

ESTEFÂNIA MARIA DE QUEIROZ BARBOZA and KATYA KOZICKI
*Judicialization of Politics and the Judicial Review of Public Policies
by the Brazilian Supreme Court*

ABSTRACT:

This paper aims at analyzing the so-called judicialization of politics, showing that it is not just a Brazilian experience, but a common one in several western countries. This movement has been very criticized on the grounds of its political legitimacy and of the exhaustion of the political sphere. On the other hand, the article analyzes the theory of judicial restraint, which defends that political matters should be decided by elected branches. Finally, it demonstrates through the analysis of the Brazilian Supreme Court (STF) and other courts' decisions, such as STJ, how the Brazilian Judicial Branch has faced issues of public policies in order to enforce the basic rights contemplated by the Brazilian Constitution of 1988.

KEYWORDS:

Constitutional jurisdiction, judicialization of politics, judicial review, judicial self-restraint, public policies

ESTEFÂNIA MARIA DE QUEIROZ BARBOZA*
KATYA KOZICKI**

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*Introduction – 1. Judicialization of Politics – 2. The Judicial
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Introduction

In the last decades Brazil and many countries around the world have been experiencing the displacement of part of their political power towards the courts. To a certain extent, one might say that this power has been migrating from the parliamentary representational sphere to the judicial branch.

The idea of constitutional supremacy was adopted in 1787 by the United States Constitution, and is nowadays shared throughout the world, especially after the second half of the 20th century, when a worldwide concern regarding human rights began. These rights started to have an influence over the internal rights of various countries, which started to adopt declarations of fundamental rights, which, on their turn, started to work as the touchstone for constitutional review of statutes and administrative acts by the courts of law.

In Latin America, East Europe and South Africa the adoption of constitutionalism took place with the imple-

mentation of democratic regimes after a long period of dictatorial governments. A strong Judiciary, therefore, emerges as a warranty to the new democratic arrangements¹.

Along with that, the adoption of rigid and democratic constitutions which contemplate a catalog of supreme human rights, protected against parliamentary majority, resulted in a new way of understanding and applying the Law. Such measures implied, in the example of Brazil, an increase of the activity of the Judicial Branch and its preponderance in the political decisions made by the Brazilian State, placing this issue in the center of the current judicial and political debate.

Even countries of the Common Law tradition have adopted Bills of Rights² as the framework to the constitutional review of laws incompatible with such rights. In this way, actions related to rights to freedom (the right to freedom of expression, of religion, of privacy), biolaw, abortion, public policies concerning health, education, the environment, the electoral process, same-sex relationships, etc., have been increasingly brought before Constitutional Courts.

The rise in importance of the courts occurred not only in the quantitative sense but also in the sense that the decisions started, more and more, to relate to society's pivotal political matters, reshaping the roles played by the Executive, Legislative and Judicial branches.

This phenomenon is defined as the judicialization of politics and can mean either the displacement of decision

¹ TATE and VALLINDER 1995, 2.

² As an example, one might mention the case of New Zealand, which adopted a Bill of Rights which was then held as the criteria for the constitutional review of the laws.

making process from the Parliament or the Executive into the courts, as well as the increase of the use of judicial methods of decision making outside of the courts³.

This paper aims at analyzing the judicialization phenomenon in the Brazilian politics, especially since the 1988 Constitution.

On the other hand, a parallel with the judicial self-restriction doctrine, which was developed to limit the political power within the Judicial Branch and defends the deference of the courts to the political decisions made by the elected branches, will be drawn.

Finally, there will be an effort to demonstrate, by the means of analyzing some decisions made by the Brazilian Supreme Court (STF) and the Supreme Court of Justice (STJ), that the constitutional review of political questions or public policies under the light of the 1988 Constitution is already happening in Brazil as a mean to secure the implementation of fundamental rights.

1. *Judicialization of Politics*

The judicialization of politics can be studied under various aspects. It is possible to affirm that the idea of constitutionalism itself and of the provision of political matters in the Constitution would, eventually, allow the Judicial Branch to address every political issue as a constitutional one⁴. Despite

³ VALLINDER 1995, 13.

⁴ In the same direction: «There is hardly a political question in the United States which does not sooner or later turn into a judicial one» (TOCQUEVILLE 1961).

the fact that it may look contrary to the interests of the Parliament, it is possible to assert that there is a common understanding that the assumption of the new roles by the Judiciary, including the decisions on political, moral, and religious issues, which are focal to society as well as to the political actors, are being accepted by society, once even the political players begin to face the Judiciary as the appropriated forum to debate and solve such questions.

Werneck Vianna states that the “litigation boom” is a worldwide phenomenon that has been occurring within the contemporary democracies, especially because of the existing gap between the representatives and those represented, what, by consequence, leads the political actors to encourage the representational channels via legislation⁵.

In spite of being a contemporary phenomenon, the discourse often confuses the idea of judicialization of politics with the generic idea of judicial activism, to the point that the term judicialization of mega-politics (or macro-politics) has been used to distinguish it from the generic judicialization of politics.

Ran Hirschl introduces three categories of judicialization: i) the expansion of the legal discourse, jargons, rules and procedures into the political sphere and into the forums of political decisions; ii) judicialization of public policies by means of the constitutional control or revisions of administrative acts; iii) judicialization of pure politics or of macro politics, which is the displacement of political matters and those of great importance to society into the courts, including questions regarding the legitimacy of the

⁵ VIANNA et al. 2007, 41.

political regime and the collective identity that defines (or divides) every policy⁶.

In relation to the first category, the author asserts that the judicialization is inherent to the apprehension of cultural and social relations by law, which happens due to the substantial increase in complexity and diversity of modern societies, as well as to the expansion of modern social welfare states, with their various regulatory agencies⁷.

This phenomenon also takes place in the supranational context as the economic globalization era brings about the need to adopt universal standards. Another aspect of the judicialization of politics is the enhancement of the Judiciary System's responsibilities to decide on public policies matters, especially on those regarded to rights guaranteed by the constitution⁸, implying the redefinition of the boundaries of the other public powers.

The judicialization of pure politics, or of the macro politics, on its turn, is understood as the jurisdiction of the courts to decide on moral issues or critical political questions, central to the society. That is, many political and moral dilemmas end up being transferred from the political sphere to the judiciary system.

It is in this way that it is possible to think of the judicialization of politics as related to the «new statute of fundamental rights and to the overcome of the separation of powers model, which provokes an expansion of the

⁶ HIRSCHL 2006, 723.

⁷ HIRSCHL 2006, 724 f.

⁸ In Brazil, the biggest example concerns questions related to the fundamental right to health, and the Judiciary has been questioned and criticized for intervening in the sphere of health policies.

interventional powers of the courts into the political arena»⁹ especially by means of the participation in the process of formulation or implementation of public policies, as it will be seen in the last chapter of this article. Politics judicializes itself in the attempt to ensure the fundamental rights listed in the constitution in benefit of the community.

Débora Maciel and Andrei Koerner explain that the judicialization of politics «requires that the Law operators choose to participate in policy-making rather than to leave it to the discretion of politicians and administrators, and, in its dynamics, it would imply a more positive political role of the judicial decision than that involved in a non-decision»¹⁰.

In Brazil, the re-democratization process ended up producing an enormous impact on the Judicial Branch. Arantes explains that: «on one side, the demand for justice, in great scale repressed during the years of authoritarianism, flooded the Judiciary due to the end of the constraints imposed by the military regime to its free functioning». On the other hand, the adoption of a Democratic State of Law generated the «need of legitimate judges and arbitrators» to decide about conflicts between society and government and between the powers of the State. This role, according to the author, was attributed, to a great extent, to the Judicial Branch¹¹.

Still, comparing Brazil to other contemporary democracies, Arantes understands that it goes through practically the same causes of judicialization of politics that are seen in other countries:

⁹ VERBICARO 2008, 391.

¹⁰ MACIEL and KOERNER 2002, 114.

¹¹ ARANTES 1999, 83.

«First, political democracy was established in the 1980s followed by the approval of a new constitution in 1988 that set out an extensive charter of rights. Second, an increasingly greater number of interest groups within society are demanding judicial solutions to collective conflicts. Third, the political system is characterized by fragile and even minority coalitions supporting the government of the day, while the opposition uses the judiciary to fight government policies. Lastly, the constitutional model delegates to the judiciary and to the Ministério Público (Public Ministry) the task of protecting both individual rights and interests, as well as collective and social rights»¹².

Loiane Prado Verbicaro points out some of the conditions that facilitated the process of judicialization of politics in Brazil, among which, the following are especially highlighted: i) the promulgation of the 1988 Constitution; ii) the universalization of the access to justice; iii) the existence of a constitution with open texture; iv) the de-codification of law, the formalism and the juridical positivism crisis; v) the expansion of the space reserved to the Federal Supreme Court; vi) the Legislative hypertrophy, and vii) the crisis of Brazilian Parliament¹³.

Notice that the opening of the fundamental rights norms requires a new role of the Judiciary System, a role that resembles the one this branch has within the systems that follow the Common Law tradition, a creation role, the judge-made law role, through which it densifies and materializes the rules listed by the constitution.

¹² ARANTES 2006, 231.

¹³ VERBICARO 2008, 390.

Observe that the open and abstract character of the constitutional norms modifies the positivist paradigm of a supposed predictable norm to be adopted in a concrete case, which implies that the countries that have adopted the constitutionalism as a way to protect the fundamental rights against state arbitrariness are approaching the Common Law system, especially regarding the constitutional jurisdiction.

In this extent, as there is no way to previously point which right will be applied to the case, the Judiciary will have to densify and give meaning to these rights, according to the historic, social, political, moral and juridical context of the society in that specific moment. The norm, therefore, does not exist in the text, but only in the concrete case.

This new role of the constitutional courts, especially regarding the possibility of adding content to human rights, reflects a major expansion of its authority, which is materialized through the judicial review.

Moreover, it can be seen that, in Brazil, the Justice System has gotten closer to the population through the Small Claims Court, where the access is independent of attorney representation. Special legislation aiming at protecting the minorities, such as the Consumer Defense Code, the Statute of the Child and the Adolescent, the Maria da Penha Law¹⁴, the Statute of the Elderly, led to a replacement process of the State by the Judiciary, turning the Judges into protagonists of the decisions on social issues, including those involving public policy¹⁵.

Combined to that, the mixed model of constitutional

¹⁴ Translator's note: Statute that creates and regulates mechanisms to reprehend domestic violence against women.

¹⁵ VIANNA et al. 2007, 41.

review, in the diffuse system, allows the political minorities to exercise the power to veto laws and administrative acts enacted by the Legislative and Executive Branches invoking the 1988 Constitution, in a way that one can state that the constitutional control is one of the major resources available to political minorities against the majorities' political decisions¹⁶. In contrast, Antonio Moreira Maués and Anelice Belém Leitão, while analyzing some Direct Unconstitutionality Actions (ADIs) filed by Political Parties before the Federal Supreme Court, concluded that those «are better interpreted as actions in defense of the Constitution»¹⁷ than effective attempts to disrespect the rule of the majority, that is, they give the Constitutional Jurisdiction the possibility to limit the possible violations of the Constitution perpetrated by the political majority.

Such statement is supported by Ernani Rodrigues de Carvalho, when perceiving that «interest groups started to consider and/or use the possibility to veto in courts in order to achieve their objectives»¹⁸.

Nonetheless, one can verify decisions by the Federal Supreme Court on political questions concerning partisan loyalty, health public policies, disarmament, research in stem cells, etc¹⁹. Some of these matters were brought before the Supreme Court by political parties and others by representative associations of minorities' rights, and others were brought by individuals to guarantee their social rights.

¹⁶ ARANTES 2006, 241.

¹⁷ MAUÉS and LEITÃO 2004, 48.

¹⁸ CARVALHO 2004.

¹⁹ In this regard, check the news section on this site: <http://www.stf.gov.br>. Accessed 28th February 2008.

Notice that this increase in deference of the Legislative to the Judiciary occurred in many nations around the globe, transforming the Supreme Courts in the most important body of political decision making²⁰.

As a consequence of this movement the Brazilian Judiciary System has been suffering severe critics, just like the United States Supreme Court did in the begging of the 20th century, questioning its jurisdiction to deal with political matters as its judges have not been elected by the people and, therefore, it would not have the democratic legitimacy to decide on such matters.

Notwithstanding the critic to the “government of judges”, the protagonism of the Judiciary System is currently a fact, and these critics «are not sufficient to repress a process that seems to have become irreversible»²¹.

This protagonism of the Judiciary is often called judicial activism, and it shall be understood not for how busy a court is but for how much its Judges are willing to develop the law. The critics and the controversies regarding the political activism are mainly due to two reasons. The first one regards the anti-majoritarian character of the judges, who are considered not legitimate to develop a new law as they were not elected in a suffrage. The second one is, in being accepted that judges could develop laws, what would be the criteria to define that the development made was appropriate²².

²⁰ On the subject: BARBOZA 2011.

²¹ CHEVALLIER 2009, 134.

²² DICKSON 2007, 367. In the same sense «The term “judicial activism” is, however, much more commonly used to refer not to how busy a court is but to how willing its judges are to develop the law. In that sense it is a controversial concept, for two reasons. First, judges are

Christopher Wolfe gives another concept to what he calls conventional judicial activism, being it the one in which the «judges ought to decide cases, not avoid them, and thereby use their Power broadly to further justice – that is, to protect human dignity – especially by expanding equality and personal liberty. Activist judges are committed to provide judicial remedies for a wide range of social wrongs and to use their power, especially the power to give content to general constitutional guarantees, to do so»²³. So the expression “activist judges” is not seen in the pragmatic sense of judges

(in most countries) not elected and in a liberal democracy the conventional view persists that only persons elected to Parliament, or serving in an executive which is accountable to Parliament, should make laws. (The extreme form of this convention is the declaratory theory of law, according to which judges never create law at all – they merely find law which has always existed but been hidden from view under layers of misrepresentation. In the United Kingdom this “fairy tale” was definitively debunked by Lord Reid in 1972). Secondly, what amounts to “developing” the law can itself be a matter for considerable disagreement: is a fully reasoned decision to preserve an existing rule, taken after long deliberation, an example of activism or not, and in situations where the judges are agreed that the law should be developed, what criteria should be employed to assess whether the chosen development is the appropriate one? As has been noted by Justice Heydon of the High Court of Australia “the relevant factors are indeterminate and to some degree they can conflict”» (DICKSON 2007).

²³ WOLFE 1997, 2. Christopher Wolfe later on concludes: «judicial activism may be defined in terms of either the relation of a judicial decision to the Constitution or the manner in which judges exercise what is conceded to be a broadly political, discretionary power. The definition on which I place the greater emphasis will be dissatisfying to most contemporary constitutional scholars, who subscribe to different conceptions of the nature of judicial power and of the evolution of judicial review in American history» (WOLFE 1997, 3).

who ignore the constitution and the precedents that gave content to it, imposing their own point of view, but in the sense that they ought to be ready to answer the questions of political morality that are presented to them.

As seen before, it is hard to find a unique cause to justify the judicialization of politics. Notwithstanding, it is certain that many of the political questions that are brought to the courts, are done either by political parties or by interest groups, and hence, it cannot be seen as a judicial phenomenon or as a usurpation of functions of certain branch over the other, but as a political phenomenon.

What one verifies is that the Judicial Branch has been used as another political arena, where political minorities in the ambit of the parliamentary deliberative discussion have the possibility to protect its rights.

Even in the American context, Keith Whittington explains that the subsistence of the judicial authority in interpreting the constitution and in actively using the power of constitutional review is an advanced political project. In order for the judicial activism to be sustained, in the sense of the declaration of unconstitutionality of the normative acts promulgated by the Legislative or Executive, the courts should operate through a policy of favorable development. Judges ought to find reasons that raise objections to the government acts, and elected politicians ought to find reasons to stop sanctioning or criticizing judges that raise such objections²⁴.

Whittington remarks that political majorities can effectively delegate to the Judiciary a number of questions because courts have more capability to act or more

²⁴ WHITTINGTON 2005, 583.

confidence than the elected politicians, acting directly²⁵. Such perspective is reinforced by Luiz Werneck Vianna, when stating that the ADIs, during the mandate of the Brazilian President Fernando Henrique Cardoso, worked as instruments in favor of the political minorities, who visualized the Judiciary as another space for the democratic struggle on affirming rights that did not achieve recognition by the means of the parliamentary majority²⁶. That is, the Judicial Branch undertakes, in this context, an important role, as it represents a democratic public space that materializes the fundamental rights protected by the Brazilian Constitution.

Likewise, Howard Gillman asserts, in a study of the Federal Courts in the United States in the 1875-1981 period, that the increased power and jurisdiction of the Federal Courts during this period of time was a by-product of Republican Party efforts to promote and entrench a policy of economic nationalism when that agenda was vulnerable to electoral politics²⁷.

The exercise of judicial review by an active and independent Judiciary, despite apparently seen as opposing the interests of the current politicians, who presumably would rather rule without any interference, is, on the contrary, supported by the ones who hold the power. When elected politicians cannot implement their own political agenda, they must foster an active constitutional review by a sympathetic Judiciary System to overcome the barriers and break through the status quo. In Whittington's point of

²⁵ WHITTINGTON 2005, 584.

²⁶ VIANNA et al. 2007, 68.

²⁷ GILLMAN 2002, 511.

view, this would justify why the elected politicians tolerate an activist Judiciary²⁸.

In Brazil, while performing a deep study concerning the judicialization of politics in the country, Werneck Vianna remarks that, despite the fact that the ADIs work as a defense tool of the minorities, it also works as a strategic institutional resource of the government²⁹. Among the ADIs proposed in the period of 1988 to 2005, 60% of them dealt with public administration issues, 12,6% were about Tax policies, and 11,6% regarded the regulation of civil society³⁰.

On the other hand, among the ADIs proposed by governors, 87,1% were against state laws, which shows that state

²⁸ WHITTINGTON 2005, 583. This is the same logic that justifies European countries to promote self-restrictions regarding their own sovereignty, favoring an independent international authority. Thus, the consent of the European countries to accept the limitation of their sovereignty in favor of an international and anti-majoritarian authority regarding the human rights is justified, according to Moravcsik, due to the fact that the governments search for the international coercion when an international commitment effectively reinforces the political preferences of a specific government in a certain moment, against future alternative domestic policies. That is, the self-restraint of a State by its adherence to international treaties of human rights is not a movement in search of a moral altruism, but, on the contrary, governments choose these tactics when the benefits of reducing future political uncertainties weigh more than the costs of the sovereignty limitation by their association. And he follows explaining that the self obligation or self compromising is more used in recently established democracies, which end up having a great interest in the democratic stabilization of internal politics against antidemocratic threats (MORAVCSIK 2000, 218-249).

²⁹ VIANNA et al. 2007, 44.

³⁰ VIANNA et al. 2007, 50.

governments, when they are not successful within the political arena, use the Judiciary in order to guarantee their claims³¹.

The high levels of litigation against norms promulgated by states legislatures is justified, according to the author, by the fact that the Executive branch does not have the political majority within the local legislatures, as well as because «these instances of power, exposed to the pressures of private interest groups, now and then end up producing circumstantial legislations without a universal scope»³², which leads the Federal Supreme Court to play the role of a State Council.

Through a concrete statistic data, the author demonstrates that the ADIs have been used as an instrument to affirm minorities interests, as most of the ADIs proposed during the mandate of President Fernando Henrique Cardoso were mainly filed by left wing parties, who significantly dropped the filing of lawsuits after Lula became President. The analysis of the ADIs, according to Vianna: «points to the fact that they are becoming a complementary via for political disputes and opposition manifestations, mainly used by the left but equally mobilized by the center and right parties»³³.

Notice, nevertheless, that important political questions, such as partisan loyalty, were filed before the STF precisely by the political parties (PPS, PSDB and DEM)³⁴, which

³¹ VIANNA et al. 2007, 54.

³² VIANNA et al. 2007, 50.

³³ VIANNA et al. 2007, 67- 69.

³⁴ BRAZIL. STF – MS 26602 – Rel. Justice Eros Grau – DJU 17.10.2008. Available from: <http://www.stf.gov.br>. Accessed 23rd June 2010. STF – MS26603 – Rel. Justice Celso de Mello – DJU 18.12.2008. Available from: <http://www.stf.gov.br>. Accessed 23rd June 2010. STF –

shows, once more, that the judicialization of politics and the consequent STF pronouncement on political matters derives from the will of the political parties, and, thus, it is a political phenomenon.³⁵

It is also perceivable that in this new political-judicial context created in the post war period with the establishment of the supremacy of the human rights, be it by written or unwritten constitutions, this movement happens along with the expansion of judicial review in many countries.

Such expansion increases the public space for debates regarding moral and political questions in the society, creating this new arena, the Judicial Branch, which plays a preponderant role in the materialization of the fundamental rights established in the Constitution.

Moreover, one can observe that the Judiciary intervention is legitimate, as far as it is provoked by political actors, and that it is legitimated by the Constitutional text itself.

The great challenge consists in overcoming the boundaries imposed on the Judiciary by the tradition of Civil Law, which aims at limiting the Judge's role to applying the normative text. The Human Rights revolution and the judicialization of politics expand the judicial activity not only in the quantitative sense, but also because it assumes the role to materialize rights that will only have a meaning in a concrete case, bringing it closer to the judge-made law system, already present in the countries of the Common Law tradition.

MS 26604 – Rel. Justice Carmen Lúcia – DJU 3.10.2008. Available from: <http://www.stf.gov.br>. Accessed 23rd June 2010.

³⁵ Likewise: VIANNA et al. 1999, 103. HIRSCHL 2006, 754: «the judicialization of mega-politics, and the transition to juristocracy more generally, is first and foremost a political, not a juridical, phenomenon».

In the next chapter, we shall outline the way the Brazilian Judiciary, in special the Supreme Federal Court and the Superior Court of Justice, functions as a supporter of politics, and especially of the minorities, while exercising the control of constitutional public policies.

2. The Judicial Review of Public Policies

In order to deal with the justiciability of public policies, it is previously necessary to analyze the justiciability of policies arguments. Philosophers and legal scholars have been trying to define what policies arguments are, often presenting redundant definitions, such as those which say that policies arguments are those which are not juridical or those which are not judicial. In some cases, the scholars end up accepting the concept that policies arguments are those which the judges say so.

Ronald Dworkin is one of the few legal scholars who tried to define what policies arguments are, separating them from principles arguments, in a sense that the Courts could only decide on principles:

«Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole. The argument in favor of a subsidy for aircraft manufacturers, that the subsidy will protect national defense, is an argument of policy. Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right. The argument in favor of antidiscrimination statutes, that a minority has a right to

equal respect and concern, is an argument of principle»³⁶.

From the above definition one might understand that the concept of public policy concerns collective goals, that is, social objectives that demand a set of actions by the Public Powers, which is a natural thing in a Welfare State. Principles, on the other hand, would be more related to the protection of individual rights.

One can, then, relate the public policies to governmental programs that seek to realize the collective goals as a whole, especially in the social area (full employment, health care, housing, etc.)

Fabio Konder Comparato, in its turn, uses a negative statement to define policy, saying that it «is not a norm nor an act, that is, it is something clearly distinct from the elements of judicial reality, upon which the legal scholars developed the majority of their pondering since the days of the roman *iusprudentia*»³⁷. He remarks the importance of such statement since, originally, the constitutional review only concerned acts and norms. And the author continues by classifying the policy as an activity, that is, «an organized set of norms and acts that converge towards the realization of an established objective»³⁸.

Maria Paula Dallari Bucci, on her turn, elaborated the following definition to public policy:

«Public policy is a governmental program that results from a process or a set of juridically regulated processes – electro-

³⁶ DWORKIN 2002, 148.

³⁷ COMPARATO 1998, 44.

³⁸ COMPARATO 1998, 44.

ral process, budget process, legislative process, administrative process, judicial process – aiming at coordinating the means available to the State and the private activities in order to realize the objectives socially relevant and politically defined. Ideally, public policies ought to seek the realization of the established objectives, expressing a selection of priorities, the reserve of the necessary means to its implementation, and the period of time needed to the expected results»³⁹.

One must keep in mind that it is through the collective public policies that the Brazilian Constitution plans to implement and guarantee the fundamental social rights. Obviously, those are rights regarding the whole society, considered in its collective form and not only in the guarantees of individual rights, thus the need for macro policies for its accomplishment, taking into consideration the people's needs as well as the State's capability.

Rodolfo de Camargo Mancuso, on his turn, defines public policies as a «public administration act of commission or omission, in a broad sense devoted to the accomplishment of a program or a goal listed in a constitutional or legal norm, subjected to a wide and exhaustive jurisdictional control, especially preoccupied with the efficiency of the chosen means and the evaluation of the achieved results»⁴⁰.

However, reality shows that, despite the fact that there is not enough budget, the State is not obliged to implement or

³⁹ BUCCI 2006, 39.

⁴⁰ MANCUSO 2001, 730 f.

to plan public policies aiming to assure the fundamental social rights. And also that such matter could not be submitted to the constitutionality control by the Judiciary System, since it is reserved to the elected branches, and also because of the risk of violating the principle of the Separation of Powers.

That is because the limited State resources have been working as an obstacle to the legitimacy of the Judiciary to realize the fundamental social rights. Some authors categorically deny «the legitimacy of judges (not elected by the people) to decide on subjects of public policies that require budgets expenses»⁴¹. That is, when concerning the implementation of fundamental social rights by the Judiciary, this branch has its democratic legitimacy questioned since «the concretization of social rights would imply having to choose between policies in a scenery of scarcity of resources»⁴², which would lead to the conclusion that the decision on public policies could not be made by a non elected branch, but only by the Executive and the Legislative, which, on their turn, reflect the majority's will.

Not forgetting the existing social gap in Brazil, where the majority of the social rights is far from being experienced by the population, it is adequate to raise the question of who, than, has legitimacy to «define what is possible in regards to basic social services, considering the distorted composition of the budgets of the different federative states»⁴³ and that the resources are usually not properly distributed.

⁴¹ KRELL 2002, 52.

⁴² SOUZA NETO 2003, 44.

⁴³ KRELL 2002, 53.

Since the Constitution establishes that public policies are the adequate instruments for the realization of fundamental rights, it is certain that the matter is subject to judicial review. To think the opposite would be the same as going back to the thought that the Constitution is only a political document without normativity, which is something unacceptable in a Constitutional and Democratic State of Law.

Initially, one must remark that this is not a defense of the judicial intervention in public policies related to budgets for the implementation of social rights. It is certain that the Legislative and Executive are the legitimate branches to deal with those public policies. What is sustained here is that – when these branches remain static – it is legitimate for the Judicial Branch to take action when properly provoked, especially in the diffuse judicial review system, in which the people entitled to the rights are the ones claiming for their implementation.

In this respect, Cláudio Pereira de Souza Neto affirms that:

«The focal point is the following: if we consider that certain social rights are procedural conditions of democracy – as Habermas, Gutmann and Thompson do –, than the judiciary, as its guardian, also has the duty to implement them, mainly when the other branches remain still. Pay close attention: if the Judicial Branch has legitimacy to void laws promulgated by the Legislative Branch, one might more easily state that it equally has legitimacy to act when the other branches don't and when this inertia implies an obstacle to the regular functioning of the democratic life. In other words: the judicial implementation of fundamental

social rights, independently of the legislative mediation, is a minus in relation to the constitutional review»⁴⁴.

Besides that, for the checks and balances control of the Executive and Legislative Branches to be effective, an enlargement of the role of the Judicial Branch is also needed. If the strict separation of powers is sustained the Judiciary might become – or remain – «dangerously weak and confined, in essence, to the private conflicts»⁴⁵. Cappelletti understands that this rigid ideal of the separation of powers leads to «the existence of a Legislative, as well as an Executive, completely uncontrolled»⁴⁶. This means that there were periods of danger in the world history, in which «the power was concentrated in the legislative assemblies and in the hands of the political groups that dominated them»⁴⁷, as seen in pre-fascist Italy or in Weimar Germany.

In the same way, the words of José Reinaldo de Lima Lopes must be here reproduced in regards to the statement that it is necessary to comprehend that the Democratic State assures minimum social rights, and also guarantees social reforms, since they represent the «condition for the possibility and for the efficiency of the State of Law», so that «there will not be an insurmountable gap of distinct advantages and opportunities: for this misery conditions are what destabilizes democracies»⁴⁸. Hence, it is possible for

⁴⁴ SOUZA NETO 2003, 45.

⁴⁵ CAPPELLETTI 1999, 53.

⁴⁶ CAPPELLETTI 1999, 53. Regarding the Judicial Branch control, see BONAVIDES 2004.

⁴⁷ CAPPELLETTI 1999, 53.

⁴⁸ LOPES 1994, 263.

the Judiciary to not only guarantee the status quo, protecting the acquired right, but also to promote the social reforms to implement the fundamental rights related to the consumer protection, the defense of the environment, the right to health care, etc.

On the other hand, «conditioning the materialization of economic, social and cultural rights to the existence of money»⁴⁹ must be repelled, since it would mean to reduce the efficiency of these rights to zero⁵⁰.

It is true that not all social rights have the same normative density. The full employment right, for instance, or the right to housing, must be implemented by public policies. This ends up making the materialization of those rights by the Judicial Branch difficult, since even in the more developed countries it is not possible to ensure that every citizen has a job, as a certain level of unemployment is inevitable⁵¹.

Therefore, despite the issue of resources allocation to certain projects that aim at implementing social rights effectively be a public policy problem, this does not mean

⁴⁹ KRELL 2002, 54.

⁵⁰ BARACHO JÚNIOR 2003, 343. In this perspective, on the subject of the separation between political questions and juridical questions Baracho Júnior states that «it is reasonable to imagine that the Judicial Branch does not intend to be responsible for the economic difficulties that a judicial decision might produce. This, inclusively, was admitted by important members of the magistracy by the occasion of the initial debates about the electric power rationing. It is undoubtedly important to preserve the integrity of the Judicial Branch, but it is also essential to secure the exercise of the fundamental rights, even if for that, in certain circumstances, it is necessary, based on constitutional principles, to stop public policies» (BARACHO JÚNIOR 2003, 343).

⁵¹ SUNSTEIN 2004, 210.

that the Judiciary does not have a role in the realization of these rights. Notice, for instance, the right to health care and to education: they hold perspectives which allow their proper realization, and this is why «the concrete provision of precarious and insufficient public services by the municipalities, the states or the Federation, should be compelled and improved by the courts»⁵².

It is also interesting to quote two decisions of the South Africa Constitutional Court regarding the position adopted by the Judiciary in the realization of social fundamental rights. They demonstrate that, even with scarcity of resources, it is possible to promote the maximization of these rights. In other words, «the Court did not say that each person in South Africa had an individual right to decent shelter or to health treatments», but affirmed that the government is obliged to take both rights seriously and to adopt programs that aim at securing them⁵³.

Thus, the South Africa Constitutional Court recognized that the Judiciary can and must protect the economic and social rights, and defined that the Government must promote policies to protect these rights. That is, it did not recognize the individual right to housing or to health, but it recognized the plaintiffs rights to the adoption of legislative and executive measures needed to achieve the realization of these rights.

In other words, for the South Africa Constitutional Court the Constitution did not create a right to immediate action to provide shelter or housing, but created a right coherent and coordinated with the program designated to implement

⁵² KRELL 2002, 56.

⁵³ SUNSTEIN 2004, 211.

constitutional obligations. The State's obligation would be, insofar, to create a program that included reasonable measures specifically designed to assure some housing⁵⁴.

In Brazil, an example of judicial review of public policies by the Judiciary is the decision taken in the ADPF 45⁵⁵, in which the Supreme Federal Court was provoked to adjudicate on public policies. In this case, the action regarded the unconstitutionality of the President's veto upon the § 2º of article 55 of the Law Project that later was converted to the Law 10.707/2003 – the Budget Guidelines Law –, that would violate the 29/2000 Constitutional Amendment (which establishes minimum financial resources for the funding of health actions and services).

This is the summary of the mentioned decision:

«Claim of breach of fundamental precept. The question of constitutional review legitimacy and of the judicial branch intervention in the subject of the implementation of public policies, in the hypothesis of abuse by the government. Political dimension of the constitutional jurisdiction of the Supreme Federal Court. The will of the State can not be opposed to the effectiveness of the social, economic and cultural rights. The freedom of conformity of the legislator is relative. Considerations regarding the limitation of

⁵⁴ SUNSTEIN 2001.

⁵⁵ Translator's note: ADPF is short for "Arguição de Descumprimento de Preceito Fundamental" (Claim of breach of fundamental precept). It refers to a certain kind of legal action that can only be proposed before the Brazilian Supreme Court (STF), and which aims at avoiding or repairing a violation made to a fundamental right by an act of the Public Power.

resources. Need of preservation of the integrity and intangibility of the core that represents the “minimum existential” in favor of the individuals. Instrumental feasibility of the claim of breach in the process of realization of the positive freedoms (Constitutional Rights of the Second Generation)»⁵⁶.

In the vote, Justice Celso de Mello affirms that when the State does not implement an imposition enunciated in the constitutional text, it represents a «major gravity juridical-political behavior, as by being inert, the Public Power disrespects the Constitution, offends the rights that are established in it, and also avoids, due to the absence of concrete measures, the applicability of the precepts and principles of the Fundamental Law»⁵⁷. Certainly, it is not a STF attribution to formulate and implement public policies, as this is a task primarily attributed to the Legislative and the Executive. Nevertheless, stresses the Justice, such responsibilities may be assigned to the Judiciary «if and when the qualified state organisms, by breaching their juridical-political incumbencies, risk, with that behavior, the efficiency and integrity of the individual and/or collective rights that have constitutional stature, even if they derived from programmatic clauses»⁵⁸.

Mello remarks that it is not acceptable the creation, by the Public Power, of «artificial obstacles which reveal the illegitimate, arbitrary and reprehensible purpose of defrauding, frustrating and derailing the establishment and

⁵⁶ STF, ADPF 45, Rel. Justice Celso de Mello, DJ de 29.04.2004.

⁵⁷ STF, ADPF 45, Rel. Justice Celso de Mello, DJ de 29.04.2004.

⁵⁸ STF, ADPF 45, Rel. Justice Celso de Mello, DJ de 29.04.2004.

the preservation, in favor of the person and the citizens, of the minimum material conditions of existence»⁵⁹, and concludes that the objective of the State is to serve the citizens and not to serve itself.

Thus, even if it is recognized that the formulation and execution of public policies depend on the political options of those who were elected by the people, there is not such a thing as an absolute freedom of choice in the decision making process, be it made by the legislator, or by the Executive Branch. That is, in the cases that the inertia ends up ignoring the constitutional text regarding the guarantee of social rights, there will be a violation of the constitutional text, and, therefore, the judicial intervention will be justifiable.

This way, the legislator's freedom of conformity must respect the constitutional framework as a manner of realizing the Constitution. There is no freedom to inertia; there is only freedom to choose the method by which the constitutional rights shall be achieved.

Supreme Court Justice Celso de Mello, on another occasion, expressed that

«although the prerogative to formulate and execute public policies lies essentially on the Legislative and Executive branches, it is possible for the Judicial branch to determine even if exceptionally, and specially in the cases of public policies defined by the Constitution, that they should be implemented by the defaulting State organisms whose omission – which implied breaches of the mandatory juridical-political duties imposed on them – can frustrate

⁵⁹ STF, ADPF 45, Rel. Justice Celso de Mello, DJ de 29.04.2004.

the efficiency and integrity of the social rights that have constitutional stature»⁶⁰.

Still, it is relevant to transcribe the summary of a decision by the Brazilian Supreme Court Justice Gilmar Mendes:

«Suspension of Injunction. Regulatory Appeal. Public health. Social fundamental rights. Article 196 of the Constitution. Public hearing. Unified Healthy System – SUS. Public policies. Judicialization of the right to health. Separation of Powers. Parameters to a judicial solution for the concrete cases that involve the right to health. Solidary responsibility of the Federal entities regarding health. Order to regularize the services provided in public hospital. Severe damage to the order, to economy, to health, or to public safety was not proven. Possibility of the inverse damage. Regulatory Appeal denied»⁶¹.

In the mentioned decision, the Justice has understood that the Judiciary can decide on the supply of different medicines or treatments than the ones provided by the Brazilian public health system, and in that case, «when

⁶⁰ STF – RE 436.996 – Rel. Justice Celso de Mello – DJU 3.2.2006. Available from: <http://www.stf.gov.br>. Accessed 18th July 2010. In the same sense: STF – AgRgRE 603.575 – Rel. Justice Eros Grau – DJU 14.5.2010. Available from: <http://www.stf.gov.br>. Accessed 18th July 2010. STF – AgRgRE 464.143 – Rel. Justice Ellen Gracie – DJU 19.2.2010. Available from: <http://www.stf.gov.br>. Accessed 18th July 2010. STF – RE 594.018 – Rel. Justice Eros Grau – DJU 7.8.2009. Available from: <http://www.stf.gov.br>. Accessed 18th July 2010. STF – AgRgRE 595.595 – Rel. Justice Eros Grau – DJU 29.5.2009. Available from: <http://www.stf.gov.br>. Accessed 18th July 2010.

⁶¹ STF, SL 47 AgR, Rel. Justice Gilmar Mendes, DJU 30.4.2010.

adjudicating the supply of a needed health care provision included among the social and economic policies formulated by the Unified Healthy System – SUS, the Judiciary is not creating public policies, but only commanding its implementation»⁶². He also affirmed that, in the aforementioned case, the existence of a subjective public right to a particular public health policy was evident.

The Superior Court of Justice has also made a pronouncement regarding the effective public budget control, commanding that there must be a specific destination of funding to the realization of the constitutional goals:

«Administrative and civil procedure – Public civil action – Discretionary administrative act: new approach

1. Nowadays, the rule of law and its review, under the auspices of the Judiciary, authorizes the examination of the reasons of convenience and opportunity of the administrator.

2. Legitimacy of the Public Ministry to demand of the Municipality the execution of a specific policy has become compulsory since the enactment of the norm by the Municipal Council of the Rights of the Children and the Adolescents.

3. Specific injunction to include the funding within the next budgeting, as means to implement certain public policies.

4. Special Appeal Sustained.»⁶³

Observe that the Superior Court of Justice (STJ) has admitted, in the case above, the possibility of judicial review of public

⁶² STF, SL 47 AgR, Rel. Justice Gilmar Mendes, DJU 30.4.2010.

⁶³ STJ, Resp 493.811, Rel. Justice Eliana Calmon, DJ de 15.3.2004.

policies through the budgeting, inclusively directing the funding of the next budget. The amount to be addressed, as well as which policy shall be adopted, are issues that remain on the field of the administrator's discretion. But there is not discretion in not realizing a public policy that is constitutionally enunciated. The constitutional provision is binding, and this is why the STJ has done well to require the specific destination of funding as a mean to assure the Constitution's objectives.

In the special appeal 1.041.197-MS, STJ Justice Humberto Martins justifies the possibility of public policies judicial review in exceptional cases, when the Public Administration acts unreasonably or surpasses the limits of its sphere, cases in which the Judiciary ought to intervene to correct the situation⁶⁴.

The Justice sustains that the principle of the separation of powers must be interpreted under the light of the Constitution, which assigns the State new roles in the realization of the social rights and that, while demanding an active performance of the Public Administration, it ends up demanding that the Judicial Branch performs a stronger supervision. This does not mean that the performance of the Judiciary in controlling the public policies can be done in an indiscriminate manner, but that when the Public Administration violates fundamental rights, the «interference of the Judicial Branch is perfectly legitimate and it serves as an instrument to re-establish the integrity of the violated juridical order»⁶⁵.

Still in this vote, Justice Humberto Martins states that the

⁶⁴ STJ, Resp 1.041.197, Rel. Justice Humberto Martins, DJ de 16.9.2009.

⁶⁵ STJ, Resp 1.041.197, Rel. Justice Humberto Martins, DJ de 16.9.2009.

Public Administration should have provided the necessary funding to supplement the lack of equipments in the hospitals, avoiding legal actions such as the present, as the Judiciary ought not to remain passive while facing the claims of the unjustified omission of the administration in implementing the public policy⁶⁶.

In the same direction, STJ Justice Luiz Fux has already manifested his point of view defending that the judicial order to provide waste collection, as it brings injurious effects to health, does not imply the unnecessary judicial intervention on the administrative sphere, as the «administrator has not got a right to discretion regarding fundamental rights established in the constitution» because «in this field the activity is bound, and any interpretation that might seek to deviate from the fundamental guarantee it is not acceptable»⁶⁷.

Thereby, the Brazilian Judiciary has advanced quite well in confronting public policy questions that involve fundamental rights, especially in cases of inertia or mismanagement by elected powers.

3. *Final Considerations*

Notwithstanding the critics that the Brazilian Judiciary has been receiving, in the sense that it is getting involved in political questions, hence offending the separation of powers principle, and also that because it is not an elected power it could not interfere in such questions, what is seen

⁶⁶ STJ, Resp 1.041.197, Rel. Justice Humberto Martins, DJ de 16.9.2009.

⁶⁷ STJ, Resp 575998, Rel. Justice Luiz Fux, DJ de 16.11.2004.

in the present paper is that the transference of the decision from the Parliament to the Judiciary System occurs as a consequence of the judicialization of politics phenomenon.

Since the promulgation of the 1988 Constitution the Brazilian Judiciary started to play an important role in the realization of the fundamental rights. The principle of the separation of powers should, then, be analyzed under the light of the Constitution, with the idea of mutual control between the powers and not of a rigid separation between them.

When defending the possibility of the Judiciary to intervene in public policies, one does not intend to make it the redemption power or the protagonist of a transforming process aimed at reducing the inequalities within a society, but that it would work along with the other powers and manage, through the realization of fundamental social rights, to improve the existent democratic process.

And that is because, many times, the Judiciary is the power which is closer to the citizens, who can directly claim the fulfillment of their basic constitutional rights. Thus, the implementation of social rights by the means of the constitutional jurisdiction can very well promote the democratic process, «by directing political attention to interests that would otherwise be disregarded in ordinary political life»⁶⁸, believing Sunstein that even in poor countries the protection of social rights is possible, as the constitutional jurisdiction has many ways to do it.⁶⁹

⁶⁸ SUNSTEIN 2004, 228.

⁶⁹ In the same sense: «For its nature, the judicial debate allows the evolution of democracy as it permits the debate of relevant issues. Whatever is our opinion about issues such as censorship, freedom of the press, abortion, minorities rights, strike rights, etc., its submission

It is possible to conclude that in the concentrated judicial review, the Brazilian Constitutional Court⁷⁰ must, in case of an omission by the Government in the realization of social rights, command the implementation of progressive and reasonable public policies to assure that the minorities can enjoy their social rights, especially in relation to basic social rights as housing and employment, that demand progressive public policies. Because even though it is complicated to judicially demand the right to employment and housing, the citizen has the right to see that the Government is implementing progressive public policies that will promote and realize such rights⁷¹.

However, if the State cannot demonstrate that it is working on such policies, or if gets proved that it had the financial capability to do something better and bigger, then the Judiciary will be able to declare that the State is violating the Constitution⁷².

Furthermore, even though the Brazilian Federal Supreme Court emptied the capacity of the “Declaratory Action of Unconstitutionality by Omission”, it is certain that the citizens can not be left unprotected, and so the Judicial branch must, by means of the diffused judicial review,

to a judicial debate broads the democracy space, because it demands, with more or less success, the rationality of the divergent proposals» (LOPES 1994, 263 f.).

⁷⁰ In Brazil the Federal Supreme Court has the function of Constitutional Court and final appellate court of the Judicial branch.

⁷¹ Check out SUNSTEIN 2004, 197 ff.

⁷² «If, for example, the State does little to provide people with decent food and health care, and if it is financially able to do much more, it would seem that the State has violated the constitutional guarantee» (SUNSTEIN 2004, 219).

determine the realization of social rights, even if individually, in the benefit of those who seek for it, mainly regarding the rights that can be fulfilled immediately, such as health care and education (especially because the right to life, when brought before a court through a claim for its protection, quite often is an emergency matter).

If the Legislative, the Executive and the Judiciary branches communicate with each other, they will be able to verify the urgent needs of the citizens, who many times are left aside of the everyday political debate, and thus, concomitantly with the immediate protection guaranteed by the Judicial branch, seek to promote long term social policies as to assure the social rights of as many citizens as possible.

Finally, it ought to be highlighted that due to the fact that the Constitution is a political document, it is indeed a Judiciary System attribution to make some political options, which, however, must be justified by principles chosen by the people at the constituent moment.

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