

Ado 26 and the Consequences of Judicial Activism for Brazilian Democracy

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ABSTRACT: This work intends to debate the performance of the Brazilian Judiciary and possible consequences in the case of Direct Action of Unconstitutionality by Omission No. 26. This is because, at the same time that the stance of the Brazilian Constitutional Court is legitimized through its counter-majoritarian power, it is questioned whether this action is truly democratic, considering that the Judiciary is not a power constituted by popular sovereignty. From this, the aim is to determine whether judicial activism is truly legitimate for the Federal Supreme Court due to its constitutionally foreseen counter-majority function to protect minorities or whether activism, while exceeding the limit of judicial action, is a cause of violation of the separation between the powers, the principle of strict legality and, consequently, a danger to Brazilian democracy

KEYWORDS: Judicial activism; Countermajority position; Democracy; Separation of Powers; Principle of Legality.

I. INTRODUCTION

This article aims to conduct a study on the performance of the Judiciary, activism, and its possible consequences for Brazilian democracy. The topic is of paramount importance today, considering the increasing prominence of the Brazilian Federal Supreme Court, which, through its decisions, has modified constitutional interpretations and given ordinary laws diverse interpretations, bypassing the Legislative Power.

The first part of this study will analyze the classical separation of powers and the legitimate role of the Federal Supreme Court as a Constitutional Court from the perspective of counter-majoritarian control, which was instituted to ensure the rights of minorities and make the fundamental prerogatives of the Constitution effective. However, this role currently faces significant theoretical debates due to the possible consequences for representative democracy and the separation of powers.

Following this, the study will address constitutional limitations in criminal matters, intended to regulate the state's power over individual freedoms so that criminal penalties fulfill their intended function rather than serving as a method for the State to impose its particular will on citizens or act as an exception.

In the third section, the central point of this discussion will be analyzed: Direct Action of Unconstitutionality by Omission No. 26 (ADO-26). In this decision, the Federal Supreme Court, after years of analysis, equated homophobia with the crime of racism, applying the Racism Law due to a legislative gap on the subject. Given this decision, it is pertinent to examine the Judiciary's "power" to "legislate," even in the face of Legislative inaction, and the risks such actions pose to Brazilian democracy. This path was developed in the study to determine, ultimately, whether this judicial action constitutes a violation of the separation of powers and, consequently, the democratic order—a conclusion this study aims to reach.

Thus, the progress of this work required exploratory bibliographic research and the analysis of contemporary judicial decisions that could confirm or refute the presented hypothesis.

II. THE SEPARATION OF POWERS AND THE COUNTER-MAJORITARIAN ROLE OF THE SUPREME FEDERAL COURT IN THE EFFECTIVENESS OF RIGHTS

The clash between the separation of powers and the counter-majoritarian role assumes considerable importance in contemporary times, especially in light of the presumed conflict: on one side, we have the maximum effectiveness of fundamental rights guaranteed by the tripartite division of powers, as described in the 1988 Constitution of the Federative Republic of Brazil, which constitutes an unamendable clause in our legislation. The independence and harmony of powers have been enshrined by national jurisprudence through the system of checks and balances. This method controls power interference and ensures constitutional balance.

However, judicial intervention, particularly in the legislative sphere, remains a point of discussion concerning the interference of powers, the realization of fundamental rights, and, consequently, the maintenance of democracy. In this context, the preservation of democracy is initially linked to the notion of the rule of law and the people as active and concrete subjects, bearers of prerogatives and responsibilities inherent to the exercise of sovereign power (FACHIN, 2017, p. 231).

Nevertheless, it is essential to recognize that analyzing democracy solely from a representative perspective is insufficient for exercising and satisfying the fundamental rights guaranteed by the Constitution. Democracy is also based on the ideas of responsibility, freedom, and, above all, equality (COMPARATO, 1997, p. 213). From this perspective, the majority of society often imposes its will on the minority, not only in political representation but especially in rights. Thus, laws enacted by the Legislature may be just or unjust, resulting in what Waldron calls the "tyranny of the majority" (WALDRON, 1997, p. 1369). According to Ferrajoli, the people are not only recipients of fundamental rights but also their holders, making any attempt to equate personal autonomy with majority decision-making an organicist conception of democracy (FERRAJOLI, 2001, p. 5).

This gives rise to the necessity of ensuring that one segment of society is protected from the encroachment of another through the Judiciary. By upholding the system of checks and balances, this branch of power ensures the effectiveness of constitutionally established rights, even when Executive and Legislative acts deviate from the Constitution (HAMILTON, 2004, p. 1395).

In this scenario, Constitutional Courts are seen as the best tools to uphold fundamental rights, as judges are deemed "better positioned" than legislators to understand popular demands (WALUCHOW, 2005, p. 16). In Brazil, the Supreme Federal Court (STF) stands out as a counter-majoritarian body, acting as the ultimate interpreter of the Constitution and safeguarding the fundamental rights of minorities as a cornerstone of the Democratic Rule of Law (SCHIER, 2016, p. 258), ensuring fundamental minimum rights for all (OLIVEIRA, 2018, p. 204). Furthermore, according to Bickel, a judge's role in opposing majority representation in controversial and significant issues helps prevent distortions in constitutional interpretations (BICKEL, WELLINGTON, 2023).

The Judiciary is called upon to act when the other branches fail, becoming the sole protagonist in ensuring rights. With the rise of constitutional supremacy worldwide, Constitutional Courts have become sensitive institutions responding to the demands of groups systematically excluded from the public sphere (HIRSCHL, 2004, p. 71). By judicializing such issues, not only is political accountability for unpopular decisions avoided, but it also facilitates the inclusion of specific topics in the political agenda, achieving rights through a strategic avenue that is simpler, faster, and less costly than the legislative process (GALANTER, 1974).

Since the implementation of the 1988 Federal Constitution, there has been a strengthening of constitutional jurisdiction and an increase in constitutional review mechanisms in Brazil, significantly altering state functions and granting the Judiciary special prominence (OLIVEIRA, 2018, p. 198). However, it is crucial to emphasize that the Supreme Federal Court's counter-majoritarian role in protecting minorities does not exempt it from adhering to other constitutional rules, as failing to do so could transform it into a tyrannical power. In this context, the Judiciary assumes a new democratic role.

The Constitution sought to prevent power encroachment by establishing the separation of state powers, assigning the Legislative Branch the primary function of norm production under the majority principle, which is fundamental to democratic systems (KOLLER, 2018, p. 507).

II.1. THE LIMITS IMPOSED BY THE CONSTITUTION IN CRIMINAL MATTERS

Recognizing the importance of the Democratic Rule of Law in applying the constitutional text is fundamental. It operates negatively by setting limits on legislative, judicial, and administrative activities, preventing results that contradict constitutional principles (OLIVEIRA, 2018, p. 113). Conversely, it also operates positively by encouraging all branches to act in favor of upholding principles. From this perspective, the legislative function is legally characterized by its ability to innovate within the legal framework, creating previously unrecognized rights and obligations (BANDEIRA DE MELLO, 2008, p. 36).

The primary purpose of the supreme law is to protect fundamental rights and freedoms while also maintaining the separation of powers and legality in administrative activities, eliminating arbitrariness from public authority actions. The goal is to ensure that the state does not interfere in individual relations, except to guarantee the coexistence of individual freedoms through legal norms (LOURENÇO, 2016, p. 402).

This underscores the necessity of affirming the state's position within the Constitution and reinforcing the principle of legality, particularly within criminal and tax law. However, this discussion will focus exclusively on criminal law.

Through strict legality, the legislator is required to explicitly define all prohibited conduct, ensuring that criminal laws are prior, clear, and written. This ensures that individuals are aware of what is criminalized and provides the state with a legal foundation for punishment (LOURENÇO, 2016, p. 405). Hermeneutic interpretation also supports this logic: as Carlos Maximiliano teaches, expansive legal rules should be interpreted broadly, while restrictive rules should be interpreted narrowly (MAXIMILIANO, 2018, p. 102).

The principle of legality serves as a constitutionalization marker for criminal law, indicating that the state is bound not only by enacted laws but also by inalienable rights enshrined in the Constitution (SCHMIDT, 2010, p. 373). It legitimizes criminal law by imposing both negative and positive limits on punitive power.

From this perspective, the Federal Constitution enshrines this principle in Article 5, II: "No one shall be required to do or refrain from doing anything except by virtue of law." Here, "law" refers to formal legislative acts enacted by the Legislative Branch and sanctioned by the Executive (ALVES JUNIOR, 2015, p. 179). Materially, it must align with the broader legal framework, ensuring judicial security.

Thus, legality is divided into four key axioms: *nullumcrimen, nullapoena sine legepraevia* (criminal norms must precede the criminal act); *nullumcrimen, nullapoena sine lege scripta* (only formal laws can define crimes and penalties); *nullumcrimen, nullapoena sine lege stricta* (criminal laws must be as precise as possible); and *nullapoena sine legecerta* (vague expressions cannot create criminal norms) (ZAFARONI, 2011, p. 22).

Ultimately, legality protects against judicial arbitrariness, ensuring greater security for individuals, given that criminal law materializes through coercion and penalties (BRANDÃO, 2014, p. 79).

III. ADO 26: JUDICIAL ACTIVISM IN CRIMINAL MATTERS AND ITS REFLECTION ON DEMOCRACY

Notwithstanding constitutional limits, the performance and configuration of the Supreme Federal Court within the framework of the new theory of separation of powers—understood from the perspective of judicial activism—will impact the evaluation of how the judicial function is exercised. This can be perceived according to the institutional role attributed to the Judiciary in each system.

In Brazil, even though we lack a precise definition of what judicial activism specifically entails, it can be understood, at first, either as an excessive interference in society (PÁDUA, 2015, p. 1141) or as a powerful antibiotic against the crisis of political representation (RAMOS, 2010, p. 104), depending on the doctrinal perspective adopted. A reflection on state functions becomes urgent, especially regarding the influence of constitutional jurisdiction, its limits, and its foundations of legitimacy (MORAIS, 2004, p. 5).

In this context, as an agent of the crisis of political representation, judicial activism refers to a proactive stance by the Judiciary, where, in theory, it uses constitutional precepts as principles to expand the scope of certain rights and extend the reach of a decision (FLACH, 2017, p. 255).

One of the consequences of this approach is the Judiciary's encroachment upon the Legislature's exclusive role in the norm-creation process, leading to the demise of a strictly positivist normative model. It suggests that the norms enacted by the Legislative Power can no longer keep up with the evolution of personal relationships (MORAIS, 2004, p. 1). As a result, principled law, with an abstract and generic nature, becomes applicable, as proposed by Dworkin. Thus, judicial activism represents a borderline situation—a fluid yet necessary boundary between two distinct worlds: politics and law (ROCHA, 2015, p. 123). Above all, it is characterized by the necessity for the Judiciary to provide more concrete responses to social demands.

Within this perspective of judicial activism as a guarantor, one of its main advocates is Luís Roberto Barroso. According to him, this stance is justified because contemporary society identifies more with its judges than with the Legislative Power as a whole, given Brazil's ongoing political crisis. Another significant aspect is that the new composition of the Supreme Court is highly committed to upholding constitutional values and principles.

Furthermore, the Supreme Federal Court is considered a more democratized environment than the National Congress, given that judges are appointed through public selection processes, whereas the electoral process requires massive financial resources to fund campaigns (BARROSO, 2014, p. 21).

From this perspective, determining the content of constitutional norms is increasingly shaped by the jurisprudentialization of the Constitution—that is, defining the constitutional text through Supreme Court decisions, leading to constitutional norm mutations (MORAIS, 2004, p. 2). In this sense, the idea of rethinking positive law based on new paradigms that are sensitive to collective needs is advocated, creating a new legal rationality. In contemporary Brazil, this justifies a rupture with the pyramidal system, which has traditionally been presented as a coherent whole that theoretically excludes contradiction and discontinuity, forming a set of hierarchically structured norms connected by logical and necessary relations (SCHNEIDER, 2016, p. 151).

Linking this idea to the Judiciary's broader and more intense participation in implementing values, it is understood that judicialization occurs to pacify conflicts when the Executive and Legislative Powers fail to act (RALHO, 2016, p. 88). From this perspective, activism does not necessarily violate constitutional principles or the separation of powers. Instead, it is reassessed through interdependence and reciprocal subjection between state functions. It is deemed acceptable when its objective is to ensure harmonious action among all branches, aiming to restore balance caused by the expansionism of the Legislative and Executive Powers in recent decades (BACELLAR FILHO, 2011, p. 5).

However, this stance requires recognizing that the Supreme Federal Court is not acting within its legitimate counter-majoritarian function but rather in an activist manner that clearly exceeds constitutional limits. This is because interpretative techniques are restructured, reducing rights to values and interests, loosening judges' obligation to rule based on prevailing norms, and consequently opening space for discretion and arbitrariness (GALVÃO, 2014, p. 192).

According to Elival da Silva Ramos, judicial activism should be understood as the exercise of judicial function beyond the limits imposed by the legal system itself, to the detriment of the Legislative Power. It does not involve the characteristic exercise of lawmaking but instead distorts the typical function of the Judiciary, encroaching insidiously upon the core functions constitutionally assigned to other Powers (RAMOS, 2010, p. 309).

Thus, asserting that judicial activism is merely a consequence of the inertia of other powers is an imprecise conclusion. Lênio Streck supports this view, arguing that judicial action can be shaped by judges' personal preferences or conceptions, making it a discretionary practice. In this case, the judge effectively creates a regulation for a specific case that was not previously supported by law—that is, it was an issue lacking prior legal regulation.

Therefore, it is nothing more than a loophole in the system that covertly legitimizes judicial arbitrariness (STRECK, 2011, p. 96). Decisions made within this framework are highly debatable, as they often

lack sufficient argumentation and are overly creative, exceeding the interpretative limits of judicial decision-making while disguising themselves as the judicialization of politics (PENNA, 2016, p. 59).

These interpretations can be validated by simply analyzing the Supreme Federal Court's rulings in recent years. It must be recognized that we are facing the most activist Constitutional Court in Brazilian history, ruling on issues such as abortion in cases of anencephalic fetuses (BRAZIL, 2012), nepotism (BRAZIL, 2013), criminal and electoral jurisdiction (BRAZIL, 2014), and even the creation of new criminal offenses—without knowing whether those elected by the people would have legislated in the same terms (RALHO, 2016, p. 99).

However, it is in the criminal sphere that judicial activism becomes most dangerous. From a protective perspective, certain powers are exclusively assigned to the Legislative Branch, enshrined in the Constitution precisely to limit not only the Executive Power, as in the past, but also the other branches, ensuring they do not infringe upon fundamental rights. As discussed in the final chapter of this study, one such principle is the strict legality in criminal matters.

A paradigmatic ruling in this regard is the decision on the criminalization of homophobia. Since 2013, the Supreme Federal Court has been handling Direct Action of Unconstitutionality by Omission No. 26 (BRAZIL, 2019), filed by the Popular Socialist Party, seeking a declaration of unconstitutionality due to the National Congress's failure to protect the LGBT community from exposure and serious offenses against their constitutional rights.

The Direct Action of Unconstitutionality by Omission is part of the concentrated control of constitutionality, filed directly with the Supreme Federal Court by those entitled under Article 103 of the Constitution. Barroso explains:

"It is an objective process of constitutional oversight, affected by the alleged normative gap or the existence of a normative act deemed unsatisfactory or insufficient. It is not intended to resolve disputes between litigating parties but rather operates solely on the normative level" (BARROSO, 2012, p. 277).

The National Congress, by failing to legislate to create a criminal offense that punishes actions arising from homophobia, would be violating its duty to protect human dignity and the constitutional mandate to criminalize actions that infringe the fundamental rights guaranteed therein.

Once the inaction of the National Congress was correctly recognized by the lead vote of the rapporteur, Minister Celso de Mello, the Supreme Federal Court, by a majority vote, acknowledged the need to protect the LGBT community through an alleged interpretation in accordance with the Constitution, considering the advances of society since its promulgation in 1988.

Moreover, according to the Minister, by ruling in favor of the action to temporarily equate homophobia to the crime of racism until the National Congress legislates on the matter, the Court would not be violating the principle of criminal legality, nor infringing on the separation of powers through a breach of competences, since this pertains to the counter-majoritarian function typical of the judicial power, established by the Brazilian Constitution itself and the Judiciary Reform introduced by Constitutional Amendment No. 45/2004. As requested by the petitioner, the rapporteur used the precedent of the aforementioned HC No. 82.424/RS, since, analogically, the same constitutional protection given to Jews should be extended to the LGBTI+ community.

Although without practical repercussion, Minister Ricardo Lewandowski was responsible for opening the debate by arguing correctly that the judicial intervention should be limited to avoid violating powers and offending democratic rules. Even though it is the legitimate counter-majoritarian function of the Supreme Court, he argued that it could not invade the legislative power's competence, which it would be doing by equating such conduct. According to the Minister, the previous position held by the Court was one of utmost respect for criminal legality, so that if such conduct were equated, it would represent a genuine analogy in *malan partem* and consequently violate the very constitutional guarantees of the principle of strict legality.

Notably, what the Supreme Federal Court did in this case was not a counter-majoritarian function, as it would be argued, but a true legislative exercise, creating an autonomous criminal offense that criminalizes conduct that was previously not prohibited by the legal system, not respecting the mandates that criminal law

must be certain, written, strict, and, above all, prior. The truth is that legislation was created on past facts, which is prohibited by the Brazilian Federal Constitution.

After the Supreme Court's analysis, in June 2019, homophobia began to be applied as a crime, using Law 7.716/1989 – the Racism Law – as an analogy in the legislative gap until the National Congress passes legislation on the matter (astonishingly, in 2024, this still hasn't happened!). Only Ministers Lewandowski and Toffoli understood that homophobic conduct could only be punished by a law passed by the legislature.

In light of the decision, it is possible to observe the active role of the Supreme Federal Court in conflict with the principle of criminal legality. It is also important to highlight that this does not only occur within the scope of the Court's collective decisions. As the Supreme Federal Court has been acting strongly through the individual decisions of its Ministers, one can also perceive a dual counter-majoritarian action, both against the legislative majority and against the majority of its own members. Thus, if its full-body decisions are already problematic, without the filter of the majority, a decision, whether majority or counter-majoritarian, becomes even more uncertain and unpredictable, and the supposed constitutional control becomes more difficult to justify (ARGUELHES, 2018, p. 29).

What is also evident from this decision is the realization of Schneider and Silva's concept, where it becomes clear that through the model of judicialization of demands, the regulatory laws and matters are being emptied, with the judiciary now tasked with freely presenting the arguments and justifications for their rulings, where decisions can differ from one another (SCHNEIDER, 2016, p. 149). Additionally, it is clear that the Constitution is being devalued in favor of these new "legislations."

In this context, although there is a real need to enforce the application of criminal law or a legitimate social concern to transform judicial actions into effective guarantees of fundamental rights, one must recognize that what is happening at the moment is a distortion of criminal dogmatics and its pillars of legitimacy, attempting to convert punitive law into an instrumental tool for a supposedly immediate and irresponsible response to society (GUIMARÃES, 2007, p. 107).

In truth, the Judiciary's role is only to evaluate the legality, legitimacy, and intrinsic provisions of institutional objectives supported by proportionality. This does not mean it is free to intervene however it wishes. It is not its role to actively guide the activities of the Legislative Power (PSCHEIDT, 2016, p. 37). Its function is to ensure that the Legislative Process is procedurally just and correct, with individual guarantees protected, even in this process (PSCHEIDT, 2016, p. 42), without exacerbating an already existing democratic crisis.

Therefore, while judicial activism may be discussed from the perspective of citizen protection, fundamental rights must be guaranteed, establishing binding effects for public authorities. It is the State's responsibility to adopt measures to protect these rights (PETER, 2015, p. 74). In this perspective, one cannot ignore that among such fundamental rights, specific protections in criminal matters exist, precisely to prevent the state from unjustifiably attacking the citizen, privileging the separation of powers.

Returning to the initial concepts brought in this text to justify the Judiciary's intervention in the protection of rights, the idea of the "government of tyranny" proposed by Waldron was discussed. However, it is already clear that Sartori disputes Waldron's idea, arguing that it is impossible to characterize such a state in contemporary Western democracies, as the concept of a tyrannical majority must necessarily be associated with an electoral majority identified by class, race, or party. The identifiable groups within this characteristic are the minorities, usually formed from such gatherings. Mass majorities, in a constitutional sense, are ephemeral, diffuse, and spread-out collectives, which dissolve election after election (SARTORI, 2017, p. 104), hence the difficulty in characterizing them as tyrannical.

Despite this, the judicialization of fundamental rights was brought precisely in the protective sense for minorities against the tyrannical majority, as an advance from the reformulation of the classic separation of powers. In Paulo Schier's view, it was only when this judicialization process reached a dangerous and excessive point that the relationship between powers began to be rethought (SCHIER, 2016, p. 259), as the separation of powers returned to the center of the debate as a limitation on the Judiciary's *modus operandi*, due to democratic deficit. Hence the need to debate from now on the criticisms of this judicial approach, considering the potential

risk to democracy.

As highlighted throughout this work, Luís Roberto Barroso acts as a major defender of judicial activism. For him, the Judiciary's democratic deficit is no greater than that of the Legislative, given its current crisis of representativity, legitimacy, and functionality, which calls for political reform (BARROSO, 2009). After all, when discussing the possibility of a democratic crisis, it is important to emphasize that it is not only the Supreme Federal Court's actions and representativity within democracy that should be considered, but also a proper legal crisis. This is because a crisis of legality exists, as the legislation itself is not being enforced, nor is the Constitution (SCHNEIDER, 2016, p. 148).

However, one must recognize that Barroso is mistaken, as judicial activism, as seen, can be a harmful practice taken to excess, trying to reduce the Constitution to an inconvenience that needs to be discarded while issues in life invoke the creation of law. Moreover, the author also errs when presenting the idea that the Supreme Federal Court exercises a representative function (VIEIRA, 2008, p. 445).

It is necessary for only one of its functions to be applied. The Supreme Federal Court cannot try to legitimize itself through popular support while simultaneously acting as a counter-majoritarian force, as that would imply the Court being empowered to take whatever position it desires, like a divine representative or as a Moderator Power endowed with "Supremocracy," completely ignoring the existence of Articles 2 and 60, §4 of the Brazilian Constitution of 1988 (VIEIRA, 2010, p. 21). On the other hand, the Supreme Federal Court does not exercise a representative role, as it does not have the legitimacy to propose amendments or legislate, and therefore, does not carry out the popular representation it seeks. Such a function, according to the Constitution, is only carried out by the Legislative and Executive Powers, both democratically elected, under the aegis of representative democracy.

Judges do not receive validation from the ballot box, they do not undergo legitimate electoral processes, and they are not replaced every four years. They are not representatives of the people. Therefore, they do not act democratically but rather republicanly. Judges should not act in accordance with the political feelings or desires of the population, but rather judge in accordance with the Law and Justice (ALVES JUNIOR, 2015, p. 183).

Thus, this is not a quantitative critique of the decisions of the Supreme Federal Court or even of its ministers individually, but rather the ability of the Ministers to influence the legislative status quo (ARGUELHES, 2018, p. 15). Judicial activism, as a tool, diminishes the law's uniformizing role, judging cases freely without considering the previous experiences of their peers through jurisprudence, meaning that legal rules are not created uniformly, diminishing legal certainty and creating a true state of judicial anarchy (GICO JUNIOR, 2015, p. 483).

Intrinsically related to the separation of powers is the principle of criminal legality, as already discussed in a previous chapter. This is because the criminal offense, as an abstract model of behavior that should individualize the prohibited conduct, can only be created by the Legislative Power, as the theory of separation of powers dictates. In effect, the technical alienation of politics and the transfer of this role to the judiciary directly affects the formal aspects of criminal typification. On the other hand, the legal practitioner applying criminal law tends not to consider the material content of the offense, which represents the protection of the legal asset (BRANDÃO, 2014, p. 60).

In this case, one cannot forget that law is a norm, based on the basic premise translated by Hans Kelsen's thought. Neither judges, nor administrators, nor even legislators can deviate from the basic normative commands derived from the Constitution without due process (PETER, 2015, p. 81), among them, the principle of criminal legality. Thus, respect for hierarchies and the Constitution as the highest norm is found not only in the respect for normative production techniques, but also in the need for the content of the created norm to align with the values present in the Constitution itself, so that judicial decisions must also submit to this analysis (PENNA, 2016, p. 88).

Given these perspectives, the Judiciary's protagonism constitutes a risk to democracy and compromises the balance and harmony of powers, authorizing judges to make decisions based on personal preferences and without the necessary information, which is typically available only to the Legislative and Executive Powers

(KOERNER, 2013, p. 77), thereby acting in true disrespect for the substantial normative limits of the judicial function (ROCHA, 2015, p. 121). This is a threat to the democratic regime, the majority principle, and the principle of popular responsibility, in the sense that the people choose their representatives (MORAIS, 2004, p. 6) and, consequently, the law emanating from them.

Therefore, a subversion of the limits imposed on the creative activity of jurisprudence is provoked, inevitably affecting other state functions, particularly the Legislative Power, and representing a serious assault on the principle of the separation of powers (RAMOS, 2010, p. 117) and on strict legality.

From this same point of view, it cannot be overlooked that the practice of judicial activism or judicialism has been generating destabilization in legal relations by undermining the predictability of decisions made by the bodies applying normative provisions and by infringing on the stability of already definitive legal relations (RALHO, 2016, p. 89). Thus, activism also causes instability, ultimately granting the judge a power to create norms that is alien to the state organizational model based on the doctrine of the separation of powers and the prior, written, strict, and certain legality. From this will come legal insecurity, moving away from the normativity of the law to give preference to a specific interpretation of a particular constitutional principle, which may be customary, analogical, or even intrinsically related to the judge's ideals, thus causing uncertainty regarding the content, leading to unpredictability in judicial decisions (ARGUELLES, 2006) and probable social injustice.

The Judiciary cannot override the separation of powers and the fundamental guarantees of criminal legality of the citizen under the premise of giving the criminal law greater satisfaction or protecting a certain social group. It is its duty to interpret criminal law in its terms, ensuring that rights are protected against undue state intervention, and it cannot be the sphere of power that offends the protection granted by the Constitution.

This is because, as previously emphasized, all public power activity is bound by the principle of legality. At this level, all are subject to the general and abstract laws that govern their form and exercise, and its observance is also part of the legitimate activity of judges. Furthermore, all the powers of the state are at the service of fundamental rights, through a limiting incorporation in its construction, meaning that one of the prohibitions is to harm the rights to liberty (FERRAJOLI, 2001, p. 856). It is in this sense that Zaffaroni also argues, as the most dangerous combinations occur between phenomena of technical alienation of politicians and political alienation of technicians, creating a void that allows technical form to any political discourse (ZAFFARONI, 2005, p. 77).

For the principle of the separation of powers to continue to pursue the ideal for which it was created — to distribute state power in a balanced and harmonious way among all — it is necessary that the delimitations of each sphere's attributions are respected, observing not only legality but also equality of rights, because the unrestrained expansion of these attributions causes a mismatch between the lines that separate the powers, emptying their content and generating confusion among them (RALHO, 2016, p. 90).

According to Lênio Streck, judicialization is not a problem in itself, since it occurs in most democracies as a natural cause. It is activism, as a behavioral problem of judges, that is causing the weakening of one Power to the detriment of the other, making the separation of powers confusing and meaningless (STRECK, 2011, p. 98). Therefore, it is not said that judicial action is illegitimate in any measure. It is an integral and inherent part of legislative and administrative activism necessary for the exercise of constitutional competencies distributed between the powers (PETER, 2015, p. 82). The interpreter is granted the power to create the norm, as long as it is derived from the normative text, with no possibility of exercising creativity that transforms the normative base and causes the invention of law (PENNA, 2016, p. 68).

This supposed overcoming of the traditional conception of the division of powers cannot be used as an argument for the normative avalanche produced by the Supreme Federal Court. Its limits, excesses, and possible consequences must be evaluated from the premise that only the other bodies of power have the constitutional competence to, within the democratic game, set the limits and contain these possible excesses, which, if monopolized by any of them, becomes inadequate for democracy (PENNA, 2016, p. 82).

And in this perspective, democracy develops when its free choices are guaranteed to society. This is because the judge's duty is to give the law a fair interpretation, to be faithful to the people's choice by the

legislators, and not to think that they have a better idea for a specific case, bypassing the legal channels. One thing is to ensure what is prescribed by the Brazilian Constitution, another entirely different thing is legislative innovation or non-existent law, causing a true innovation in the legal system (RALHO, 2016, p. 100). This role is exclusively given to the Legislative Power, democratically elected and representative of the people; and so it should remain.

IV. FINAL CONSIDERATIONS

The counter-majoritarian action can be seen as an adequate representation of the Judiciary in the interest of minorities, especially because the Legislative Power is subject to various reasons for not making a series of political decisions. However, the delimitation of the separation of powers is not easy when analyzing concrete cases.

The so-called judicialization of rights, which leads to the creation of protective legislations for certain groups or social strata, while often reproducing the very desires of democracy, including through the application of constitutional precepts, can subvert the original ideal: the very protection intended by the democratically conceived law when the analyzed situation involves business relationships. The confluence of legislative and judicial competences can provoke undesirable effects, especially when considering a free-market system (RALHO, 2016, p. 100).

It is a perspective of rights protection, through the control of a power that is not majority-based, but precisely for that reason, exercises effective protection. However, even with this complementary relationship between powers, there are some constitutional core principles that cannot be affected, even under the aegis of minority protection. Among them, we find the separation of powers and penal legality.

It is in this perspective that judicial activism politically invokes a discussion of legitimacy. While legitimizing itself as an instrument for guaranteeing rights and constitutional guarantees, it can also violate them, given its action in balancing rights that are deemed more important and others that, in theory, are deemed less important. The actions of judges are seen by many as necessary due to the crisis of political and democratic representativity that we are supposedly facing today.

However, this excessive judicial action and activism, as an overreach of constitutional limits, is responsible for interpretive deviations and various causes of violations of constitutional norms. Penal legality and the separation of powers were constitutionally conceived instruments to limit the power of the State, not only as a manifestation of the Executive Power but in all spheres. In this regard, these principles must always be respected, under penalty of causing an imbalance in the democratic system.

Moreover, the perspective of activism as exceeding limits also causes significant legal uncertainty within the Brazilian legal system, as there are no formulated parameters for this action, given that the Judiciary is not represented by popular representativity and judges can still rule according to their individual positions and prejudices.

Thus, activist judicial action represents an undeniable danger to democracy, as a justice system must guarantee legal certainty in the sense of transmitting confidence to the parties regarding a norm and how it is applied, and further, that this stance will not be modified. This is an essential, though not sufficient, condition to ensure the satisfactory development of an environment, as well as its personal and economic relationships.

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