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Political Activity of Brazilian Adjudication: Some Dimensions

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Abstract: Since the advent of what is known as new constitucionalism, jurists have been facing a challenging task in order to overcome some difficulties of normative positivism. In this context, it can be said that the judiciary has played a renewed role, which can be justified on grounds of legal theory and institutional reasons. However, this new role have led legal philosophers to several concerns, such as the relationship between law and ethics and the distribution/control of power, for example. As some critical legal scholars point out, the judge always acts susceptible to be informed not only by her own convictions but also by external influences. From another perspective, according to some scholars concerned with theories of justice, judicial outcomes shouldn't be so problematic once law-making can be provided with ethics, but not ethically justified. In any sense, the simple openness of law to morals makes it difficult for the interpretative judicial discourse to be taken as claimed by K. Günther: as a discourse of application only, and not of justification. All these controversies, however, deal with a common concern: the constitutional adjudication has exercised a different activity. Some legal systems allow such activity in some extent, like Brazilian's, for example, which: i) states a very broad spectrum of competency for adjudication, ii) provides en extensive catalog of basic rights, and iii) provides several procedural mechanisms for their protection. This all togheter empowers judges to exercise what can be called a political activity. Therefore, a series of moral issues which were once predominant at other forums have been brought to the judiciary, such as: gay marriage, abortion, affirmative actions, religious freedom, federation, separation of powers, distribution of scarce resources. In a democracy, these moral questions ought to be mainly decided through deliberation outside the judiciary, but this is not always the way it happens. The paper discusses these issues, with focus on the Brazilian legal system.

Keywords: Adjudication, Law and Politics, Brazilian legal system.

1. Introduction

Recently, the Supreme Court was called upon to decide about the possibility of five candidates, subscribed to participate in a public contest to the Union prosecutors career, to take the test in another day (the test was scheduled for a Saturday) or after sunset. These candidates are members of the Seventh-day Adventist Church, and for them Saturday is considered a holy day of worship. They argue that setting the date of the contest on a Saturday

is embarrassing access to public carreers through democratic means without hurting their convictions.[1]

It concerns a case on which the Brazilian Supreme Court will decide about the protection of the fundamental right to freedom of religion in a State which is plural, secular and democratic, considering also that the Parliament has not yet a defined position about this situation. The right of freedom of religion is constitutionally guaranteed, it contains a moral choice of society, but the main question is the definition of its scope, what's the measure of its effectiveness. Which power (Executive, Legislative or Judicial) is competent to do so, and under what justification?

Working with maximum effectiveness of fundamental rights involves making moral choices. In a system, like Brazilian's, where such issues are allowed to come into discussion under the judiciary, deciding is inevitable in most cases. Pronouncement on moral issues can lead courts to play what has been called political activity. In addition, in a context where the courts have repeatedly been demanded on the implementation of rights, especially of fundamental rights, this political activity tends to put the judiciary in evidence.

This leads to questions about the reasons for the exercise of that activity, considering that it is viable in a particular political community, and also which consequences it can bring to a democratic rule of law. In this paper, the premise is to recognize that the constitutional adjudication exercises political activity; and the challenge is to reach a balance between the dynamics of democracy, the constitutional choices and a legitimate judicial activity.

2. Theoretical foundations of the political activity of Brazilian constitutional adjudication

2.1 Institutional justification

It is possible to sustain several reasons to pursue the political aspect of the constitutional adjudication activity. These reasons, in general, come from some idea about the institutional balance between the three powers - Executive, Legislative and Judiciary.[2] As Ran Hirschl says, it is a problem which needs to be solved also by a political point of view, and not by a

[1] Source: www.stf.jus.br. Accessed: 9/30/2010.

[2] Ran Hirschl says that this political role of adjudication reached a certain point because the political actors are somewhat tolerant about it. Moreover, the lack of unity of the political system, with strong and organized institutions, would be in part responsible for this judicial role: "More fragmentation of power among the political organs reduces the ability they have to curb the courts, and therefore increases the ability of courts to assert themselves." Also, the author points out as factors of this judicialization both the voluntary transfer of responsibility of politicians to judiciary, as much as the use of justice as a place for political disputes and attacks on political parties in power. Ran Hirschl, O novo constitucionalismo e a judicialização da política pura no mundo. In: *Revista de Direito Administrativo,* v. 251, 165.

legal point of view only.[3] Considering that one of those powers plays, in some extent, the role of a protagonist - in the case, the Judiciary branch - it interests to indicate, as an institutional justification, what *is expected* from the contemporary State, and *which answers* this sort of State has been giving to these expectations.[4]

If nowadays, in a greater or lesser extent,[5] benefits are expected from the State in order to satisfy human needs, the same cannot be said about the model of State current at the time of the modern law.

From the post-Enlightenment ideas built throughout the nineteenth century, it no longer matters, for purposes of legitimacy of law, that this law is the product of doctrinal or judicial creation. The settlement of the principle of certainty, as well as the sovereignty of law, leads to what might be called the legalistic rule of law: valid law would be just the law created by the expression of general will.

In this model of rule of law, considering that the judge was expected to simply subsume the concrete fact to the abstract standard in order to take the decision, it appears that the single legitimate source of new law is the positive law, and no longer judicial decisions or doctrine. This legalistic atmosphere was associated to the liberal model of political organization then current, in which the State was not required to interfere in civil society, except to ensure rights of liberty and property. It was not required robust state benefits or state intervention in the economy, as it would occur several decades later.

This liberal and legalistic model of rule of law, current in the early twentieth century, however, came to be overcome by new means of state action. The period between the two World Wars was marked by a strong contradiction between political equality and social inequality, leading to constitutions requiring the State no longer a prevailing attitude of abstention in relation to civil society, but of intervention.[6] Constitutions were not limited to only structurally organize the State, securing its political boundaries; in addition, rights of freedom and equality are guaranteed, on which it is printed a note of formal and material

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[3] That this is a political phenomenon was also warned by Ran Hirschl: "the transition to jurisdiocracy is primarily a political phenomenon, rather than legal. It is in this light that it should be studied. "O novo constitucionalismo, 174.

[4] What is expected of the state depends on what the community understands objectively as the goals of the state (what should not be confused with its justification). And the determination of the purposes of the state is essential to its understanding: "The determination of the meaning role of the state is critical to its understanding in every detail. Without reference to the meaning role of the state, all the concepts of the theory of state and political rights are empty of meaning." Hermann Heller, **Teoría del Estado**, México, Fondo de Cultura Económica, 1998, p. 260-261. Aside the apparent indifference of Kelsen on the question of state teleology, justified, as Bonavides says, by the character of his normative legal positivism, the fact is that these goals are historically changeable. See BONAVIDES, Paulo. **Teoria do Estado**. São Paulo: Malheiros, 1995. p. 21 and 25.

[5] It is reported in greater or lesser extent because state action depends, always and ultimately, on some costly provision, to ensure both rights to freedom and equality rights. The idea refers to the thesis of the cost of rights developed by Cass Sunstein and Stephen Holmes in their popular work **The Cost of Rights**: why liberty depends on taxes. New York / London: W. W. Norton & Company, 1999.

[6] This period of over-legalistic rule of law marks the beginning of contemporary constitutionalism, understood by Luis Prieto Sanchis as it follows: "In fact, the idea of constitutionalism, or at least the idea that interests us here seems to be used as a concept which transcends the rule of law legislation, as a counterpoint to the model of nineteenth century liberalism, and perhaps its most salient feature resides in effective procedures for monitoring the constitutionality of laws." SANCHIS, Luis Prieto. **Constitutionalismo y positivismo**. México: Fontamara, 1999. p. 15.

fundamentality which binds institutions, and also instruments to guarantee and protect these rights are forseen. Thus, the constitutional protection of labor rights, welfare and education, the intervention in the economy, fixing wages, currency manipulation, price regulation, combating unemployment, protection of the sicks, the funding, coping with economic crises, in short, an entire state structure leads to the so-called Welfare State.[7]

This constitutional rule of law, in which constitutions assigned to the State a strong presence in society, in the late 70's seems failure to honor its commitments to post-war constitutionalism. The State's bureaucracy starts to no longer fulfill the satisfaction of human needs. In Brazil, in the mid-90s, there is a move to restructure the management of public institutions, aiming to make the state apparatus more efficient, "legitimizing the administration of the Welfare State".[8] Along those changes, many occidental democratic constitutions also provided a list of fundamental rights, and in the case of Brazil's 1988 Constitution, the rights to freedom and equality demanded public policies in their implementation. Nevertheless, these policies fail to happen in a satisfactory way.[9]

This list of fundamental rights expresses what may be recognized as a fundamental rights rule of law,[10] in which there is general concern to protect the fundamental rights neglected during the periods between wars and dictatorships, and also in which there is a specific concern with equality, justice and democratic participation and representation. It is within this context that it has happened, more and more often, the transfer to the judiciary power of the expectation of charging the state for fulfilling the social obligations assumed in those constitutions. This transfer of expectation reinforces this power, which has been increasingly demanded by the community in many other moral issues. Demands usually involve the claim that public policies be ultimately oriented to protect and guarantee legal rights considered essential to the establishment of a free, fair and solidary society: the fundamental rights. And when the expectations concerning these rights are not timely or satisfactorily replied by the executive and legislative branches, the judiciary has been appealed as a forum to charge their action. And so the ground is prepared for the exercise of political activity by the constitutional adjudication:

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[7] BONAVIDES, Paulo. **Do Estado Liberal ao Estado Social**. 8. ed.. São Paulo: Malheiros, 2007. p. 186.

[8] This words are by Luis Carlos Bresser Pereira, mentor of the Brazilian Administrative Reform of 1995, which this author names *managerial*, and not *bureaucratic*, as the one that had happened previously (in 1937). This Reform would operate in two angles: *management*, with management by results, and *structural*, whith reforms through the strategic core of the state, enhancing careers and organizations that participated in this nucleus. See BRESSER PEREIRA, Luis Carlos. Os primeiros passos da reforma gerencial do Estado de 1995. Source: www.bresserpereira.org.br. Accessed: 04/20/2010.

[9] It is said that the 1988 Constitution norms, which ensure to citizens a series of public policies in health, education, housing and social care were incompatible with the country's slow economic growth, generating a huge deficit in public finances. PINHEIRO, Armando Castelar; SADDI, Jairo. **Direito, Economia e Mercados**. Rio de Janeiro: Elsevier, 2005. p. 4.

[10] Some authors call it a democratic rule of law, which in essence has no differences in its scope. Here is the definition of Jose Afonso da Silva: "The fundamental task of a democratic rule of law is to overcome the social and regional inequalities and to establish a democratic regime to carry out social justice." SILVA, José Afonso da. **Curso de direito constitucional positivo**. São Paulo: Malheiros, 2009. p. 122.

> The judiciary is political when proclaims itself as the power to defend the rights of citizens, against the positions of representative political institutions and when it assumes power as the revelation of the fundamental values of community. The legal guardian judge and the judge who achieves morally righteous goals represent today, in fact, the archetypes of the rupture in relation to the Jacobin model of judge executor passively, loyal to the will of the legislature.[11]

2.2 Theory of law justification

The exercise of political activity by the constitutional adjudication, either by the nature of decision-making activity, either by the object upon which focuses the interpreter - in this case, law itself - is not recent.

From the theoretical point of view, law has been designed and operated under different approaches, from the legalistic rule of law, until the fundamental rights rule of law as recognized today. The contemporary theoretical approach is being constructed in close connection with what has been recognized as political activity of constitutional adjudication.

Let's see, then, when it might started and where this theoretical attitude is today.

It is attributed to Hans Kelsen the most accurate theoretical formulation for the approach to law in a scientific manner. Once overcome the "methodological babel"[12] of eclectic sociology, the nineteenth century legalism requires a scientific treatment of law, in order to be operated with precision, consistency and predictability. Under Kelsen's positivism, law would have an *object* and the knowledge of this object would demand a specific *method*. For Kelsen, this object should be the *legal norm*, whereas the method to be applied by the operator of the law should be the *legal positivism*. In this sense, interpreting law would mean to *describe* what could be extracted from the legal norm. Further, to the judge it would mean to *know* what doctrine and law could offer him and from this point make a decision.[13]

Despite this, it was recognized that judicial activity created new law somehow, which occurred in situations where positive law was insufficient to solve the case. For no other reason, Kelsen said that the activity of the judge was authentic, while the activity of doctrinal interpretation was inauthentic. Judicial interpretation would be an act of knowledge but also an act of will.[14] Therefore, the activity of interpretation would incorporate categories from

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[11] CANOTILHO, José Joaquim Gomes. Um olhar jurídico-constitucional sobre a judicialização da política. *In:* **Revista de Direito Administrativo,** v. 245. p. 91.

[12] The expression is borrowed from MACHADO NETO, A. L. **Teoria da Ciência Jurídica**. São Paulo: Saraiva, 1975. p. 120.

[13] A. L. Machado Neto points out that Kelsen was the one who mainly contributed to placing an autonomous epistemological problem of law. Ob cit., p. 136.

[14] "Rightly for this reason, the achievement of individual norm in the process of law enforcement is, to the extent that in this process is completed the frame of the general rule, a voluntary function." KELSEN, Hans. **Teoria**

outside the law, or from strictly legal grounds, but it was necessary to operate a choice, and ultimately a decision.

These are words of Kelsen in this sense:

> To the extent that, in law enforcement, besides the necessary fixation of the frame within which the act will be put, there may also be a place to a cognitive activity of the organ enforcing the law, this will not be a mere knowledge of positive law, but other norms here, in the legal process of creation, may have their impact: Moral standards, standards of Justice, value judgments that we usually designate by everyday expressions as well being, public interest, progress, etc.[15]

Regarding the activity of judicial interpretation, Kelsen came until this point, only identifying the existence of volition in the judicial interpretation of law. He identified, also, that the authentic interpretation could produce norms beyond the possibilities revealed by cognitive interpretation contained in the frame.[16] He did not mind, however, to build a theory oriented to impose limits to that discretion, or even to cast doubt on its legitimacy. That would come to occur later, based on reflections made by theories of argumentation and hermeneutics.

This problem of building restrictions on the exercise of judicial interpretation of law is directly related to the above mentioned constitutional rule of law and fundamental rights rule of law. This is because the atrocities resulting from the post world wars period led to human rights declarations and charters that guarantee rights expressed by vague statements. The impossibility of a priori precision of the meaning of rules would consist on what Herbert Hart described as statements of *open texture*.[17] Examples of these statements would be freedom, equality, human dignity, human rights, public interest, legal security, among others. Parallel to this, these normative statements continued to contain principles, but these principles would no longer be only guidelines for interpretation, positioned on a contingent level related to the rules. Principles would become norms, positioned at the same level of rules, forcing law operators in their observance and fulfillment. Daniel Sarmento notes that "recognition of the normative force of legal principles and the appreciation of its importance in the implementation of law" is a striking feature of contemporary constitutionalism.[18]

However, operate law through principles (or, managing these vague statements) brings some peculiarities to the interpreter. The conflict between principles is not resolved by

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Pura do Direito. São Paulo: Martins Fontes, 2003. p. 393.

[15] KELSEN, ob. cit., p. 393.

[16] Ibidem, p. 394.

[17] The definition of Hart to open texture of law is as follows: "The open texture of law means that there are indeed areas of conduct in which many things must be left to be developed by courts or officials, which determine the balance in the light of circumstances, conflicting interests that range in weight from case to case. " HART, H. L. A. **O conceito de direito**. 5. ed., Lisboa: Fundação Calouste Gulbenkian, 2007. p. 148.

[18] SARMENTO, Daniel. O Neoconstitucionalismo no Brasil: Riscos e possibilidades. *In*: SARMENTO, Daniel (Coord.). **Filosofia e Teoria Constitucional Contemporânea**. Rio de Janeiro: Lúmen Júris, 2009. p. 113.

eliminating, from the legal system, the principle in opposition. For example, the Brazilian constitutional rule which states that the resources of the budgetary allocations will be delivered on the 20th of each month to each legal destination, overrides any rule that provides anything different from that. However, deciding whether some news offend the right to privacy, or expresses the right to freedom of expression and information, involves a conflict soluble only in the face of factual and legal circumstances in the particular case.[19] Therefore, opt between one or another principle as prevailing in the concrete case requires an effort, a very large burden of argument from the judge, as the solution to the case in question does not exist in law.

All this makes it difficult to control any reasonsing versed in the judicial decision. How can the abstract judicial review be justified, without recognizing that its discourse involves also the validity of the norm under discussion? The unpredictability of all situations susceptible to regulation, associated with the contingencies of time and knowledge, which is the basis of the limitations of the discourse of justification, leads to conclude that judicial activity involves not only a discourse of application of law, but also a discourse about its validity. Complex cases involving collision among fundamental rights requires this type of concern.[20]

Therefore, it has been recognized that there is a new theoretical paradigm, a new way of thinking and operating the law, aimed at resolving the conflicts that come in every day to judiciary. If judges were before required only to ensure the law, today they are required to ensure observance of Constitutions, which are windows to rights which are more complex with regard to its implementation.

Even before the normative positivism strong stream, it was already recognized the exercise of political activity by the constitutional adjudication. The difference is that under the premodern law, judicial law-making was legitimate source of law; under modern law, the only legitimate source was the positive law, but judicial discretion was recognized as inevitable when rules were insufficient; under the contemporary law, what was called before judicial discretion can nowadays be named political activity, face to which it has been sought mechanisms for its control. So, with Miguel Carbonell, it might be said that the recent things are the new paradigms of constitutional rule of law and legal theory.[21]

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[19] This is the position of Robert Alexy, who considers fundamental rights as commandments of optimization achievable as far as possible, depending on the factual and legal circumstances in the situation under analysis. ALEXY, Robert. **Teoria dos direitos fundamentais**. São Paulo: Malheiros, 2008. p. 103-104.

[20] The reference to discourses of application and justification of law is an allusion to the theoretical construction of Klaus Günther. For this author, the discourse of justification (or validity) would be valid for the elaboration of legal norms, provided that attended the principle of universality "U", thus defined: "A norm is valid if the consequences and the side effects of its observance can be accepted by all, under the same circumstances as the interests of each one individually." (GÜNTHER, Klaus. **Teoria da argumentação no direito e na moral**: justificação e aplicação. São Paulo: Landy, 2004. p. 67) The discourse of application, or adequacy, of which the legal discourse would be a special case, would be operated only by checking the suitability between the valid law and the case in question. The discourse of application does not discuss the validity of the standard, although it also incorporates arguments from the discourse of justification. It is suggested also by the same author: Un concepto normativo de coherencia para una teoría de la argumentación jurídica. *In*: **DOXA**. Cuadernos de Filosofia del Derecho. n. 17-18. 1995. Source: www.cervantesvirtual.com. Accessed: 07/20/10.

[21] CARBONELL, Miguel. Prólogo: nuevos tiempos para el constitucionalismo. *In*: **Neoconstitucionalismo (s)**. Carbonell, Miguel (org.) Madrid: Editorial Trotta, 2003. p. 10.

3. Legal practice of the political activity of Brazilian constitutional adjudication.

3.1 Preliminarily: what the Brazilian Constitution allows

The political activity of the constitutional adjudication is projected today, in Brazilian society, from a constitutional design that enables the exercise of that activity. Look to the fundamental goals of the Brazilian Republic - art. 3. of the Constitution: build a free, fair and solidary society; ensure national development; eradicate poverty and marginalization; reduce social and regional inequalities and promote the welfare of all without any discrimination. These are goals explicitly confirmed as binding for the fundamental rights rule of law.

Achieving these fundamental goals depends, first and foremost, on the satisfaction of human needs, from the basic to the contingent ones (or, in the latter case, the preferences).[22] Satisfaction of human needs through public actions, and to some extent by actions of individuals, means paying deference to formal and material fundamentality which constitutes human rights stated in the 1988 Constitution. The list of fundamental rights is extensive, not limited to those expressed in Title II of the Constitution (art. 5, § 2).

For the protection and guarantee of those rights, the Brazilian Constitution organizes an institutional frame, providing also tools for its requirement. Constitutional actions, for example (*habeas corpus*, *habeas data*, writ of mandamus, writ of injunction, popular action, abstract control of constitutionality actions), interposed personally or not, express constitutional openness to postulate judicially against any injury or threat of injury to rights. In this context, for its importance and in a more embracing way, fundamental rights to health and education received special protection from the constitutional legislator. The Brazilian legal system prescribes, for example, for the four federal entities: a) common administrative competency to promote means of access to both rights (art. 23, II and V), b) common competency to legislate for actions and programs to protect and defend health and education (art. 24, IX and XII; art. 30, VI and VII), c) interventive measures if the federative entity does not apply the constitutionally required minimum of tax revenues in education and health actions (34, VII, *e* and 35, III), d) basic education as a subjective public right, now extended from 4 to 17 years by the constitutional ammend n. 59/2009 (art. 208, 1), e) percentage of tax revenues tied to stock in these two areas (arts. 198, § 2 and 212), f) funds established as

[22] The Economist Max Neef notes a distinction between human needs in a broad sense and basic human needs in a narrow sense. Neef believes that fundamental human needs are common to every culture, being only their satisfiers switchable historically and culturally. About the distinction, he says: "This combination allows to operate with a classification that includes, on one hand, the needs of Being, Having, Doing and Being, and on the other, the needs of Subsistence, Protection, Affection, Understanding, Participation, Idleness, Creation, Identity and Freedom." And those needs would be a characteristic of all human beings. NEEF, Max. **Desarrollo a Escala Humana:** una opción para el futuro. Santiago: CEPAUR/Fundación Dag Hammarskjöld, 1986. p. 26-27.

sources of funding for activities and services in public health and education (arts. 60 and 74 of the ADCT[23]).

Once required from the state (and from particulars, to some extent) the achievement of the constitutional fundamental goals in order to satisfy human needs, what has been seen is frequently deficient or inadequate actions towards their enforcement. The satisfaction of human needs is limited by not only political but also economic and legal factors.[24] Anyway, being or not within the competence of elected politicians, the fact is that by virtue of the Brazilian legal system any discussion about the implementation of actions involving the guarantee of rights - and in a fundamental rights rule of law, ultimately the guarantee of fundamental rights - can be submmited to judges, even if in the end she decides for not being competent to solve the case. This is evidenced by the openings in the art. 5, XXXV of the Brazilian Constitution - principle of the unremovable adjudication.

In this scenario, categories such as constituent power, self-legislation, sovereignty, and political pluralism, which are fundamental principles of the Brazilian Federal Republic are put under questioning because issues traditionally discussed within the parliament arena may inevitably be discussed and decided within the boundaries of judicial lawmaking. Thus, in Brazilian experience, one has to wonder: in Brazil, although no political issue is virtually immune to judge's discretion (especially considering the aforementioned principle of unremovable adjudication), how should the constitutional provision of those basic principles of Republic (sovereignty, political pluralism) be seen, considering that they are irrepressible through amendments?

3.2 Constitutional adjudication and the institutional justification

As an institutional justification for the political activity of the constitutional adjudication it was presented earlier that the Brazilian legal system today is a fundamental rights rule of law. It is required that the exercise of public institutions actions have as an ultimate goal the achievement of fundamental rights. The commitments of Brazilian Constitution reveal that expectation. Furthermore, if the satisfaction of this expectation is inadequate/insufficient, people have used the courts to obtain the legal goods that satisfy basic and contingents human needs.

The recourse to the judiciary as a forum to obtain such legal goods began with judicial protection of the right to health,[25] and also matters concerning freedom of private initiative,[26]

[23] The ADCT is the Constitutional Act of Transitional Provisions.

[24] As argued in previous work: PEREIRA, Ana Lucia Pretto. **A reserva do possível na jurisdição constitucional brasileira**: entre constitucionalismo e democracia. Dissertação de mestrado. Curitiba: Universidade Federal do Paraná. 2009. p. 29-55.

[25] STF, PET n. 1.246. In this leading case it was discussed the payment of a myoblast cell transplantation for a child patient with Duchene Syndrome. On the occasion, the necessary treatment was performed in the United States and would cost R$ 85,500.00 (covering the treatment and travel expenses). Although the issue was not

reaching today more daring questions regarding moral choices of a particular community.[27] If within emergency and dramatic choices it is more difficult to sustain arguments against judicial interference on political choices, in front of issues which define the political profile of a certain community is a more onerous task.

Because of the deference given by the constitution to the fundamental rights to health and education, and also to the demands for social and state responsability to the satisfaction of such rights, judicial demands are frequent whether for the implementation of government policies designed to satisfy these needs, whether for direct adjudication of those legal goods. When about health, in most cases demands involve granting of drugs not listed in the public system of aid, and also treatments and procedures not covered up by the public health system. When about education, it has been postulated obtaining places in elementary school, because of the free and universal access which is guaranteed in the Brazilian Constitution (art. 208, § 1).

These demands involve controversies about judicial interference on political choices: the power to manage scarce resources, administrative discretion on public policies in social rights and its progressive satisfaction, equal access to universalizable legal goods, access to justice, amongst other issues. Nevertheless, one cannot at all say that the judiciary has been indifferent to such objections. Moreover, using unjustifiably the widespread argument of human dignity protection can result in inconsistencies as to what has occurred, for example, concerning requests for federal intervention for non-compliance of judicial decisions.[28]

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decided by the Court for procedural reasons, a manifestation expressed by one of the Justices, Celso de Mello, drew attention to three aspects of the problem: i) the uniqueness of the case under examination, because it concerned a rare disease, ii) the indispensability of the treatment in question, set as the only mean to save the patient's life, and, iii) the fulfillment of a constitutional duty of the state regarding the right to health care, which is everyone's right indistinctively. Justice Celso de Mello took those reasons under consideration to determine the state of Santa Catarina to pay the treatment, which would be "far from characterizing threat to public and administrative local order", leading to the subsequently often reproduced idea that human life should be prefered when confronted to financial reasons. Source: www.stf.jus.br. Accessed: 09/09/2008.

[26] Examples of the effects of social rights laws into relations among private persons can be taken from ADI n. 1950, where the Supreme Court ruled the constitutionality of state law n. 7.884/92, which grants to students discount tickets in houses of entertainment, sports and culture; ADI n. 2649, where the Court upheld the constitutionality of the federal law 8.899/94, which grants free pass in interstate transportation to disabled; and ADI n. 3768, where it was confirmed the constitutionality of federal law n. 10.741/2003 (the Elderly Statute), at the provision which assures the gratuity of urban and semi-urban public transport to people over 65, although in such trials the Supreme Court failed to address explicitly the issue of interference of social rights in private issues. Source: www.stf.jus.br. Accessed: 09/09/2008.

[27] This applies to ADI n. 3510, where it was discussed the constitutionality of federal law n. 11.105/05 (Biosafety Law), art. 5, which concerns the genetic manipulation of stem cells. The reporter Justice understood for the constitutionality of the Biosafety Law. He built his arguments basically on the premise that the embryo resulting from *in vitro* fertilization has only expectation of *development* and *birth* if inserted into a human womb. Therefore, it deserves separate legal treatment of intrauterine embryo, which has protected its property and non-property rights by law. The reporter Justice further argued that the infra-constitutional legislation (federal law n. 9.434/97) provides that civil personality ends with cerebral death, which leads to the conclusion that life begins with the formation of the neural tube, which would lack in stem cells. Finally, the Justice based his decision on the constitutional provision of the right to life, as a strong argument for further research in support of saving lives of people already born. Source: www.stf.jus.br. Accessed: 12/20/2008.

[28] Up to date, the Supreme Court never upheld requests of intervention on federal states on the basis of art. 34, VI of Constitution, regarding non payment of food budget by public bodies. On the other hand, on the grounds of protecting human dignity, the Court has already accepted the request of interference on public budget to capture funds for health care or to obtain medications. For details, see RCL n. 3982, filed by the State of the Espírito Santo to preserve the authority of the decision rendered in ADI n. 1662.

Anyway, within the procedural constraints of the lawsuit, the judiciary has tried - and it is imperative to do so - to gather as much information to embody the cognition of the case as possible, as it happens, for example, in cases related to the right to health, when in order to investigate the legitimacy of the demand it is important to verify the economic situation of the applicant, the essentiality of the request, the technical feasibility of their care within the public funds, the existing policies in order to satisfy needs related to health, among other measures.

Successive demands for public action in protecting fundamental rights and the responses of judiciary charging its implementation over the past two decades (from the Petition n. 1246, about the Duchenne Syndrome) have led under judicial consideration other issues concerning policy choices, even if the rights at stake do not guard formal fundamentality in the Constitution, and the corresponding liability as a state duty, such as rights to health and education. That's what happens, for example, in sentences that determine the government to build prisons,[29] or decisions that choose to consolidate in time unconstitutional situations because of factual impossibility to return to the *status quo ante*.[30]

On the other hand, political issues can lead adjudication not to act though competent do so, as is the case cited above about the rejection of requests for federal intervention based on non-compliance of judicial decisions.[31]

This scenario reports that relevant decisions to the community are being taken in connection with another power than that typically defined as competent to decide claims about the universality of rights to property and freedom. In addition, other policy issues have already been submitted to the Judiciary and are waiting trial. For example, the possibility of pregnancy termination of an anencephalic fetus,[32] the constitutionality of racial quotas in public universities,[33] the recognition of homosexual unions as family entities,[34] the constitutionality of provisions of the Electoral Act that prevent broadcasters from expressing

[29] These are demands on which prisoners, usually with the help of a public defender, denounce the poor conditions in which they are in prisons, such as poor hygiene, overcrowding in cells, physical and moral violence, sexual abuse, among other situations. In this sense, the prisoners ask to the responsible federal entity an indemnity for the moral damages suffered during the detention. In the courts, decisions are found upholding such requests, based on the need to guarantee the basic conditions to the dignity of human existence - the *existential minimum*, an argument that could override the state's shortage of resources for improving facilities in the prisonal system, and the budget constraint previously set by the legislature. See, for example, Civil Appellation n. 2006.015034-1 - MS.

[30] Such as the ADI n. 2240 filed by the Workers Party against the Government and the Legislative Assembly of the state of Bahia. The lawsuit had as object the declaration of unconstitutionality of state law n. 7619, of March 30, 2000, which created the Municipality of Luis Eduardo Magalhaes. Basically, the establishment of the municipality had come out in affront to art. 18, § 4, of Brazilian Constitution, which in accordance to what determined by Constitutional Amendment n. 15/96 provides that the creation, merge and breakup of municipalities should be given only as provided in federal law, which, however, has not been passed yet. Moreover, on the contrary to the Federal Constitution, only the population of the District of Luis Eduardo Magalhaes (and not the entire "population directly involved" in the case, according to the Constitution) participated in the referendum, which occurred, moreover, before the publication of a municipal feasibility study, and not after, as determined by the Constitution.

[31] STF, IF n. 2.915.

[32] STF, ADPF n. 54.

[33] STF, ADPF n. 186 and RE n. 597.285.

[34] STF, ADPF n. 178.

programs that may degrade or ridicule candidates in the three months preceding the elections,[35] among other topics.

3.3 Constitutional adjudication and the theory of law justification

The political activity of a constitutional court is also the result of a particular understanding of what emerges from the Constitution. This understanding relates to the idea of maximum effectiveness of the Constitution in line to what has been recognized as post-positivist conception of law. Hence Canotilho stating that "dogmatic categories serve today to open up to the judges the interstices of political rights and values."[36] For Canotilho, these categories would be the *realization of rights*, or the opening to judges to realize the constitution; the *balancing of goods and rights*; and the *principle of fiscal responsibility*, with which issues of public policies are discussed.

Take as an example of the maximum effectiveness of the Constitution the principle of security, extracted from the art. 5, caput of the Federal Constitution. Based on this principle, it has already been recognized the State's strict liability for damage arised from lack of actions aimed at maximum effectiveness of this principle.[37] From another perspective, it has also been decided that claims for legal certainty may allow the modulation of the effects of the declaration of unconstitutionality, although absent formal authorization to do so on the case.[38] In other words, the normativity of the principle is expressed in its direct applicability in the concrete case, without legislative mediation.

Concerns about the effectiveness of constitutional norms, accompanied by the recognition that constitutional concretization is made possible by a specific interpretive attitude that overcomes the unbearable indifference of law in relation to morality, was evidenced for example with the new understanding of the Federal Supreme Court about the use of the writ of injunction, under art. 5.o, LXXI of the Brazilian Constitution.[39] That's because the 1988 Constitution no longer could wait for legislative integration to give life to

[35] STF, ADI n. 4.451.
[36] CANOTILHO, ob. cit., p. 90.
[37] STF, STA n. 223. In this case, the Supreme Court accepted the thesis of the strict liability of the public body, determining to the state of Pernambuco to pay all the necessary costs to an implant surgery of a Diaphragmatic Muscle - MDM - in the appellant, by a professional appointed by him. The appellant would have been quadriplegic as a result of assault in a public road in Pernambuco, and filed an indemnity action aiming the state of Pernambuco to pay the the cost resulting from the surgery. Source: www.stf.jus.br. Accessed: 09/10/2008.
[38] STF, RE n. 197.917-8.
[39] Regarding the nature of the judicial pronouncement on writ of injunction, some scholars have long defended the stream of *implementation*, in the sense that the ruling on the decision of the writ has not a merely *declaratory* nature of the legislative omission, but, rather, a *mandatory* one. However, considering the decisions rendered in writs where the Court discussed the strike by public servants, there may be divergence of opinions regarding the outcomes of the decision, whether *inter partes* or *erga omnes*. This is because in such cases it was decided by the *erga omnes* effect, and for this type of judicial review (which is concrete) the effectiveness would be *inter partes*. However, this is one aspect of what has been identified as a rapprochement between the diffuse and the concentrated control of constitutionality, which is not treated in this paper.

the writ of injunction. Hence the renewed understanding of the effectiveness of the writ, built under discussions about the right of public employees to retirement by insalubrity and to strike, respectively under articles 40, § 4.o (amended by constitutional ammendment n. 47/2005) and 37, VII, of the Brazilian Constitution.[40]

Even with regard to the renewed way of thinking and operating law in post-positivist perspective, there is the recovery of legal principles, evidenced by the possibility of using the technique of balancing by the courts. The model of balancing receives harsh criticism, on grounds of being irrational, evaluative, and so resulting in not strictly legal decisions, or in moral choices due to personal preferences of the judge. Fact is that the method of balancing, if properly used (as a technical and consistent effort on reasoning and argumentation), can be a useful tool to control judicial law-making, even if the arguments of the three sub "principles" of the mechanism of proportionality (necessity, appropriateness and proportionality in the strict sense) are presented in an implicit way. Thus, with regard specifically to the discourse of judges, the criticism can be answered in the sense that, whenever the issue is necessarily to be decided by the judge (as a real conflict between the right to human dignity and respect a budgetary principle, for example), the decision should be built taking into account: a) respect for the procedure, b) preference to political choices; c) review of all legal and circumstantial instruments regarding the case d) a clear and reasoned decision.

An effort in this sense was made by the Court of Justice of the federal state of Paraná, for example. The city of Nova Londrina, in Paraná, filed an appeal against decision that rejected the suspension of a previous decision which had determined the supply of drugs Aripripazol to the author of the process. This case is interesting becuse the lawsuit contained details about the funds transferred by the federal government to the municipality, as well as the distribution of such resources to citizens, which provided subsidies to the judge to make his decision. That is, the cognition of the judge was wide enough to be accepted the argument of the budget constraint. Moreover, as it appears from the decision, the judge recognized that health was a universal right for all, guaranteed by the Constitution. However, the fact that the applicant had the means to buy medicine by himself removed the exception of the case. Still, as reported by the magistrate, the action was also filed against the state of Parana, which did not appealed the court when imposed command to supply the drug, assuming, thus, the burden assigned to the municipality by the author.[41]

4. Democratic legitimacy by representation, participation and argumentation: three essential dimensions

[40] The new position of the Supreme Court about the writ was inaugurated at the ruling on the right of public employees to retirement by insalubrity, at the MI's 721 and 758, repeated at the MI's 998, 962, 938, 927, 905, 879, 857, 850, 841, 828, 825, 815, 809, 808, 797, 796, 795 and 788. The same understanding was followed, with some difference about the effects of the decision, at the ruling of the right of public employees to strike, which can be found at the MI's 670, 708 and 712.

[41] TJPR, AR n. 312754001.

Along this paper it has not yet been discussed the legitimacy of the political activity of constitutional adjudication.

In this regard, it can be said at first that the judiciary exercises portion of the state power distributed among the organs of the Republic. The public power that it detains *on* the State is intended to exercise the duty-power to decide, legally, the conflicts that are submitted. However, constitutional adjudication deciding legallly means working on an open and complex constitution, a task that demands the opening to the practiced law, the live law, the policy of law. For example, the idea of epistemic value of decision making, as proposed by Santiago Nino. For Nino, the historical constitution could not fail to admit values in its construction. Values in the construction of rights, values in the procedure that implement them, and this epistemic value is increased when decision making go through dimensions that enrich the knowledge of problems and the discussion necessary to solve them. Nino considered the value of deliberative democracy higher because of its procedural aspects on discussing problems and seeking solutions. However, Nino himself acknowledged epistemic value to individual reflection in certain situations.[42] Thus, one may ask: does the epistemic value of democracy arise from the guarantee of procedural conditions, of substantial conditions, or of both cooperatively? It seems that it can arise from the two of them.

Thus, because judiciary detains a political power oriented ultimately to the realization of fundamental rights - because that is the purpose of the contemporary rule of law - the justification of judicial decisions has to be guided by public and not private reasons. Tastes, preferences and privileges have to be outside the judicial *discourse*.

At this point, the critical in the manner of Duncan Kennedy is important because it details what one might find as intuitively known.[43] Kennedy argues that the work of judges is opened to be exercised under the influence of an *ideological intelligentsia*, in the sense of imposition of a speech written by an elite to defend its interests with pretensions of universality.[44] We embrace this idea, adding another issue. Political activity may consist, in a simple and very limited way, in moral choices in tune with positive law and current constitutional practice. That is because even when it is required from the judge coherence with past decisions related to the same legal principles (given the fundamental principle of equality), the fact is that normative solutions to difficult cases are not always defined in advance by the legal system.[45] That does not mean that judges are not bound by any constitutional, supra-legal, legal, infra, judicial or doctrinal instrumental, given also the need for consistency, reasoning, argument and deliberation. The judge ends up making moral choices, but there is a *cost of legitimacy* in the decision.

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[42] As it is the case, for example, of the three exceptions to judicial review: a) the guarantee of democratic assumptions: b) the cassation of perfectionist decisions; c) the preservation of constitutional practice. (See NINO, Carlos Santiago. **La constitución de la democracia deliberativa**. Barcelona: Gedisa, 1997. p. 273-282)

[43] Cf. KENNEDY, Duncan. **Libertad y restricción de la decisión judicial**. El debate con la teoría crítica del derecho (CLS). Bogotá: Siglo del Hombre Editores, 1999.

[44] Ibidem, p. 62-78.

[45] The theoretical proposal of the chain of law, built by Ronald Dworkin, finds limitations in the requirement that the judge's choices are choices already defined a priori. DWORKIN, Ronald. **O Império do Direito.** São Paulo: Martins Fontes, 1999. *passim*.

And by offering public reasons in their decisions is that the judiciary has the chance to act legitimately. It is a legitimacy *nearly* close to the one Alexy would call *argumentative legitimacy*.[46] Deciding on reasonable grounds in tune with political and legal options of a certain community does not represent, itself (even arguably), the interests of that community; further, it brings sufficient reasons for a sufficiently rational community be able to recognize the judicial discourse as legitimate at all levels of adjudication. People of this community covers from the common citizens until their elected representatives.

In Brazil, the legitimacy of state actions on grounds of representation or participation is insufficient. It has been said, note well, *insufficient*. Especially if that representation is simply decision making and lacking in public deliberation. The ideal of potential universality of decisions expressed by elected representatives is still a state to be reached in an unequal, exclusionary and mass society as the Brazilian's. It still remains the ultimate goal of the principle of self-legislation. The same is valid to direct participation in policy decisions determining the direction of society. Legitimation strictly by procedure cannot be totalizing in a space where people still struggle for the realization of the Constitution.

Therefore, the argumentative legitimacy only exists while the judicial activity is in tune with what a community considers relevant to be decided by the judiciary in a given historical moment. How could it be checked? The acceptability of the arguments of judicial decisions by the individuals directly or indirectly involved is a way. In the words of Alexy, "Constitutional adjudication can only be successful when those arguments which are alleged by the constitutional court are valid and when members, sufficiently many of the community, are willing and capable of making rational use of its possibilities."[47] Furthermore, the position of each power in the existing institutional framework, associated with the social demand for adoption of a certain measure, might suggest the moment when the judiciary is entitled to review commissive actions and omission of elected representatives. It happened in the trial of an injunction concerning the retirement of public employees for insalubrity; it was not what happened at the trial of the constitutionality of the Biosafety Law, for example.

The political activity of constitutional adjudication, however legitimate, cannot remain immune to *constant vigilance*. It is intended to correct omissions and distortions, or unjustified actions of other officials and public bodies, and not simply replace their choices for one another moral point of view. There is a fundamental problem, which lies in the fact of the existence of judicial review in democratic systems:[48] this review is legitimate, but it faces limits and the great difficulty is that these limits overpass what is in the law. It is, as mentioned earlier in this text, a problem to be solved from a political perspective, too, and not strictly legal.

But, how should it be done? The institutional strengthening of the other branches increases the reliability and effectiveness of political decisions, balancing the distribution of power among the public institutions and avoiding a constant reliance on the judiciary. This

[46] It was said "nearly" because we agree with the argumentative legitimacy, but not with a kind of argumentative representation. For more: ALEXY, Robert. Ponderação, jurisdição constitucional e representação. *In:* _____. **Constitucionalismo discursivo**. Porto Alegre: Livraria do Advogado, 2007. p. 162-165.
[47] ALEXY, **Ponderação, jurisdição constitucional e representação**, p. 165.
[48] CANOTILHO, ob. cit., p. 89.

avoidance might be limited, but not prevented. One way, for example, to avoid that issues concerning distributive justice be discussed in the judiciary, in other words, that the judiciary decide the problem of obtaining goods because of difficulties of access to justice (as is the case, for example, of issues concerning distribution of medicines), is the *a priori* control of public accounts and public policy.

The Brazilian Constitution of 88 contains mechanisms to exercise this control through participation and vigilance. A first example would be the proper internal control of budgetary (art. 74, II). Then the external control by population (art. 31, § 3. in the case of municipalities), by the Courts of Auditors (article 71) and both jointly (art. 74, § 2). Parliamentary committees, permanent and temporary, should hold public hearings with civil society organizations (art. 58, § 2, II). In addition, it is allowed the participation and supervision of the population through representative organizations on public policies and social assistance issues (art. 204, II). The constitutional design of public policies regarding social rights suggests that these rights are connected to the principles of progressiveness, social solidarity, universality (the latter insert in the arts. 3, I, 227 and 229), and to equality.

It is also important to mention the popular initiative to law-making (art. 61, § 2), even though procedural requirements make its exercise very difficult.[49] Furthermore, there is the popular vote, compulsory in Brazil for citizens between 18 and 69 years (art. 14, § 1, I). Both represent democratic instruments of popular mobilization for moral choices of the community.

5. Final considerations.

Operate law independently of moral is not possible under the institutional and theoretical dimensions of Brazilian law. The 1988 Constitution holds an emancipatory project in permanent construction, under responsibility of both bodies of the three branches as well as civil society, each within its responsibilities. With regard to the three branches of the Republic, when the actions of one of them transits from the mere status of technique gap to unjustified omission[50] - whether in terms of rights to liberty, whether in terms of rights to equality - the judiciary can be called upon to rule on the correctness of that political action - or commissive omission. Pronouncing about it must be exceptional in relation to the rule of

[49] Although this has not been an obstacle to submit projects of great national impact, as is the case, for example, of the bill from popular initiative which resulted in the recent special (because of its special approval quorum) federal law n. 135/2010, known as the "Law of Clean File", wich prevents politicians with conviction in courts to run for office, among other issues. The " Clean File Bill" circulated throughout the country, having been collected more than 1.3 million signatures on its behalf - which amounts to 1% of Brazilian voters. In 09/29/2009 it was submitted to Congress together with the collected signatures, and the law passed in 06/04/2010. Source: www.fichalimpa.org.br. Accessed: 08/25/10.

[50] A definition of the difference between situations of gap technique and of legislative omission, can be found at CLÈVE, Clèmerson Merlin. **A fiscalização abstrata da constitucionalidade no direito brasileiro**. São Paulo: Revista dos Tribunais, 2000. p. 327-356.

deference to the political choices. However, when judiciary does so, it is obliged to engage the maximum argument, reasoning and strict observance of procedure, without which the activity cannot postulate legitimacy.

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