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Constitutional Hermeneutics: The role of the Judicial Power in the concretization of fundamental rights

Giselle Feliz Santiago[1], Olavo Bilac Quaresma de Oliveira Filho[2]

[1]PhD student in Law, Postgraduate Program in Master, and Doctorate in Law, UNICEUB, Brasília, Brazil
Email: giselle.santiago@sempreceub.com
[2]PhD of Biotechnology Applied on Agriculture, Department of Environmental Engineering, UEAP, Macapá, Brazil
Email : olavo.filho@ueap.edu.br

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Abstract *— Within the limits of this production, we will focus on working on a specific theme, namely, the role of the Federal Court of Justice* (STF) *in fulfilling the defense of fundamental constitutional principles and in the consolidation of legal certainty. To do so, we will open a theoretical discussion framework about the evolution of ideas that guide and interfere in the performance of rights operators, in a way that results in a process of realization of fundamental rights and guarantees indicated in the constitutional text. In this sense, we defend the thesis that, within certain limits, the role of the Judiciary is essential to ensure the Democratic State of Law.*

I. INTRODUCTION

In the development of this work, we will present reflections on legal hermeneutics, models of constitutional interpretation, the possibilities, and limits of the Judiciary, having as focus the controversy and theoretical debate, in the academic and legal scope, which revolves around the phenomenon very in vogue in the actuality that is judicial activism. Through this, we will seek to contribute to the analysis on the subject to try to understand the real effects of this role of the Judiciary, especially in Brazil.

In the context of this work, we will present opposing views on judicial activism, based on the analysis of several authors. In the first chapter we will confront the theoretical, philosophical, and methodological perspectives of two great schools of legal thought, namely, Formalism and the Realist School. In the second chapter, we will analyze the approaches of authors who have developed another understanding of the social and judicial role of law enforcers.

We will approach the role that the Judiciary can and should incorporate in its performance, in search of the defense and effective fulfillment of the Constitution. In this sense, the issue of judicial activism enters the order of discussions raised to collaborate with the notion that the Judiciary must work to ensure the fundamental rights provided for in the constitutional text, even if the other powers of the Republic ignore them or try to violate. Therefore, we will address the issue of judicial activism as a way for the STF to guarantee fundamental rights, of a constitutional nature, promoting the legal security of the citizens of our Democratic State of Law.

Finally, we will end with the conclusion, resuming the fundamental points addressed in the development of the work and evaluating the importance of judicial activism in the exercise of the Judiciary.

II. FORMALISM X REALIST SCHOOL

In law, from a philosophical point of view, the question that first arises is the following: how should law be interpreted? And along these lines, we start from the perspective of the so-called legal formalism, a current of thought in the field of law that is very common to be found in legal literature, and which fundamentally derives, in its systematic structuring, from the reflections of Hans Kelsen[1].

It is the line of thought that states that law is science and, in this sense, the interpreter, in the operation with the law, must act as the scientist acts with his object of analysis, having as difference only his object of study, in this case, for the jurist, to legal norms, and, for the scientist, physical and chemical phenomena. Therefore, all value judgments must be discarded.

According to this perspective, the analysis of those who dedicate themselves to the science of law is also an analysis as objective as that of the scientist, hence the idea consolidated by Formalism of separating law from morality. Not that the contents of legal norms do not have moral relevance or that they do not suffer interference from a moral dimension, even because legal norms translate moral conceptions, but the operator of law, according to this line of thought, must assume an eminently juridical, that is, the central idea is that the interpreter of the norms does not have a supra-moral protection of the positive law[2].

The law would have a systemic unity, and it is up to the interpreter, when applying the law, to make use of the techniques of interpretation, which are learned in universities, such as, for example, resorting to analogy, the basic syllogism of the major premise, minor premise, and the conclusion. of the law, systematic, teleological, historical, literal, authentic and doctrinal interpretation. In short, these are all the mechanisms that the law enforcer must organize the discovery of facts and say what the law is.

The final decision using this process, in principle, would not be a choice of the interpreter, but the necessary result of the exercise of logical-legal reasoning based on these interpretive mechanisms. Therefore, it is a judgment of cognition or a judgment of discovery, as opposed to a judgment of creation, or of innovation. This understanding requires as a presupposition that the legal order consists of a rational universe of doctrines and laws capable of reducing the apparent empirical diversity of law in a systemic and non-contradictory unit. Therefore, value judgments as well as political judgments should be removed[3].

It can be seen that this type of interpretation supposedly has a very significant value in terms of legal certainty, since this system gives us an important level of certainty of the law put forward, as being a valid law that provides us with the certainty that judges they will interpret the law according to the basic canons of this rationality, given by a teleological method, and so that there will be no big surprises in the interpretation of the law, as well as there will be no innovations in this sense, which guarantees a certain security for the citizen.

From the 1920s onwards, Legal Formalism began to be attacked by the so-called Realist School, or School of Free Law[4]. This school fundamentally wished to introduce what they called the human element into the evolution of law, that is, instead of emphasizing "doctrinal science" and concentrating on rules as material for analysis, the Realists claimed that the truth of legal decisions it was in the social philosophies, motivations, and mental attitude of the judges. Law enforcers cannot be blind to the social reality of the law, and even if in their decisions they do not specifically refer to considerations of the social effects they will provoke, these issues must always be present as a justifying background for the decisions.

The judicial decision would thus constitute an essentially creative exercise linked to moral and political values. In other words, the conception of the Realist School is diametrically opposed to that of Legal Formalism. In this, we have an almost total freedom of the judge to create the law, based not on a dogmatic organization chart structured in the codes of laws and doctrine, but focused on social reality, the present and the problems that occur in concrete life. Therefore, in the Realist perspective, the judge himself makes the law, that is, the law would not be exactly what is contained in the Code, but what results from the interpretation and, so to speak, of the decisions of the courts[5].

From the realistic conception, it follows that law would not be a science in the molds conceived by Legal Formalism and that value judgment is essential in the solution and application of law.

So far, we are referring, therefore, to two distinct and contradictory poles of interpretation of the law. However, between the two poles some intermediate solutions emerge, among which some of them provide recent contributions to legal philosophy and the legal theory of interpretation, which is the case of an important English philosopher named Herbert Hart (1907-1992), being considered one of the great icons of Modern Law, one of the great representatives of the so-called moderate (or tempered) positivism.

According to Hart[6], whatever the extent of a body of rules, laws, or other regulatory mechanisms, they will never be totally immune to indeterminacy and conflicting interpretations. It is impossible for the law to not have a texture to some extent open. The author introduces an idea from the philosophy of language in which the determination of reality is conceived through its conceptual expression, that is, if there is no concept capable of expressing a given reality, it therefore does not exist. In other words, it would be the denial of metaphysical conceptions that cannot be linked to language, and it is exactly in this language that we will have the great space for disputes, due to its eminent open texture.

The author emphasizes that the open texture of language represents a kind of gray area, which is inherent to empirical concepts, and it is even impossible, given the indeterminacy, to determine its application in each case. The open texture of the laws means that the regulation of the rules of conduct must be left to the courts and authorities to strike a balance in the light of circumstances between conflicting interests, which vary from case to case.

However, it should be noted at this point that "open texture" does not mean complete indeterminacy, as most terms contain a central, fixed meaning, which provides clarity and ease in their understanding and general use. Thus, according to the considerations of Hart[6], only when the terms present a penumbra, or an obscure region, that it becomes almost impossible to say with certainty if the term is applicable or not a legal interpretation, is that there is to be the creative exercise of the interpreter is required, at which time the discretion in the judge's decision arises.

Therefore, the judge's discretion, for Hart[6], only arises when there is a situation of categorical indeterminacy of terms, but if this situation really takes place within a context of vagueness, of open texture of the term (or of the text). Only in the context in which this vagueness, or this penumbra of the terms dilute the guidelines of the legal norms, does the space for the judges' discretion open, in the sense of choosing between the competing interests in the concrete case. In this sense, the author even admits the exercise of the creation of the law by the interpreter (by the judge), but unlike the realists who understand the exercise of the judgment action as eminently creative, Hart limits this perspective, stating that, in principle, the judgment must be carried out according to the canons of Legal Formalism.

Furthermore, although the judge may, in a situation of indeterminacy as we have just mentioned, resort to the use of the power to create the law, he must not do so arbitrarily, that is, the magistrate must always be invested with certain general reasons. to justify his decision and must act as a conscientious legislator, even if deciding with his own beliefs and values. It should be noted that, even so, the judge does not dispense with the legal basis and reasons that are subject to the critical judgment of those to whom it is addressed and of the community itself.

One of the great inspirers of judicial activism and neo constitutionalism, Ronald Dworkin[7], an American legal philosopher, will deny the judge's discretion, based on a broader conception of law. According to Ronald Dworkin, Hart's view is the result of a distorted view of law common to all positivists, which asserts that law is limited to legal rules. The logical antecedent assumption of a judge's discretion is that the concept of legal rules is coextensive with the law, so that if a person's case is not open to one of the prevailing legal rules, then that case could not be decided through the "application of the law". In other words, for Dworkin, Hart, and the positivists, they were limiting too much the power to create law, placing this law on a very narrow margin.

For Ronald Dworkin[8], the law is not limited to the rule, and it also includes principles and values, and these are immanent to the law and are implicit in its general structure. In this way, this author understands that it is not exactly the use of discretionary power, but only the exercise of discovering the best solution or answer to be given to the concrete case, as an expression of a coherent conception of justice and equity inherent to the law itself.

This orientation affirms that between principles and rules there is a merely logical, operative difference. The rules only operate as an all or nothing, that is, they apply or not, and they can never conflict, however, if a conflict occurs, it means saying that one of them is valid and the other is not. The principles, on the other hand, do not operate within this yes/no duality, they have a dimension of weight, that is, they can be applied to a greater or lesser degree, according to the real situation of the concrete case. In addition, these principles can conflict, and the relationship between conflicting principles will also depend on the circumstances of the specific case.

Therefore, a new hermeneutic method emerges, since the interpreter will have to carry out an evaluation between the principles, and with this new interpretation techniques are born, in addition to those already known and mentioned above.

The principles integrate the essential legal interpretive universe in the same way as the rules. But if the principles are conflicting, how then can the impasse be resolved? With the judgment of weighting, judgment of proportionality, judgment of reasonableness, judgment of

maximum effectiveness, these are the main concepts that enter the mechanism of legal interpretation[9].

The judge must then assess the relative importance of the applicable principles and try to find out, through weighting, proportionality, and reasonableness, which principle should prevail. The fact that the magistrate opts for one principle over another does not mean that the deprecated principle is denied, but rather that, in a relation of proportionality, in an assessment of the balance of interests, which determines which of the principles should prevail and which would be the most important for the resolution of the specific case[10,11].

Dworkin[7] creates a guiding model for judges that he calls Hercules and, in this perspective, asserts that judges, faced with a concrete case, should develop some political theories that could serve as justifications for the set of constitutional rules that are expressly relevant to the problem.

If two or more theories seem to fit together quite well and thus point to contrasting results for the case, the judge must turn to the remaining set of practical rules and constitutional principles to create a political theory for the Constitution as a whole. The successful theory will conform to all the rules of the Constitution (or at least most of those rules), so that it represents them as a unified and cohesive set of prescriptions and rules that cover civil behavior. In other words, the judge must make decisions that apply the existing law; however, he must do it in a way that represents the law as an expression of a political theory, endowed with internal coherence, that is, the theory that best comes to be adjust to the general coherence of society's moral and political development[12].

It is required, therefore, that the judge decides, ultimately, from a foundation of public morality. The proposal is essentially to make a moral reading of the Constitution, bringing political morality to the heart of constitutional law.

One of the great discussions of legal philosophy is this relationship between law and morality. The positivist stance seeks to eliminate morality from law as such. Not that there are no moral presuppositions in law, we are just saying that for positivists, as already mentioned, there is no superior moral protection of the applicable law[13].

III. JUDICIAL ACTIVITY ON THE AGENDA

The great fundamental justification that Kelsen[1] will present to be operated in the legal system is the famous *pacta sunt servanda*, that is, the pacts must be fulfilled, or the laws must be fulfilled, obeyed. For natural law there is an idea of the just superior to the right, in which the just is defined by reason, and man is understood as a rational being capable of mobilizing his capacity for rationality, the use of right reason, thus leads the law to the fair. Therefore, what governs positive law, ultimately, are the ideas, principles, or foundations that we arrive at using right reason. In the case of situations of great contradictions in the law, the right reason to solve the problem should prevail[14].

In short, the legal system, under this orientation, would be supervised by the idea of fundamental reason, which, in fact, is the expression of the famous Kantian categorical imperative, which establishes the idea that actions must be manifested in the world so that can be universalized[15]. This notion of categorical imperative is projected in the law insofar as the conducts that can be rationally universalized establish justice. No one can kill someone, for example, because this conduct, once widespread among individuals, would cause social chaos, so criminalizing homicide. It is the categorical imperative that guides the practical notion of law.

However, Dworkin[7] changes this perspective, asserting that justice or morality is introduced into law through the interpretation of law. This becomes the foundation of a narrative construction of political values, that is, they would no longer be in the heteronomic domain of reason, but, ultimately, in the interpretive process, in the rhetorical-argumentative production of the interpretive process of application. and law enforcement. In summary, we understand that this reading is giving rise to the adoption of solutions and interventions in Brazilian Justice by the Federal Supreme Court[16,17].

To illustrate this idea, we will briefly point out some decisions of the STF in this regard, namely:

a) prohibition of nepotism: the STF considered the constitutionality of the issue that it prohibited the appointment of relatives of members of the judiciary up to the third degree. The Federal Supreme Court understands that regardless of whether the law specifies the prohibition or not, this prohibition does not require a law that prohibits it, as it stems from constitutional principles of morality and impersonality, that is, the STF, in fact, with this decision, ended up positivize the principle, making it the very definition of the prohibition of nepotism, ignoring the need for an express law that asserts the prohibition of hiring in positions of trust, of someone who is related to the one who hires up to the third degree. For the STF, if the Constitution enshrines the principle of morality and impersonality, this is enough to declare a ban on nepotism.

b) the impossibility of imprisonment for debt: the STF concluded that the imprisonment of the unfaithful trustee is unconstitutional, even though this determination is

provided for in the Constitution: "there shall be no civil imprisonment for debt, except for the person responsible for the voluntary and excusable breach of alimony obligation and of the unfaithful trustee" (CF 1988). To defend this position, the STF sought to base itself on a supra-legal concept by stating that the Constitution was derogated because Brazil is a signatory of the Pact of São José da Costa Rica, that is, the Pact is now assigned a derogatory status of the Constitution itself using the same mechanism as the principles.

c) suspension of the press law: the STF simply suspended the press law, declaring that all provisions are incompatible with the standard of democracy and freedom of the press conceived by the Constitution.

d) Equation of homosexual union with stable union (gay marriage): according to the STF's menu on this issue, people's sex does not serve as a factor of legal inequality; recognition of the right to sexual preference as a right emanating from the principle of human dignity; right to self-esteem in the highest point of the individual's conscience; right to pursue happiness. The concrete use of sexuality is part of people's autonomy of will. With this, we can see the political-juridical, principiological and moral construction of the Constitution promoted by the STF.

We are faced, therefore, with constructions made within a political analysis in line with Dworkin's perspective. The ministers of the Brazilian Supreme Court seek to give the Constitution an interpretation in a way that enshrines the principle as a norm, sometimes even changing the very literalness of the constitutional norm, as we have seen, for example, in the case of the unfaithful depositary[18,19,20].

The art. 226 of the Constitution[21] states that "the family, the basis of society, has the special protection of the State. For the purposes of State protection, the stable union between a man and a woman is recognized as a family entity, and the law must facilitate its conversion into marriage".

The argument of principle is not established from a balancing of opposing interests, or from an attempt to distribute resources to the community, nor in the will of the majority, but, only, from the consideration of the individual as a moral subject. And the judge of the decision could not be subject to any interest or any situation of apparent conflict, otherwise he would have harmed his own perspective of analysis, since he is responsible for analyzing the essential founding moral element that lies behind the norm[22].

So, Dworkin[7] states that, in the face of the open language of the Constitution, it is necessary to recognize the circumstance that it is not a question of applying logical or linguistic methods, but of performing a moral reading by the judge. In this sense, the judge would be open to the confrontation of arguments instead of camouflaging the moral evaluation that he performs under a technicist guise that is not supported by the constitutional text.

However, in fact, what would be being done is the separation between two different decision-making plans, namely: the democratic one, given by the majority – the political-legislative plan; and the decision plan given in a list of principles evaluation.

Jurgen Habermas[23] demonstrates that when axiological judges are mixed with normative arguments, intersubjective preferences are commonly taken as objective values, endowed with a universalizing and self-sufficient character. The great danger of this practice lies in the fact that this supposed objectification of values, treated by the courts as normative categories, is often used in the usurpation of the citizen's autonomy. At this moment, the supposedly neutral legal discourse masks the imposition of moral standards. According to the author, the use of values as reasons for deciding, removes the rationality of the process and allows the judge to act according to their conceptions of the good, which, in a pluralist society, cannot exactly be taken as consensual.

Thus, the legal norms produced by the democratic procedure would be displaced by a judicial activity of attributing meanings to the constitutional text, to some extent arbitrary, from which they emanate as values supposedly shared by the legal community[24].

The skepticism of Habermas[23] about the moral reading of the Constitution made by a constitutional jurisdiction is notably due to the monological aspect of the decision process. It is about reducing political morality to a single actor, the judge, who must gather an arsenal of virtues inspired by the ideal model of Judge Hercules, which allows him privileged access to truth and justice. This author will propose another mechanism, called procedural, in which he will state that what is essential for the Judiciary is to be the arbiter of the democratic game, therefore, he must verify if the channels of inclusion in the public debate were obstructed, preventing as soon as some sectors of society contributed to the formation of opinion and collective will.

For Habermas[23] the constitution of public spheres is fundamental, spaces in which the most relevant issues for society are widely debated, the wills generated communicatively in these spheres must contaminate legislative procedures, thus resulting in norms that express social pluralism. It is proposed the constitution of a model

of democracy in which the formation of the collective will is marked by the dialogic, not monological aspect of the judge. And the procedural rules become requirements of the rationality of discourse.

What is most important, therefore, is knowing how to measure, with the metric of the effectiveness of justice, the expansion of the Judiciary over the sphere of the other Powers so that excesses are not incurred, otherwise, a situation of exaggerated reduction is created. of the Legislative Power, and the values of the Judiciary Power, whose members were not elected and, therefore, are not representative of society, start to prevail over the values of the Legislative Power[3].

It is also necessary to consider, despite the arguments that frame judicial activism as being counter majoritarian, that in a neo constitutional legal context, in respect of the dignity of the human person, it is necessary to preserve the existential minimum, that is, the minimum effectiveness of rights and fundamental guarantees, even if, for this to be accomplished, counter-majoritarian interference is necessary, especially because, in a highly complex society, formed by a plurality of groups, ideas, values, interests and, above all, carrying with it a whole history of social problems , racial, fundamental political issues were judicialized[25,26].

Controversies of great social relevance make room for the process of transferring power to the Judiciary, as the political spheres of the two other Powers of the Republic simply do not meet the interests of society, creating a kind of representation vacuum and a crisis of representation.

For the purpose of illustration and contextualization of judicialization, Cesar Britto[27], who has presided over the Brazilian Bar Association (2007-2010), lists some determinations of the Judiciary with a direct impact on the political field, such as, for example, when this broke the monopoly of PETROBRAS (Petróleo Brasileiro S.A.) on the oil exploration and refining process, or when it defined the indigenous question that had dragged on for centuries in Brazil, as well as the transformation of asylum into a judicially controllable act, the prohibition of the well-known and almost common practice of nepotism, the legal and ethical restrictions of electoral campaigns, party loyalty as a constitutional imposition, ceilings and floors in the remuneration of public servants, tax exemptions or the legality of taxes and a series of other issues that lead to the idea that the Judiciary, in fact, is currently constituted as the sphere of Power that has taken on the responsibility for the ratification executive action of a good part of the public policies of the federative entities[28,29].

The qualified performance of the STF in the realization of fundamental rights and guarantees of the citizen offers a positive aspect of protagonist to the Judiciary, including by society itself, which is sure of the effectiveness of justice[30].

IV. CONCLUSION

The so-called Democratic State of Law, which implies the obligation to be governed by the Law and democratic rules, as well as implies the respect of public authorities to fundamental rights and guarantees, enshrined in article 1 of the Federal Constitution of 1988, adopted, still in its sole paragraph, the so-called democratic principle, by noting that “all power emanates from the people, who exercise it through elected representatives or directly, under the terms of the Constitution”.

In this sense, we emphasize the fundamental role played by the Magna Carta. In this, the limits, and rules for the exercise of State power are found (where the "Fundamental Rights and Guarantees" are present), and, through it, the rest of the so-called "legal order" is elaborated, that is, the set of laws of a society. The democratic rule of law, therefore, cannot do without the existence of a constitution.

In this order of understanding, we consider that fundamental rights must be protected by the activism of the Judiciary against the onslaughts of the other Powers, in favor of legal security and the Democratic State of Law.

Once a right is violated, there is scope for the violation of all the others, and judicial activism can represent an important channel against the will of the State. The essence of popular sovereignty must be consolidated by the authentic, effective, and legitimate democratic participation of the people in the instruments of production and control of political decisions, and the STF, being the highest court of the Judiciary, guardian of the Constitution, must assume, in its sphere, of competence, the leadership of judicial activism.

Judicial activism, as we have seen throughout the development of this work, is a phenomenon that points to the growing role of the Judiciary, the expansion of the global power of judges, in which we perceive that this Power is increasingly trying to occupy spaces that other Powers left servants. The supposed vacuum of Power created mainly by the Legislative Power, would motivate the filling of this gap by the Judiciary, in the search for the realization of a qualified citizenship and a new meaning for democracy.

Judicial activism is involved in major controversial discussions in the legal sphere and in the academic sphere. As a new way of thinking about legal interpretation, judicial activism has to do with what used to be called the inept power of judges (or juristocracy, or dictatorship of

the judiciary), however, at the other extreme, the view is fixed that the Judiciary has a share of responsibility in the construction of democracy and active citizenship and, sometimes, some authors believe that certain movements of the Judiciary would be episodes that can be identified as the judicialization of politics.

Magistrates are elements of public administration, maximum vectors of public action and implementation of the law to satisfy our fundamental rights. The central question is to know the limits of this Judiciary action. In this reflection we think that the Judiciary is not given the right of omission. If the Legislative Power is omitted from sensitive issues, the Judiciary needs to march towards the realization of fundamental rights.

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