v. 4, n. 14, 2024

Scientific Journal of Applied Social and Clinical Science

JURISDICTIONAL ACTIVITY AND THE ENFORCEMENT OF FUNDAMENTAL RIGHTS AND GUARANTEES: JUDICIALIZATION, ACTIVISM AND JUDICIAL PASSIVISM

Renaud Ponte Aguiar
Graduated in Law by ``Universidade Estadual Vale do Acaraú`` - UVA. Master in Public Policy and Higher Education Management by ``Universidade Federal do Ceará`` - UFC. PhD in Law from ``Faculdade de Direito de Vitória`` - FDV

Abstract: Judicialization and judicial activism are issues raised quite frequently in legal circles, with little attention paid to judicial passivism. There is even confusion regarding concepts. The point of intersection between these concepts lies in the fact that there is a counter-majoritarian difficulty in the Judiciary, which is not made up of representatives elected by the people, and this Branch often has the last word on the law. The present work aims to conceptualize and present the positive and negative aspects of judicialization, activism and judicial passivism, in the light of academic literature. Starting from the premise that the Democratic Rule of Law can only be understood as such with the enforcement of fundamental rights, the parameters for self-restraint of the Judiciary are presented. Whenever this is required, in case of omission of other powers, the aim is to overcome the counter-majoritarian difficulty, with the main parameters being the defense of vulnerable minorities and the maintenance of the necessary assumptions for the functioning of democracy.
Keywords: Judicialization. activism and judicial passivism.

INTRODUCTION

There is much talk about judicial activism and judicialization in legal and political circles, sometimes defending the greater participation of the Judiciary in the implementation of fundamental rights and guarantees, sometimes criticizing the excessive interference of the aforementioned Power in what is the responsibility of the other powers.

When we defend judicial activism, the inertia of other powers is presented as arguments, whether in terms of the Executive Power in implementing Public Policies or the Legislative Power in the task of regulating situations, aiming to guarantee the realization of rights, whether individual or diffuse, homogeneous collective or individual. When they criticize activism, the notion of separation of powers is presented as an argument, in which the typical functions of each power are defined, with rare exceptions for atypical functions, and jurisdictional activity in these cases is seen as undue interference in the competence of others. powers, given that decisions are taken as true administrative guidelines in the execution of Public Policies or to legislate in situations considered strange and not supported by the Constitution. The counter-majoritarian difficulty of the Judiciary's actions is highlighted, especially in the control of constitutionality, since the court has the last and decisive word regarding the validity of norms created through the legislative process.

However, little is said about the legal and political means of judicial passivism, such as the refusal of the Judiciary to consider demands presented by those legitimized in actions, especially in the control of constitutionality, under the argument that they would be interfering with other powers, as is the case of passivism in relation to violations of the legislative process. Passivism can be as harmful as judicial activism, in certain circumstances, as it is possible for the Judiciary to refuse to assess the constitutionality of norms that had a procedural defect in their preparation, when the norms of the legislative process are covered by norms of law fundamental aspects, which will be explained in greater depth below.

In view of these findings, the need to research, in the light of academic literature, became evident in which circumstances judicialization, activism and judicial passivism may be necessary or harmful, with this attempt at elucidation as the general objective of the present work. It is also necessary to look for possible mechanisms to eliminate or reduce the negative impacts of possible excesses. First, the most appropriate definitions for the terms

and objects of the study will be sought, as well as in the end, checking the possible harm to fundamental rights, whenever activism or passivism are obstacles to the realization of these rights.

As a methodology, bibliographical research and documentary analysis will be carried out. For bibliographical research, authors who have extensive work related to the proposed object and who provide support for the interpretation of the documentary analysis will be consulted. This will be carried out by consulting the judgments of higher courts that generated a critical reaction regarding activism or passivism. Considering that the study involves a retrospective analysis, it was decided to adopt the inductive method, considering that based on the situations studied, generalizations will be sought.

JUDICIALIZATION, EXISTENTIAL MINIMUM AND RESERVATION OF POSSIBLE

Before delving into the central topics of this work, which are judicial activism and passivism, it is necessary to present another important concept, which is dejudicialization. The importance of initially dealing with judicialization lies in the fact that it has a different concept from the others, but there is still a lot of confusion about the repercussions of each one. The confusion is generated by the tenuous difference between judicialization and judicial activism, but also because there is a relationship between the two.

Judicialization is understood as the opening that the constituent legislator provided to the Judiciary to delve into the merits of conflicts arising between the subject of jurisdiction, especially the individual, and state entities.

> It is true that the 1988 Constitution itself opened the opportunity for the judicialization of life by assuming, in the historical horizon, the emphasis on changing society through Law, centered on the precision of the State's purposes, regardless of the conjunctural element relating to occasional majorities, that is, the economic-social structure was previously based on a Directive Letter, with the means of its activation, by a wide range of interested parties, aiming to implement measures capable of ensuring the materialization of the established benefits. (COURA and PAULA, 2018, p. 76- 77)

It can be seen, from the lessons contained in the quote above, that the phenomenon of judicialization is related to governing constitutions, which are not limited to the establishment of mechanisms for exercising power and the distribution of competencies of public bodies and entities, delving into other topics, as fundamental rights, with the guarantee of enforcement by the State.

The phenomenon of the marked proliferation of legal demands for the enforcement of fundamental rights, such as, for example, the right to health, is well-known and widely studied by legal researchers. It is quite common for patients treated by the Unified Health System-SUS - which is regulated by Law 8080, of September 19, 1990, and which establishes a complex care network - to take legal action to obtain health treatments, whether surgical procedures, diagnoses, medicines or special food, almost always high cost, having as its legal basis Art. 196 of the 1988 Federal Constitution. There are legal demands even requiring experimental treatments, when there is no scientific basis to attest to the effectiveness of the medicine or procedure, and even prophylactic treatments, that is, preventive treatments for patients who do not have diseases.

The lessons from Coura and Paula (2018) are instructive, about the proliferation of legal demands for the enforcement of fundamental rights, attributing the phenomenon to the lack of performance of the Executive and Legislative Powers:

> This plethora of subjects, due to constitutional self-applicability combined with the imperative nature of the rules and principles and the lack of initiative from both the Executive and the legislator in relation to issues typical of each one's sphere, ended up directing a countless number of demands to the judiciary, stimulated by adopting the syncretic model based on the American judicial review and the Austrian model of concentrated control. This way, the judge, faced with the discredit of majority politics and discrediting the checks and balances mechanism, tends to define public policies outside the legislator, in behavior leading to the politicization of justice. (COURA and PAULA, 2018, p. 76)

Considering that it is almost always the inertia of the powers in implementing rights guaranteed in the constitution, it can be said that judicialization is a positive phenomenon, as it aims to guarantee these rights. However, there is a broad debate regarding considering the existential minimum and the reservation of what is possible as criteria to guide the actions of the Judiciary in decisions that can guarantee the rights of a few to the detriment of the rights of the majority.

An existential minimum means the establishment of basic conditions for a dignified life in a given society. In the case of health, for example, the State would implement minimum conditions for the population to guarantee a reasonable supply of health services.

The reserve of what is possible is related to the financial capacity that the State has to provide for the realization of fundamental rights. As human needs are unlimited and financial resources are limited and even scarce, it is argued that it will only be possible to realize rights without compromising available resources. Committing resources to the inclusion of one individual can result in the exclusion of a much larger number of harmed individuals. When it comes to health, for example, granting high-cost treatment to one patient can generate losses for many others who need low-cost treatment for continuous use, necessary to maintain health and life.

The doctrine warns of the responsibility of the judge who must treat each case with great caution, in order to avoid the negative impacts of the demand on the population as a whole. In this sense, the lessons from Sarlet and Figueiredo (2008):

> Furthermore, a growing awareness on the part of the bodies of the Judiciary Power assumes an emergency nature, that they not only can but must ensure the implementation of fundamental social rights, but that, in doing so, they will have to act with maximum caution and responsibility, whether when granting (or when denying) a subjective right to a certain social benefit, or even when declaring the unconstitutionality of some state measure based on the allegation of a violation of social rights, without such a stance, as we hope to have managed to substantiate, coming to fruition. necessarily imply a violation of the democratic principle and the principle of separation of Powers. (SARLET and FIGUEIREDO 2008)

However, it is also necessary to consider the zeal of the judge in relation to fundamental rights, especially individual rights highlighted here, in order to prevent managers from insufficiently applying resources for a dignified existence. Besides, in the same sense, and dealing with the right to health, Sarlet and Figueiredo (2008) speak in the following terms:

> The central premise of the analysis to be undertaken is the fact that it cannot be ignored that the right to health, like other fundamental rights, is always and in some way affected by the so-called reservation of the possible in its various manifestations, either due to the availability of existing resources (which also includes the organizational structure itself and the availability of efficient technologies), or due to the legal (and technical) capacity to make

> use of them (the principle of reserving what is possible). On the other hand, the (implicit) guarantee of a fundamental right to the existential minimum operates as a minimum parameter of this effectiveness, preventing both omissions and insufficient protection and promotion measures on the part of state actors, as well as in the sphere of relations between individuals, when necessary. the case. (SARLETE FIGUEIREDO, 2008).

It is not possible to understand and attribute democratic status to the State without promoting the effective exercise of fundamental rights by the population, especially the most vulnerable groups.

JUDICIAL ACTIVISM

After having made brief considerations about judicialization, understood as the opening given by the constituent legislator to the Judiciary, in order to assess demands for the implementation of fundamental rights, we begin to discuss activism. While Judicialization is operated based on a previously existing constitutional norm, which guarantees rights to those under jurisdiction, but not realized, in its vast majority by the Executive Branch, thus opening the opportunity for Judiciary action, activism is based on the gap left by the absence or insufficiency of legislation.

The most recent example of judicial activism was the case of homophobia being equated with a crime of racism. The matter was dealt with in a Direct Action of Unconstitutionality by Omission (A.D.O., number 26) and in a Writ of Injunction (MI 4733), with the actions filed by the Popular Socialist Party-PPS and the Brazilian Association of Gays, Lesbians and Transgenders-ABGLT. The decision has the following terms in summary:

> The Court, unanimously, partially accepted the direct action of unconstitutionality due to omission. By a majority and to that extent, it judged it to be valid, with general effectiveness and binding effect, to: a) recognize the state of unconstitutional delay of the National Congress in implementing the legislative provision intended to comply with the incrimination warrant referred to in sections XLI and XLII of art. 5th of the Constitution, for the purpose of criminal protection for members of the LGBT group; b) declare, as a result, the existence of an unconstitutional normative omission by the Legislative Power of the Union; c) inform the National Congress, for the purposes and effects referred to in art. 103, § 2, of the Constitution with art. 12-H, caput, of Law, number: 9,868/99; d) give an interpretation in accordance with the Constitution, in light of the constitutional incrimination warrants included in sections XLI and XLII of art. 5th of the Political Charter, to classify homophobia and transphobia, whatever the form of their manifestation, in the various criminal types defined in the Law, number: 7.716/89[...]. (STF, 2019).

Despite the court's good intention in criminalizing homophobia, and it is fair and necessary to consider the practice as a crime, the judge's non-compliance with the principle of reservation is questioned, as one cannot criminalize a fact that is not covered by the criminal type, being prohibited the analogy. But it is also necessary to highlight the inconceivable omission of the legislator, considering the numerous cases of offense against members of the LGBT group and which often trigger serious typical conduct, such as bodily injuries and homicides, such as the Dandara dos Santos case, which occurred in the State of Ceará in 2017. However, given the positive jurisdictional activity, there is the possibility of unjustifiable excesses, as Coura and Paula (2018) discuss:

> The fundamental issue, however, is the dosage with which the desire to achieve material gains is interpreted by the justice system to safeguard the forms of life conducive to emancipation, especially when there is a feeling that voting and politics have nothing more to offer. In this reflection, the pendorativist manifests himself as the judge

> overcoming, in an unorthodox way, the demarcation line that separates him from legislative choices, in theory, responsible for stabilizing expectations, honoring durability and coherence with the aim of achieving predictability of behavior.
>
> Judicial decisions that are based on convenience and/or moral roots and, therefore, follow the route of discretion of parliamentary conventions without those responsible submitting to suffrage and the possibility of renewing the electoral calendar, lead to the anti-democracy of the toga, which begins to dictate standards bordering on arrogance and oracular grandeur, lately expressed in the so-called extrajurisdictional activism to become [...]. (COURA and PAULA 2018, p. 93).

According to the principle of separation of powers, as is known, there are typical powers for each of them (Executive, Legislative and Judiciary), with atypical powers being carried out in very specific situations. For example, the Judiciary is responsible for resolving conflicts as a typical function, using the rules created by the Legislative Branch. However, the courts draw up organizational rules and internal regulations to regulate their activities, which would be their atypical function. Until then, there are no considerable problems, the difficulty arises when there is undue interference by the Judiciary in what would be the competence of the Legislature, in situations not provided for by law or contrary to the law itself. According to the rules of the Democratic State, the Legislature is responsible for creating norms through the legitimacy acquired by the population's vote. As the judiciary is made up of members not chosen through voting, acting outside of their typical (and exceptionally atypical) functions, the difficulty of the counter majoritarian stance of judicial activity in these cases arises. In this sense, Souza Neto and Sarmento (2015):

> The democratic legitimacy of constitutional jurisdiction has been questioned due to the aforementioned "counter-majoritarian difficulty" of the Judiciary, which arises from the fact that judges, despite not being elected, can invalidate decisions adopted by the legislator chosen by the people, often invoking, constitutional norms of an open nature, which are the subject of divergent readings in society [...] Criticism of judicial control of constitutionality insists that, in cases like this, the decision on the most correct interpretation of the Constitution must rest with the people themselves or the their elected representatives, not magistrates. (SOUZA NETO and SARMENTO, 2015, p. 78).

However, the aforementioned authors present arguments that seek to rule out the counter-majoritarian difficulty, especially in Brazil, among them the fact that those judged do not deviate from the will of the majority of the population, that is, there is harmony with public opinion. Especially because the magistrate is part of society, being one of those affected by the decision.

It is also highlighted that there is excessive influence of economic power on the outcome of elections, which occurs especially in Brazil. It is also argued that in our country there was a democratization of constitutional jurisdiction, by increasing the list of legitimate active parties to file actions and the incorporation of amicuscuriae.

Another argument to avoid the counter-majoritarian difficulty, also presented by the aforementioned authors, would be the fact that democracy cannot be limited to the exclusive consideration of the will of the majority, as minorities cannot be excluded from fundamental rights and guarantees, often required to the Judiciary in the face of the omission of other powers.

The aforementioned author also emphasizes that in many cases the judgments are not against the interests of the majority but in

favor. These are cases in which the Legislature does not enter into "thorny" situations for strategic reasons, aiming to avoid wear and tear, practically leaving room for the Judiciary to act on purpose.

The arguments presented by the author, in an attempt to eliminate the negative effects of the counter-majority difficulty, are in fact quite enlightening in the sense of being able to admit judicial activism as a stance of the Judiciary that can be seen as an instrument for the enforcement of fundamental rights and guarantees.

JUDICIAL PASSIVISM

Much is said about judicial activism and judicialization, but little is said about judicial passivism as something that could have negative effects on the implementation of fundamental rights. Judicial passivism can be understood as the negative stance of the Judiciary in delving into topics that are apparently beyond the possibilities of judicial assessment, as they supposedly compete solely and exclusively with the other powers. In fact, what is not the responsibility of the Judiciary must not be taken up for consideration by the magistrates, under penalty of undue interference in the sphere of competence of the other powers.

While in activism there is criticism of disrespecting the popular will, in passivism there is an attempt to remove the counter-majoritarian difficulty in the Judiciary's actions. However, practice shows that there are situations brought to the Judiciary that end up not being assessed by courts and tribunals, under the argument of lack of competence, but that in essence are situations that demand a positive stance from the Judiciary.

> Passivism, while refusing a judicial defense of the democratic legislative process and the rules that guarantee its rigorous observance, represents an inadequate and insufficient protection of the formation of popular will and the legitimate forms of its manifestation. By failing to adequately monitor and guarantee full compliance with the democratic legislative process, the court acts negligently in its role of guarantor of the democratic conditions necessary for the proper functioning of the rule of law. (BUSTAMANTE, 2016, p. 359).

From the above, it is clear that the Judiciary's refusal to analyze a situation related to compliance with due legislative process is an unreasonable omission, when the intention is to protect, in this case, the popular will. Even though the protection of majority decisions that legitimize the actions of the Legislative Branch is fair and necessary, it is important to consider that it does not have the freedom to disrespect the process of drafting laws, failing to comply with the established phases, the quorum for deliberation and the set deadlines. On the subject, Coura (2018) provides the following terms:

> In relation to the procedure, the Brazilian judiciary, particularly the Supreme Court, while moving in appreciation of moral issues, does not appear with the same commitment when faced with arguments that must be resolved internally from other powers, that is, the phenomenological display slips through the fingers and the facticity of being-there is veiled, because the decision based on the "pure self" ignores the ``*ek-sistir*``, the being-outside, preferring to hide itself on the surface of the causal explanation. This is what happens when, in view of the internal regulations of the congress houses, the STF fails to ensure the democratic legislative process [...] (COURA and PAULA 2018, p. 102)

As an example of the need for positive action by the Judiciary in assessing the constitutionality of norms created without observance of the rules of the legislative process, Bustamante (2016) presents Robert Alexy's concept of ascribed norms of fundamental rights, which are those found

outside the constitution, but which They are necessary for the actual implementation of constitutional norms.

> Written (or attributed) fundamental law norms are norms created in the process of implementing the law by constitutional courts or by the legislator that specifies a certain Fundamental Right.
>
> In Alexy's thinking, these written norms, although they do not formally have the status of a constitutional norm, they also operate as norms of Fundamental Law, because it is possible to base them correctly in the Constitution. In this sense, it is simply impossible to comply with the norms directly from the Constitution, without observing the parameters defined by said norms for the application of the Constitution. (BUSTAMANTE, 2016, p. 366).

The aforementioned author even presents a formula for detecting ascribed constitutional norms: *Is it possible to comply with norm X, directly established in the Constitution, without at the same time observing norm Y, provided for in the Internal Regulations?*

If the answer is negative, it is clear that the regulatory norm is adhered to, therefore non-compliance with it renders the legislative process unconstitutional, enabling the Judiciary to adopt an active stance in order to judge the validity of the invalid norm.

PARAMETERS FOR JUDICIAL SELF-CONTAINMENT

As already mentioned in this work, judicialization, activism and judicial passivism have two faces: a positive one, in the sense of being important for the implementation of fundamental rights and guarantees established in the Constitution, and a negative facet, in the sense that there may be harmful excesses, considering the division of powers and competencies established in the constitution. Excesses are incompatible with the concept of a Democratic Rule of Law, but omissions can also generate the same incompatibility.

Given this duplicity of possibilities in relation to activism, it is important for legal researchers to seek solutions or alternatives to contain excesses, or to present plausible justifications for more active action by the Judiciary, especially the Constitutional Court.

Souza Neto and Sarmento (2015) present in a didactic and clear way the parameters for what they call judicial self-restraint, with an initial warning that it is necessary to "*institutional and social dialogue between, on the one hand, the STF and, on the other, representative bodies and civil society*". Corroborating the aforementioned author's understanding, Danner (2014, p. 570), discussing Habermas and the Welfare State, presents an understanding in the sense of greater rapprochement between the Powers and civil society:

> The bureaucratization of power and the replacement of basic democracy by the political party, in this sense, are the two points of criticism that Habermas develops in relation to the left, pointing to the need for radically inclusive democratic processes, which bring administrative political power closer to society civil society, social movements and citizen initiatives. (DANNER, 2014, p. 570).

In this sense, the aforementioned authors Souza Neto and Sarmento (2015) present the following as mechanisms for self-restraint: the degree of democratic legitimacy of the process of drafting the normative act questioned, the protection of the assumptions necessary for the functioning of democracy, the defense of vulnerable minorities, the defense of materially fundamental rights (basic living conditions and existential freedoms), the comparison of institutional capacities, the time of the normative act and temporal inconsistency.

In relation to the first parameter, the process of drafting the law must be considered, as the more democratic it is, the less interference

from the Judiciary must occur. Therefore, before overturning the effects of a certain law, for example, the judge must analyze the degree of legitimacy of the norm, checking the way in which the law was drafted. Souza Neto and Sarmento (2015) point out the norms submitted to the referendum and plebiscite process as having a presumption of constitutionality. In these cases, the degree of legitimacy is evident, due to the direct exercise of power by the people. In other situations, the degree of consensus in the approval of the norm, measured by the deliberations and votes of parliamentarians, must be considered. For example, a rule that has been approved by the legislative houses by a large majority, unanimously or almost unanimously must receive greater consideration by the judge. A different situation occurs when there is a tight majority.

The author continues to present a second self-containment mechanism, which is the protection of the assumptions necessary for the functioning of democracy. "*There are rights and institutes that are directly related to the functioning of democracy, such as political rights, freedom of expression, direct access to information and the prerogatives of the opposition.*" (Souza Neto e Sarmento, 2015, p. 104).

In these situations, activism would not be used to the detriment of democracy, but in favor of its maintenance. The authors present as an example the Direct Action of Unconstitutionality (ADI 4650), which judged the legal provisions related to the possibility of financing electoral campaigns by legal entities. In fact, by limiting the possibility, an electoral election is held without interference from economic power, or at least trying to reduce this possibility. As is known, large donations from entrepreneurial legal entities, with their own interests, provide the candidate of their preferences with the possibility of disseminating campaigns and ideals in an unequal way in relation to other candidates, outside the distinctions established by the law itself, as is the case of television time for electoral propaganda. In these situations, there is no doubt that the validity of the norm is an affront to democracy itself, and there must be active action by the Judiciary.

The defense of vulnerable minorities is also seen as a form of self-restraint. As democracy presupposes respect for human dignity, norms that prevent the exercise of fundamental rights and guarantees must be subject to analysis by the Judiciary. Especially because when we talk about minorities, we refer to groups with little or no representation in Power, which does not necessarily correspond to the number of people in vulnerable conditions in society as a whole.

> It must be noted that the criterion for defining a minority that must guide the application of this parameter is not numerical, but involves the participation of the social group in the exercise of political, social and economic power. The argument for the protection of minorities has already been used, in the past, as a mechanism aimed at immunizing the privileges of the rich compared to the poor. Obviously, this is not what is being defended here. Millionaires represent a minority in quantitative terms, but not in terms of participation in power. Their interests are even excessively protected through majority politics, so contaminated by the influence of economic power. (Souza Neto and Sarmento,2015, p. 105)

Now, if minorities with little or no representation in power, but who represent a large portion of the population, are in a vulnerable situation due to the actions of the Legislature, nothing fairer than the positive action of the Judiciary in order to correct the discrepancies for the benefit of values who are more in tune with the concept of democracy.

Closely related to the defense of minorities, there is also the parameter of defending materially fundamental rights, which are

those relating to the guarantee of basic living conditions and existential freedoms. In these cases, it is possible to insert not only norms that violate the aforementioned rights, but also when there is a failure by the legislature to draft laws that enable the rights in question.

Regarding the comparison of institutional capacities, there are very specific situations, regulated by specialists in certain subjects, such as, for example, the idealization of a government's economic policy. In these cases, the Judiciary must adopt a more restrained stance, as it does not have the same capacity institution to analyze, with the same property, the effects of the norms created in these circumstances. This is what can be seen from the academic literature:

> One must not adopt an idealized view of the judge in constitutional jurisdiction – like Ronald Dworkin's "judge Hercules" –, which assumes infinite and omniscient wisdom of judges, as well as the absence of limitations resulting from lack of time due to work overload. A theory that is based on idealizations far from reality will not work well in practice, when operated by concrete constitutional judges, of "flesh and blood", acting within institutions and through decision-making procedures that have their weaknesses and limitations. (Souza Neto and Sarmento2015, p. 108-109)

However, this cannot mean that it is completely impossible for the Judiciary to assess and judge the constitutionality of norms that undermine, for example, the rights of vulnerable minorities, and the provisions set out in the previous parameters must be observed.

In relation to the parameter of the time of the normative act, Souza Neto and Sarmento (2015), argue that, depending on the period and historical context in which the norms were created, the presumption of constitutionality can be ruled out, leaving room for the Judiciary to act. An example would be the norms created before the 1988 Constitution, especially those created during the dictatorship, due to the lack of democracy in the choice of representatives. The same cannot be said about the norms already created under the aegis of the current constitution, where there will be a need for a more restrained stance. Another argument to rule out the presumption of constitutionality is that, even created in democratic contexts, the deliberations of older norms may not reflect the current understanding of the regulated situation, deserving an active stance from the Judiciary in order to resize the limits of the norm.

Finally, the last parameter presented by Souza Neto and Sarmento (2015) is temporal inconsistency, which consists of the tendency of human beings to value short-term interests and, consequently, devalue long-term interests, not restricted to individuals and also affecting communities.

> The electoral political system tends to exacerbate the temporal inconsistency in collective action, increasing its myopia, by inducing long-term values and interests to be underestimated - more distant from the voters' day-to-day concerns -, in favor of immediate advantages. It can be said, in a generalization, that, as politicians aim to be re-elected, they tend to prioritize actions that yield positive effects during their mandates, aiming to obtain electoral dividends. (SOUZA NETO and SARMENTO, 2015, p. 111)

In these cases, it is up to constitutional judges to defend long-term interests, since the trend of majority politics may harm the future enjoyment of the benefits of actions with long-term effects. As an example, environmental issues are cited, as it is common for government actions to promote economic development at any cost, even if this means discrediting existing, and often costly, mechanisms to reduce or eliminate the environmental impacts of potentially or actually polluting activities.

The 1988 Federal Constitution itself, in its Article 225, presents the principle of intergenerational solidarity, when it comes to the environment, as a way of not depriving future generations of the enjoyment of natural resources. In these situations, it demands the active action of constitutional judges as a way of promoting the Constitution itself and correcting the myopia mentioned by the aforementioned author.

FINAL CONSIDERATIONS

Judicialization, activism and judicial passivism are phenomena present in practice, and evidenced in a large part of judicial decisions, especially in the constitutional courts of countries that have adopted a governing constitution model. With a constitution full of fundamental rights and guarantees and which, therefore, is not limited to the establishment of guidelines for the actions of the powers and their members, the form of state and government, the opportunity for more active action by the Judiciary arises.

It is argued that this action must not be considered as something harmful to the Democratic Rule of Law, with its characteristics, in particular the exercise of powers in accordance with the distribution of competencies provided for in the Constitution. However, there are possibilities of excesses on the part of the Judiciary that can even cause adverse reactions in relation to the necessary action, generating criticism and discredit.

As a way to avoid such reactions, it is up to the legal researcher to seek solutions, in the light of legal principles, so that the Judiciary can act whenever the other powers present an omission in the implementation of fundamental rights or when the positive action of these powers represents a threat to the Democratic Rule of Law.

In this work, the difficulties of judicialization, activism and judicial passivism were presented, especially the counter-majoritarian situation in which the Judiciary finds itself, as the members of this power are not chosen by the people and many judges question the validity of norms created by powers formed by elected representatives and who, therefore, enjoy legitimacy in their actions.

In particular, the main parameter for an activist stance of constitutional judges is defended by respecting the interests of vulnerable minorities and maintaining the necessary assumptions for the functioning of democracy.

REFERENCES

BRASIL. Constituição Federal de 1988. Disponível em: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Acesso em: 09 de março de 2020.

BRASIL. Lei nº 8.080, de 19 de setembro de 1990. Disponível em: http://www.planalto.gov.br/ccivil_03/leis/l8080.htm. Acesso em: 09 de março de 2020.

BUSTAMANTE, Thomas e BUSTAMANTE, Evanilda Godoi. Jurisdição Constitucional na Era Cunha: entre o passivismo procedimental e o ativismo substancialista do Supremo Tribunal Federal. Disponível em SSRN:https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2633948. Acesso em: 08 de março de 2020.

COURA, Alexandre de Castro e PAULA, Quenya Correa de. Ativismo Judicial e Judicialização da Política: sobre o substancialismo e procedimentalismo no Estado Democrático de Direito. Revista Brasileira de Estudos Políticos, v.116, p63-112, 2018.

DANNER, Leno Francisco. Habermas e a idéia de continuidade reflexiva do projeto de bem estar-social. Análise Social, 212, XLIX (3º), 2014, p. 568-597.

SARLET, Ingo Wolfgang e FIGUEIREDO, Mariana Filchtiner. Reserva do possível, mínimo existencial e direito à saúde: algumas aproximações. Revista de Doutrina da 4ª Região, Porto Alegre, n. 24, jul. 2008. Disponível em:<https://revistadoutrina.trf4.jus.br/artigos/edicao024/ingo_mariana.html> Acesso em: 08 mar. 2020.

SOUZA NETO, Claudio Pereira de e SARMENTO, Daniel. Controle de Constitucionalidade e Democracia: algumas teorias e parâmetros de ativismo. Capítulo 03. In: SARMENTO, Daniel (coord.). Jurisdição Constitucional e Política. Rio de Janeiro: Forense 2015. P. 73-114.

SUPREMO TRIBUNAL FEDERAL. Ação Direta de Inconstitucionalidade Por Omissão nº 26. Disponível em: http://portal.stf.jus.br/processos/detalhe.asp?incidente=4515053. Acesso em 09 de março de 2020.

SUPREMO TRIBUNAL FEDERAL. Mandado de Injunção nº 4733. Disponível em: portal.stf.jus.br/processos/detalhe.asp?incidente=4239576. Acesso em: 09 de março de 2020.