lobbying (although it has been ready for the agenda since 1993, it was never voted on in the Plenary of the House of Representatives), 4) Bill N˚. 6125/1990, which defines the crimes of responsibility and regulates the respective trial process, which is pending the opinion of the rapporteur since 2011 and whose processing time to date is 12,040 or 32 years.

Although it may seem counterintuitive, the decision not to decide is, according to Bachrach & Baratz (1962: p. 632) the practice of "limiting the scope of real decision making to "safe" issues by manipulating the dominant community's values, myths, political institutions, and procedures. Through it, an implicit decision is made not to approve, reject, or shelve the issue under analysis, revealing itself to be one of the faces of power.

Power is exercised when A participates in making decisions that affect B. But power is also exercised when A devotes its energies to creating or reinforcing social and political values and institutional practices that limit the scope of the political process submitted for public consideration to only those issues that are comparatively innocuous to A. To the extent that A succeeds in doing this, it prevents B, for all practical purposes, from bringing into public consideration any issues that might in his decision be seriously detrimental to A's preference set (Bachrach & Baratz, 1962: p. 151).

In order to dissociate from the concept of non-decision those propositions that require further discussion, Nascimento (2015: p. 92) illustrates some ways in which legislative non-decision is manifested.

These are, e.g.: 1) in the case of preliminary drafts, a non-decision can be considered to have occurred when the reporter of the matter presents his vote and the Special Commission does not deliberate; 2) in the case of proposals already registered, when they are ready for the agenda, whether in the scope of the Plenary of the House, or in that of any commission, and the matter is not put on the agenda for deliberation; or 3) even if it is put on the agenda, it does not go to the vote, due to maneuvers of obstruction.

It is, therefore, the time, as a currency of value and invariable element of the phenomenon, that seems to determine, in the end, the quality of the Legislative's institutional performance and, in tow, the activist propulsion of the Judiciary, to the extent that the vacuum left needs to be filled.

To the extent that the Legislature takes more time to decide or simply deliberates by not deciding, in view of the theory of constitutive power proposed by Hall and Taylor (1998), it is possible to believe that the expectations and interests of authentic political representatives, conscious of the vague character of the constitution and of the inapplicability of constitutional jurisdiction, are shaped in order to relegate to the Judiciary the decision on difficult questions, in a kind of programmed organic displacement, in order to preserve their institutional well-being.

This can be justified because the Legislative is not yet fully capable of constituting or concluding deliberations and agreements involving the approval of a given legislation, or even because, seeing a loss of political capital, it chooses to submit the final decision on the issue to an unelected power, and therefore immune from the vote of no confidence.

Although it is possible to start from the premise that the deliberative displacement programmed is the result of a conscious deliberation of Parliament as an institution, the issue of activism has become, in the last decade, the object of sensitive concern of political representatives, appearing on the agenda of important bills and amendments to the federal constitution.

According to a quick search in the legislative proposals portal of the House of Representatives, it is possible to identify a total of 26 (twenty-six) initiatives contemplating the "judicial activism" theme, of which 17 (seventeen) are bills and 9 (nine) proposals for amendments to the constitution.

Regarding the date of proposition of the PECs, the oldest of all dates back to 2009 (PEC n˚. 342/2009) and the most recent, filed ten years later, in 2019 (PEC no. 93/2019). PEC 342/2009, authored by the then federal deputy Flávio Dino, today he is the current Minister of Justice of the then President Luis Inácio Lula da Silva, changes the constitutional provisions regarding the composition of the Federal Supreme Court in order to, in short, establish criteria for the choice of STF Justices and fix their term of office at eleven years, with no reappointment allowed.

Under the justification that the main functions exercised by the Court have an eminently political nature, the author proposed the establishment of an eleven-year term for the position of Minister, with no possibility of reappointment,

in addition to changes in the way the Court is appointed.

Today appointed exclusively by the President of the Republic with an appointment in the Federal Senate, the author proposed that the Justices should be chosen in the following ratio: 1) five by the President of the Republic; 2) two by the House of Representatives; 3) two by the Federal Senate; and 4) two by the Federal Supreme Court itself.

Very curiously, about 55% (fifty-five percent) of the PECs proposed in the last three years about activism, as a rule, either propose changes in the structure of the Court or in its constitutional review process.

Among the ordinary infra-constitutional level, of the seventeen (17) bills, fifteen (15) touch on the point of activism only as "obiter dicta" in the justification of the matter, while only two face the debate on the merits of the proposition. Among the proposals for amendments to the constitution, it is possible to observe the opposite. Nine proposed amendments to the constitution face the merits of activism, while it is not possible to find any that face the debate only as justification, which means that of all the proposals for amendment to the constitution mapped, it is proposed to change the formal and material powers of the Court in all of them.

The most curious thing, however, is that the issue of judicial activism seems to be of supra-partisan interest, attracting the concern of both left-wing and right-wing political-ideological spectrum groups.

By cross-referencing the data on the party affiliation of the proposing parliamentarian, it is possible to verify that among the amendments to the constitution and bills related to judicial activism, 10 (ten) come from the Liberal Social Party (PSL), 4 (four) from the Communist Party of Brazil (PCdoB), 2 (two) from the Brazilian Democratic Movement (MDB), 2 (two) from the Workers' Party (PT) and 2 (two) from the Democratic Labor Party (PDT), containing New (NOVO), Democrats (DEM), Humanist Party of Solidarity (PHS) and Progressives (PP) 1 (one) proposition each.

It is important to note that despite their interest in the need for legislative primacy of law interpretation as opposed to increasing judicial protagonism, as Taylor and Da Ross (2008: p. 825), "political parties themselves appear among the leading plaintiffs in Direct Actions of Unconstitutionality before the Supreme Court".

For illustration, from 2019 to 2021, the PSL was the author of 5 (five) direct actions19 as well as the MDB, with 5 (five) distributions. On the other hand, the PCdoB was the author of 15 (fifteen) ADIs, followed by the PT with a total of 32 (thirty-two) in the same period, which is why it is even clearer that political representatives and their parties, in the Brazilian case, instrumentalize the Constitutional Court, to some degree, as a kind of forum for (re)debate of the clashes waged in Congress, attracting the Judiciary to also participate in public policy debates. In view of these considerations, it is possible to believe that the institutional dialogic model can present relative gains in terms of democratic interpretation of the constitution in Brazil.

This is because, in theory, it is recognized that the legislature should not be

limited to simply obeying the interpretations of the Constitutional Court but should affirm its understandings of the meaning of the Constitution, while not disregarding the inputs that the Constitutional Court may present for the discussion of difficult issues.

It was concluded that although the Federal Supreme Court decides a significant number of direct actions of unconstitutionality, only a relatively small number of them refer to laws from the National Congress, accounting for slightly less than one-fifth.

In other words, for each new ADI (action of unconstitutionality) judged in the period, four of them deal with the challenge of acts not produced by the National Congress, while only one is related to its legislative activity.

Thus, the alleged existence of judicial activism by the Brazilian Court most likely does not stem from the invalidation of federal laws, meaning it is not justified by the judicialization of political-congressional disputes at the national level.

4. Conclusion

Judicial activism currently represents a considerable warning sign of institutional dysfunction never observed on such a large scale. From consolidated democracies to newly liberalized regimes, judicial protagonism in public policy issues reveals the pressing need to resize public powers.

However, contrary to what may appear preliminarily, this dysfunction that propels the judiciary to a prominent position is not linked only to endogenous factors. Adopting Sweet's behavioral theoretical model as a reference for analysis, it is possible to verify that, together with the indeterminate language style, the legislative omission in several themes ensures a wide discretion to the interpreter.

In the Brazilian case, whether by deference, reticence or deliberate inaction, the National Congress drives judicial activism by allowing decisive thematic areas of the constitution without the necessary regulation or by using excessively open language.

Furthermore, although the phenomenon of activism recurrently appears as a target of concern for the political sector, the political parties, regardless of ideological bias, often instrumentalize the Court in order to attract it to the center of the debate on highly controversial issues from an ethical and moral point of view, which further sharpens the judicial protagonism since the more it is provoked, the greater part it takes of the debate.

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