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EXISTENTIAL MINIMUM AND RESERVE OF THE POSSIBLE: CONSIDERATIONS ON JURISDICTIONAL CONTROL OF PUBLIC POLICIES IN POST-1988 CONSTITUTION, BRAZIL

MÍNIMO EXISTENCIAL Y RESERVA DE LO POSIBLE: REFLEXIONES SOBRE EL CONTROL JURISDICCIONAL DE LAS POLÍTICAS PÚBLICAS DESPUÉS DE LA CONSTITUCIÓN DE 1988, BRASIL

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ABSTRACT

In the face of omissions involving the thorough fulfillment of positive rights, consistent with the State's failure to comply with the 'existential minimum', the Brazilian Judiciary has taken an increasingly proactive role. This paper aims to analyze, within the scope of the legal doctrine and jurisprudence, aspects related to the manifestation of judicial activism in the context of judicial control of public policies in Brazil. The relevance of this study rests on the fact that such proactive stance has been a notable feature in the post-1988 Constitutional period by means of the 'Claim of Non-Compliance with a Fundamental Precept' (ADPF, in portuguese) number 45/Federal District (DF), which recognized the possibility of formulating and implementing public policies through the Judiciary's determination on exceptional grounds. The research was bibliographical and documental in nature, with a qualitative approach. The results show the existence of disparate views on the prominence of the Court, frequently based on the democratic and separation of power principles and on the urgency in the fulfillment of positive rights.

Palavras-chave:
activismo judicial; derechos fundamentales; mínimo existencial; políticas públicas; reserva como sea posible.

RESUMEN

El presente artículo tiene como objetivo analizar, desde un enfoque doctrinal y jurisprudencial, aspectos relacionados con la manifestación del activismo judicial en el ámbito del control judicial de las políticas públicas en Brasil. La investigación es de tipo bibliográfico y documental, con un enfoque cualitativo. Ante las omisiones que involucran la plena realización de los derechos prestacionales, que consisten en la falta de observancia del "mínimo existencial" por parte del Estado, el Poder Judicial ha protagonizado una actuación cada vez más proactiva, observable desde la post-Constitución de 1988, a partir de la Arguição de Descumprimento de

Preceito Constitucional (ADPF) 45/DF, en la que se reconoció la posibilidad de que la formulación e implementación de políticas públicas se lleven a cabo, con bases excepcionales, por determinación del Poder Judicial. Los resultados evidencian la existencia de visiones dispares respecto al protagonismo del Tribunal, teniendo en cuenta el principio democrático y de separación de poderes, así como la urgencia en la concreción de los derechos prestacionales.

Introduction

Public policies translate strategies or government action programs aimed at achieving politically and constitutionally determined objectives. In other words, they refer to the 'State in action' to address economic, political and social issues, whose effectiveness is required in light of the constitutional precepts. Specifically, the normative principle of human dignity implies that the minimum conditions of existence [existential minimum cannot be guaranteed without first ensuring it's positive dimension of state obligations, which are a positive dimension of the so-called 'minimum living standards' and, therefore, linked to the principle of human dignity.

In this sense, in order to comprehend the implications of the failure to fulfill this State's duty to provide services, in other words, of the deficit in public policies implementation, it is necessary to point out the connection between the crisis of both representation and functionality of the political powers in Brazil. This connection will later be used to analyze the prominence of the Judiciary in the control of public policies, an approach observed as a skillful response to the fulfillment of constitutionally guaranteed rights. In this context, we examine the transformations in the Supreme Federal Court's (STF) case law following the advent of the 1988 Constitution. A change is seen in the self-contained stance of the Court towards a manifestly proactive approach, under the scope of guardianship of the 'existential minimum'.

Indeed, once instigated, the Judiciary cannot refrain from issuing a statement, under penalty of incurring in a denial of judicial relief. It is precisely in the manner in which it does so that one may or may not verify, or not, the existence of judicial activism. Although judicial activism can achieve progress, especially with regard to the effectiveness of fundamental rights, it has — for a long time — been the object of investigations and doctrinal positions, most of which address the 'contraindications' in its current *modus operandi.* The discussion concerning judicial activism revolves around the usurpation upon the duties of the Legislative and Executive branches, considering the institutional overlap of the Judiciary, in contrast to the principle of independence and harmony of the three branches.

Judicial activism is subject to multiple definitions that, for the most part, issue value judgements: sometimes with a positive connotation, as an effective means of fulfilling rights (e.g. in the event of legislative inertia); sometimes with a negative connotation, seen as a phenomenon "either linked to a judicial relief marked by arbitrariness or to a usurpation of competence on the part of the judge" (Ramos, 2021). Roughly speaking, it can be said that this activism relates to a judicial action that exceeds its classic limits. In other words, it transcends the boundaries of the jurisdictional role.

Historically, the term "judicial activism" has its beginnings in the paper "The Supreme Court", by the American historian Arthur M. Schlesinger, published in Fortune magazine, vol. XXXV, no. 1, January 1947. Despite its terminological origin, judicial activism — as a phenomenon related to the expansion of the institutional space occupied by the Judiciary — has a different causality, long predating the creation of the term. This is because, dating back to the 19th century, especially in North American doctrine, we can find discussions related to what is now known as "judicial review". As Clarissa Tassinari (2012) recalls, the judicial review was inaugurated in the USA by the case of *Marbury* v. *Madison* (1803), which asserted the power of the Supreme Court to declare unconstitutional and cease from applying a federal law as incompatible with the Constitution.

It should be noted that, in the aforementioned period, the Constitution of the United States of America did not expressly grant the exercise of judicial review to the American courts - the review was not an attribution of the Judiciary. Since then, discussions on the subject have been enabled, leading to debates of increased significance and depth - especially with the subsequent multiform judicial activity in its activist stance.

In fact, as stated by Luís Roberto Barroso (2009): "in different parts of the world, at different periods, constitutional or supreme courts stood out in certain historical segments as protagonists of decisions involving far-reaching issues". However, it must be emphasized that the gradual progression of judicial activism has given it a certain diagnostic complexity, in view of the countless political, social and institutional transformations — including the legal culture itself — that have taken place over the years. This is why much is currently said about the distinction between this phenomenon and the judicialization of politics.

In Brazil, the causality of judicial activism is linked, in a more expressive way, to the process of redemocratization — enacted by the Constitution of 1988. The reason for this is that, after the Brazilian Military Regime (1964-1985), "a favorable environment — a democratic one, therefore — to the development of the idea of fulfilling citizens' rights was created", as Tassinari (2012) observed. According to the author, this is equivalent to saying that "it was only with the notion of democratic constitutionalism — and precisely because of it — that the judiciary began to think from an activist perspective". Along these lines, the evolution of judicial review is also worth mentioning, considering the expansion of the exercise of constitutional jurisdiction and, notably, the primary competence of the Supreme Federal Court as guardian of the Constitution.

Such a meaning is appropriate, which is why numerous decisions of the STF might be mentioned in the post-1988 Constitution era — to what some call the “second phase” of judicial activism, highlighting the proactive role of the Supreme Court:

Thus, judicial activism in Brazil has manifestations that can be concretely identified in the light of the doctrinal concepts above within the legal system inaugurated by the 1988 Constitution. As follows, it is important to understand that in the Brazilian context, unlike in the United States, "there has been an almost unreflective diffusion in the imagination of institutional agents that an activist Judiciary would not only be advantageous, but also necessary in order to achieve the fulfillment of fundamental rights" (Pessoa; Neves, 2021). This statement can be verified in the context of the judicialization of public policies, in such a way that judicial intervention is seen — in certain circumstances — as an indispensable means for the effectiveness of positive state obligations.

One cannot expect to deliberate about judicial activism without first observing its meaning in the context of a rule-based democracy. That is due to the democratic ideal laying down limits to the exercise of power (scope of non-concentration), as seen through the division of state attributions and roles. In fact, the country's legal system — in view of the compensation system — requires that each of the state's "gears" fulfill their purpose, under penalty of systemic compromise. José Afonso da Silva explains the functions of the State in these terms:

> The legislative role consists of issuing general, abstract, impersonal, and innovative rules of the legal order, called laws. The executive solves concrete and individualized problems in accordance with the laws. Its role is not limited to the simple execution of laws, as sometimes said; it includes prerogatives and all legal acts, and facts that do not have a general and impersonal character also come under the executive role. For this reason, it is appropriate to say that

> the executive is divided into a government function, with political, co-legislative, and decision-making attributions, as well as an administrative function, with its three basic missions: intervention, promotion and public service. The jurisdictional role aims to apply the law to specific cases in order to resolve conflicts of interest (Silva, 2009).

It should be noted that the theory of the separation of powers was incorporated into constitutionalism by the work of Montesquieu, conceived precisely to ensure the freedom of individuals. It is indeed accurate that — in the context of the evolution of fundamental rights — there was the advent of positive freedoms, linked to the principle of equality and, *ipso-facto*, to the provisional duty of the State. Afterwards, there was also the rise of guardianship mechanisms for diffuse and collective interests, bearing in mind the ideals of fraternity and solidarity. In any case, when considering the principle of the separation of powers, it is essential to reference the dimensions (or generations) of fundamental rights — without neglecting those not mentioned (4th, 5th, and perhaps 6th dimensions).

It must be inquired, however, how this meaning would remain if the principle of the separation of powers were set aside, precisely in order to guarantee — in certain situations — the effectiveness of fundamental rights. This is a fair provocation, and the response evokes the risk of institutional domination by one Branch over the others. It is important to emphasize that — by acquiring a kind of institutional prominence — the Branch that has been empowered under the scope of fulfilling rights can, at a given moment, change its *modus operandi* and not be bound by the observance of this initial scope. That is the reason for the warning: one cannot dismiss the risks of acting in a way that is tangential to constitutional competence by looking only at the immediate effects of the phenomenon. Rather, we must visualize the possibilities infused in this stance in view of how much it is fundamentally regulated by the constitutional convention.

Within this context, it is important to note that Article 2 of the Federal Constitution (CF) proclaims the Principle of Independence and Harmony between the Powers; the separation of which is a permanent clause, under the terms of Article 60, § 4, III.

Nevertheless, the Judiciary, for quite some time, has understood that when it comes to public policies, “it would be a distortion to consider that the principle of the separation of powers, conceived initially to ensure fundamental rights, could indeed be used as an obstacle to the fulfillment of equally fundamental social rights” (REsp 1.041.197/MS, Judge-Rapporteur: Justice Humberto Martins, Second Panel, DJe 16/9/2009). This is because "[...] in the realm of individual and social rights of absolute priority, the judge should not be impressed or swayed by claims of convenience and opportunity brought by the negligent administrator." (REsp 440.502/SP, Judge-Rapporteur: Justice Hermam Benjamin, Second Panel, DJe: 24/09/2010). This understanding is consolidated in the precedents of the High Court of Justice and the Supreme Court, as we further discuss.

The debate centers on the "price to be paid" to uphold the Welfare State. This is a discussion with numerous biases, as stated. From a perspective of constitutional rights effectiveness, as a response to legislative inertia or omissive and commissive actions by the Executive that harm rights, the Judiciary can take proactive measures to enforce those rights. For example, in cases regarding health and environment, the Judiciary can take action to protect people's rights. This can be affirmed with great caution, presuming the exceptionality of this action, because of the jurisdiction's non-obviation (Art. 5, XXXV, CF), and due to the primary competence of the Brazilian Supreme Court to ensure fundamental rights, as guardian of the Constitution. The major challenge lies precisely in the

unpredictability of the extent of the Judiciary's interference in another branch of government, especially considering the lack of support in the Constitution.

In this sense, Luís Roberto Barroso (2008) ponders that "judicial activism has so far been part of the solution, not the problem. Yet, it is a powerful antibiotic, and its use should be occasional and controlled". In fact, the effects of proactive judicial action have often been aligned with the intentions of the original legislator, as they often imply overcoming a state of affairs foreign to constitutional commands. Nevertheless, it is not possible to fully analyze the phenomenon based on its effects, whose predictability is controversial, and this is where judicial activism presents more significant challenges. There is an ongoing debate among scholars regarding the means employed to guarantee rights in a way that follows the principles of the rules-based democracy. While it cannot be said that the guarantee of rights is contrary to the Constitution, there is a disagreement about whether the methods used, such as activism or decisionism, align with these principles.

Judicial activism, which allows for discretionary decision-making, can sometimes work against the democratic ideal. This is because it goes against the principles of independence and harmony that govern the relationship between the branches of government. However, it is crucial to emphasize the impossibility of detracting from the link between the manifestations of judicial protagonism and the fulfillment of rights, which is equally esteemed to the democratic ideal. For this reason, debates should be based — more necessarily — on the viability of judicial activism in specific hypotheses. There may be situations where the only way to address a problem the authorities need to handle appropriately and urgently is to use a remedy with known risks.

Method

The objective was investigate, through qualitative, bibliographical and explanatory research, how the violation of positive rights prompts an exceptionally proactive stance from the Judiciary, in view of safeguarding these rights and overcoming state failures involving the formulation and implementation of public policies. To this end, we highlight elements of this assertive response, such as the use of the 'existential minimum' within the case law of the Supreme Federal Court in coexistence with the 'reserve of the possible budget'. This is preceded by a doctrinal analysis of the judicial control pertaining to the merit of administrative acts. The analysis of case law, in turn, also denotes a documental nature of the research.

The chosen method was inductive, as it aimed to derive answers from the analysis of a set of judicial decisions emanating from the Supreme Court. Data collection was carried out through sources that allowed for a comprehensive understanding of judicial activism and, simultaneously, facilitated the establishment of a parallel between the occurrence of this phenomenon and omissive and/or commissive behaviors undertaken by the Legislative and Executive Powers concerning public policies; something that presupposed a centralized understanding in the realms of democratic representation, separation of powers, and fundamental rights, intrinsic to Constitutional Law. In this regard, laws, doctrines, scientific articles, and, primarily, judgments of the Supreme Court were the subject of analysis.

Discussions

The State's failure in providing services is the subject of numerous academic investigations and a recurring topic in studies of judicial activism. Barroso (2008) argues that the Judiciary's prominence stems from dysfunctions that undermine the democratic state, including the crisis of representation and legislative functionality. In this context, it is essential to pay attention to the complexity of the system, as the author states: "The expansion of the judiciary should not divert attention from the real dysfunction afflicting Brazilian democracy: the crisis of representation, legitimacy, and functionality of the Legislative Branch". Therefore, it is important to observe one of the most concrete manifestations of this prominence as a consequence, among others, of the aforementioned functional and representative deficit: the judicial control of public policies.

Therefore, recognizing the central role of the Legislative Branch in enacting new rights, "the Brazilian parliamentary exercise has not reflected the aspirations of society and the practice of representative democracy" (Garcia; Zacharias, 2013). For this reason, it is essential to consider the connection between the challenges of representation and functionality within this branch of government and the handling of public policies.

Peres and Silva (2020, p. 570) highlight the relationship between this scenario and judicial prominence. They emphasize that "the Legislative Branch, specifically the Congress, must take responsibility for its actions, fulfill its constitutional duties, and address any omissions. By not creating laws, the Legislative Branch significantly contributes to expanding the Judicial Branch". It is essential to note that the challenges experienced in the legislative process are not only due to the legislator's inertia and inadequate representation of the electorate. The Executive Branch also plays a significant role in implementing public policies, which can lead to the difficulties being faced.

It should be noted that, initially, the position of the Supreme Federal Court was orthodox and, in a certain way, conservative when assessing the constitutionality of the norms. In other words, in the context of constitutional control, it was difficult to speak of "protagonisms" that could be analyzed in terms of judicial activism.

In fact, until the mid-1990s, the Supreme Federal Court did not act as a "positive legislator", that is, "it did not provide solutions for cases in which it declares laws unconstitutional, whether due to action or omission" (Vieira Júnior, 2015). From this period onwards, due to reasons previously discussed in this paper, variations in jurisprudence began to emerge, demonstrating a change in the self-contained mode of action of the Supreme Court. Regarding public policies, this self-restraint meant upholding the autonomy of the other branches of government in their formulation and implementation. This, in turn, made it almost impossible for the Judiciary to interfere in administrative decision-making:

> At first, the STF's self-restraint was the rule. The Court rigorously applied the principle of separation and harmony of powers, which is established in the 2nd Article of the Constitution and made unamendable by Article 60, § 4, III, of the Constitution. The self-restraint respected the prerogative of the Executive Branch's autonomy in the formulation, implementation, and evaluation of public policies, in defining priorities in the allocation of limited budget resources, and in adhering to the financially feasible clause. In this context, the judiciary could not review public policies regarding their merit, timeliness, and convenience (*Ibidem*, p. 6-7).

It should be noted that the administrative merit is "nothing but the power granted by the law so that the administrator may decide on the timeliness, and convenience, of a

certain discretionary act under practice" (Oliveira, 2019). Meanwhile, it is within the Judiciary's power to evaluate the legality of said act. Whereas, ordinarily and within the boundaries of the law, the public administrator is the one in charge of rendering the suitability and occasion (merit) of it. Simply put, the Judiciary is not authorized to replace the administrator's discretion with that of the judge. It must also accept administrative choices by substituting them with other options considered more suitable or timely. This is the conclusion drawn by Hely Lopes Meirelles (2021, p. 122), who states that this "assessment is solely the responsibility of the Government".

Despite what has often been repeated since the early 2000s, the jurisprudence of the Supreme Court — from the perspective of the non-obviation of jurisdiction — has emphasized the non-discretionary nature of judicial arbitrariness in the fulfillment of rights. Therefore, it is recognized that the judiciary may control and intervene in the formulation and implementation of public policies, although, as stated by Justice Celso de Mello, such an assignment belongs to other branches of government. Regarding this change in the Court's *modus operandi*, we refer to the claim of non-compliance with a fundamental precept (ADPF) number 45 - MC/DF (2004), in which the theory of "existential minimum" was first introduced in the STF's jurisprudence in a monocratic decision.

As per the synopsis of the decision:

> Claim of non-compliance with a fundamental precept. The question of the constitutional legitimacy of judicial control and intervention in the implementation of public policies when government abuse is established. [...] Decision: (...) I must acknowledge that the constitutional action in question is a suitable and effective tool to enforce public policies as stipulated in the Political Charter, such as in the case of Constitutional Amendment (*Emenda Constitucional* – EC) 29/2000, which have been violated either wholly or partially by the government instances mentioned in the Constitution itself. The Supreme Federal Court has been granted an eminent authority, which highlights the political dimension of constitutional jurisdiction entrusted to the Court. The Court cannot refrain from the grave responsibility of making economic, social, and cultural rights effective — as second-generation rights, these are related to positive, real, or concrete freedoms. (Quarterly Court Reporter, RTJ 164/158-161, Judge-Rapporteur CELSO DE MELLO) — under the risk of the Government, through positive or negative violation of the Constitution, unacceptably undermining the integrity of the constitutional order itself: "DISREGARD FOR THE CONSTITUTION - FORMS OF UNCONSTITUTIONAL BEHAVIOR BY PUBLIC POWER. Disregard for the Constitution can occur both through state action and through governmental inaction. [...] Certainly, it is not typically within the institutional functions of the Judiciary - particularly the Supreme Court - to formulate and implement public policies. (JOSÉ CARLOS VIEIRA DE ANDRADE, "Fundamental Rights in the Portuguese Constitution of 1976," page 207, item no. 05, 1987, Almedina, Coimbra). In this domain, the primary responsibility lies with the Legislative and Executive branches. In exceptional circumstances, the Judiciary may bear the responsibility of safeguarding individual and/or collective rights with constitutional status. This can happen when competent state bodies fail to fulfill their political and legal duties, which compromises the effectiveness and integrity of such rights, even if they are derived from clauses with programmatic content. (ADPF 45/2004, emphasis added).

From the aforementioned judgment's heading, another important element regarding judicial activism in the field of public policies becomes evident: the "need to preserve, in favor of individuals, the integrity and inviolability of the core of the 'existential minimum'".

The right to the "existential minimum" is part of "the notions of individual and collective fundamental rights, which the State must act positively to fulfill", and can include, for example, "the right to health, sanitation and housing, education, social assistance and social security, as well as access to justice" (Hess, 2010). This is the minimum that the State must provide to individuals and the community, in light of the principle of human dignity.

Nevertheless, while the "existential minimum" refers to a set of basic rights related to human dignity, its coexistence with the principle of the reserve of the possible must be pointed out. According to Ana Paula de Barcellos (2002, p. 236), this relation 'aims to delineate the economic phenomenon characterized by the constraint of available resources in the context of nearly always infinite needs that must be addressed by such assets', later asserting that this reserve 'means that, beyond the legal debates surrounding what can be judicially demanded of the State — and ultimately of society, since it is society that sustains it — it is important to recognize that there is a constraint within the material possibilities of realizing this right'.

The courts' understandings of absolute disregard for the reserve of the possible, in view of the 'existential minimum', deserve concern, such is the seriousness involved in dealing with what has been said. In this context, Júnior and Shimamura (*apud* Herrera, 2009, p. 84) point out that: 'the Judiciary's coercion over the Government to release funds to sponsor treatments not foreseen in the health system budget could suppress the right to health of other people or the treatment of a larger number with the same resource allocation'.

Thus, the right to the existential minimum implies the need for positive state obligations, but, according to the majority doctrine, it does not exempt compliance with the budget's reserve of the possible — given its conciliability. This is necessary — above all — in the context of judicial control, in which the balance of both the existential minimum and the reserve of the possible is essential in terms of the harmony between Law and reality. This finding recalls an old maxim, attributed to the French jurist Georges Ripert: 'when the Law ignores reality, reality takes revenge by ignoring the Law'.

Results

It should be noted that the judicial control of public policies, since the aforementioned ADPF 45/DF (2004), usually uses the perspective of the 'existential minimum', conceiving that its protection prevails over the 'reserve of the possible'. In this context, it is worth mentioning that the first board decision of the Supreme Federal Court that used the principle of the 'existential minimum' was in the judgment of the Internal Interlocutory Appeal in Extraordinary Appeal No. 410.175/SP, in 2005. Also in the judgment of Direct Action For the Declaration of Unconstitutionality 3.768-4/DF (2007), this principle is included in the vote of Justice Carmen Lúcia (Judge-Rapporteur), whose excerpt is shown below:

> The gratuity of public transportation represents a minimum condition for mobility, favoring the participation of the elderly in the community and fostering their dignity and well-being; yet, it is not compatible with the

> constraints imposed by the principle of the reserve of the possible. Instead, it should align e with the guarantee of the existential minimum, about which I have previously affirmed to be "the set of primary socio-political, material, and psychological conditions without which constitutionally guaranteed rights lack substance, particularly those pertaining to individual and social fundamentals... which guarantee that the principle of human dignity possesses a determinable content (though not explicitly determined in the abstract constitutional norm expressing it), that it is binding on the public authorities, which cannot deny its existence or fail to ensure its realization, in a sense that this principle carries a weight that imparts it a specific content from which the State cannot be removed'.

We should also allude to the judgment of Suspension of Injunction 228/CE, in 2008, in which Justice Gilmar Mendes, based on the 'existential minimum' of the right to health (mentioning the ADPF 45/DF), partially granted the request — imposing, *in casu*, obligations to do for the Federal Government, as analyzed by Giovanna Malavolta da Silva (2016, p. 30). These examples allow us to visualize the progressive rooting of this principle in the case law of the Brazilian Supreme Court, especially in the 21st century, with the understanding that — if there is a scope to protect this right (the existential minimum) — a proactive stance by the Court in the judicial review of public policies would not be violating the principle of Separation of Powers. This can be seen in the Internal Interlocutory Appeal on the Interlocutory Appeal No. 734.487 (2010), as follows.

> 1. The right to health is an irrevocable constitutional prerogative, guaranteed through the implementation of public policies, imposing on the State the obligation to create objective conditions that allow effective access to such a service. 2. It is possible for the Judiciary to determine the implementation by the State, when it is in default, of constitutionally provided public policies without creating interference in a matter that involves the discretionary power of the Executive. Precedents. 3. Internal Interlocutory appeal dismissed. (Emphasis added).

It is in the same sense that the judgment of the Interlocutory Appeal in Extraordinary Appeal with Interlocutory Appeal 761.127/AP, of 2014, took place. In this case, the State of Amapá, then the appellant, emphasized that 'within its discretionary power and taking into account budgetary limitations, only the Executive Branch [...] can choose where its funds should be spent and in which project, purchase or service it should invest, among the respective priorities'. Despite this, once again the thesis was established that the reserve of the possible finds limitation in the offer of minimum conditions through state obligations; thus justifying proactive judicial intervention, as can be extracted from the vote given by Justice Luís Roberto Barroso (Judge-Rapporteur):

> The intervention of the Judiciary, concerning the implementation of government policies outlined and mandated in the constitutional text, particularly in the area of early childhood education (Quarterly Court Reporter, RTJ 199/1219-1220), aims to counteract the detrimental and harmful effects caused by state omission [...] The reserve of the possible clause — which the Government cannot invoke with the intent of subverting, thwarting or rending impractical the implementation of public policies defined in the Constitution itself — encounters an insurmountable limitation in the constitutional guarantee of the existential minimum, which represents, in the context of our positive system, a direct emanation of the principle of human dignity. (Emphasis added).

Furthermore, in ADPF 347 MC/DF (2015), the Supreme Court recognized the so-called 'unconstitutional state of affairs' (USoA) in Brazil, in view of the situation involving the prison system. In fact, when considering the 'massive and persistent violation of fundamental rights arising from structural flaws and from the failure of public policies', acknowledging such a state of affairs allows, in the words of Justice Marco Aurélio (Judge-Rapporteur), for a rationale to justify a greater intervention by the Judiciary — in light of the State's omission — without that constituting a violation of the principle of the separation of Powers. In the exact terms of the Justice:

> Theoretical controversies are not enough to undermine the conviction that, when the preconditions of a state of unconstitutional affairs are met, the Court can take part, to the appropriate extent, in primarily political decisions without giving rise to any concerns regarding an infringement of the democratic principle and the separation of powers. The profound infringement of fundamental rights, extending to the transgression of human dignity and the existential minimum itself, warrants a more assertive action by the Court. [...] judicial intervention is deemed legitimate at these high levels of state omission amid a situation of widespread violation of fundamental rights. Upon confirming the paralysis of political powers, idealized arguments regarding the democratic principle make little practical sense. (Brazil, 2016, p. 31-32, emphasis added).

It is crucial to emphasize that when the Judiciary intervenes in the sphere of public policies, it entails the imposition of obligations to perform certain actions (and/or not refrain from them). The prominence of the Judiciary in the area of positive rights, considering the need to protect the 'existential minimum', means — as has long been observed (ADPF 45/DF) — the possibility of implementing public policies, in a usurpation of the attributions held by the inert government. In other words, the Brazilian Supreme Court 'has already established the possibility, in emergency cases, for the implementation of public policies by the Judiciary, in face of inertia or sluggishness on the part of the Government, as a measure to ensure fundamental rights', as can be seen in the judgment of the Internal Interlocutory Appeal in Extraordinary Appeal 877.607/MG, of 2017.

As an example, this time in the environmental field, where the recognition of the USoA is also claimed, let us take ADPF 708/DF, whose ruling determined that the Union should 'refrain from failing to operationalize the Climate Fund Program or allocate its resources' (Brazil, 2020, p.4). Similarly, in the vote rendered by the Judge-Rapporteur of ADPF 760/DF, the Federal Government was ordered to formulate and present a plan for the effective implementation of the Action Plan for Deforestation Prevention and Control in the Legal Amazon (PPCDAm), as well as a 'specific plan for the institutional strengthening of Ibama, ICMBio and Funai', with Justice Carmen Lúcia shedding light on how an action of competence not held by the Court (the choice of public policies) can be carried out by the same body:

> It is not up to this Supreme Court to choose the most appropriate public policy to combat illegal fires, deforestation and environmental degradation. However, in the primary role of this Court as guard of the Constitution (STF) and of the rule of environmental law, it is in this Supreme Court's responsibility to ensure compliance with the constitutional order by observing the constitutional principle of prevention for the preservation of a balanced environment and the prohibition of retrogression. (Brazil, 2022, p. 107- 108)

We can observe a consolidated understanding among the courts that the prominence of the Judiciary, exercised under exceptional circumstances and in response

to the paralysis of political powers, does not violate the democratic principle. However, doctrinal criticism on this matter can be summarized in the idea that a mere judicial declaration of respect for the separation of powers is insufficient to prevent the risk of judicial activism. This is due to the fact that, in proactive action, 'judgments are shaped by evaluating, for instance, the cost-benefit considerations on what is best for society, thereby substituting the deontological dimension of law for the gradual logic of "values" (Bahia, 2012, p. 118).

In fact, notwithstanding the concrete benefits arising from the new trend propagated by this phenomenon — here emphasized as a leading role in the implementation of public policies, from the standpoint of the existential minimum — one must pay attention to the fact that, as seen, judicial intervention is no longer adhering to constitutional control in its self-contained form, as it begins to assume an (almost) substitutive role in relation to the Government.

It is known that, in view of the existential minimum, the Judiciary can even impose the obligation on the State to change its fiscal policy in order to obtain new resources (Torres, 1992). Yet, this is not always possible, and the adoption of other measures — of macroeconomic impact, such as decisions involving minimum wages, social security, etc. — can lead to other rights being violated: 'an activism excess in this area, even if very well-intentioned, could ultimately destroy the national economy and, in these crises, the biggest victims are usually and precisely the most vulnerable social segments' (Sarmento, 2016).

Conclusions

In conclusion, the case law of the Brazilian Supreme Court under the prism of the non-obviation of jurisdiction and based on the adduction of the constituent core of the 'existential minimum' has been adhering to a proactive conduct with regard to the fulfillment of rights. In this sphere, judicial discretion is consolidated in the possibility of control and intervention by the Judiciary in the formulation and implementation of public policies, although there is no discussion of the potential this scenario has for an implied usurpation of the powers held by the other branches of Government — which is why this article discusses how it fits in with the concept of "judicial activism".

The prominent role regarding the extreme expansion of decision-making discretion in Brazil can mean an antagonistic movement to the democratic ideal. That is feasible, bearing in mind the intrinsic relationship between this expansion and the principle of independence and harmony involved in the interactions between the Branches of Government. However, it is essential not to overlook the established connection between manifestations of judicial activism and the fulfillment of rights, which is also central to the democratic ideal. For this reason, the need for similar debates in the field is reinforced in order to delve deeper — and more certainly — into the viability of judicial activism in specific cases. Notably, when such a remedy, although laden with contraindications, may represent the only way to achieve urgent solutions to issues not properly handled by those with ordinary competence, urging such considerations to radiate across the scenario involving the fulfillment of rights to services.

In this sense, while the benefits of such exceptionality are recognized, there is a latent risk of institutional dominance by one Branch over the others. Thus, the crux of the matter lies in the logical-conjunctural examination of the fact that the one empowered under the scope of fulfilling rights can, at a given moment, change its *modus operandi*, becoming no longer conditioned to the observance of this initial scope. It is for this reason

that it does not seem reasonable to detract from the risks of an action tangential to that of constitutional competence, focusing solely on the immediate effects of the phenomenon. Rather, it is necessary to envision the possibilities inherent in this stance, considering what has been fundamentally regulated by the Constitution.

As this work does not aim to exhaust discussions on the topic, nor to produce a systematic critique, it is clear that the improvement of academic debates within this context is extremely necessary for a more accurate juridical-conjunctural elucidation. One that emphasizes the democratic ideal, the aforementioned principle of independence and harmony between the Branches, and, concurrently, the need to implement positive rights — demanding, from beginning to end, the primacy of the Constitution.

References

Bahia, A. G. (2012). Fundamentos de teoria da constituição: A dinâmica constitucional no Estado democrático de Direito brasileiro. In E. H. Figueiredo et al. (Coords.), *Constitucionalismo e democracia* (p. 118). Elsevier.

Barcellos, A. P. (2002). *A eficácia jurídica dos princípios constitucionais*. Renovar.

Barroso, L. R. (2008). Ano do STF: Judicialização, ativismo e legitimidade democrática. Consultor Jurídico. https://www.conjur.com.br/2008-dez-22/judicializacao_ativismo_legitimidade_democratica

Garcia, L. R. D. & Zacharias, R. A. (2013). Crise de legitimidade do poder legislativo e ativismo judicial: Uma análise crítica do fenômeno como fator de risco para o Estado democrático de Direito. Acesso à Justiça II (pp. 406-425). FUNJAB. http://www.publicadireito.com.br/publicacao/unicuritiba/livro.php?gt=173

Hess, H. M. C. (2010). O ativismo judicial no controle de políticas públicas no Estado democrático de Direito. In *Anais do 34º Encontro Anual da ANPOCS*. http://anpocs.org/index.php/papers-34-encontro/st-8/st17-7/1510-hhess-o-ativismo/file

Meirelles, H. L. (2021). *Direito administrativo brasileiro* (35ª ed.). Malheiros Editores.

Oliveira, M. B. A. de. (2019). *A possibilidade de controle do mérito do ato administrativo pelo Poder Judiciário.* Empório do Direito. https://emporiododireito.com.br/leitura/a-possibilidade-de-controle-do-merito-do-ato-administrativo-pelo-poder-judiciario#:~:text=O%20m%C3%A9rito%20administrativo%20nada%20mais,e%20da%20oportunidade%20relativas%20%C3%A0

Peres, E. V. & Silva, J. B. (2020). Mora do legislativo x ativismo judicial na implantação das políticas públicas relativas a direitos humanos. *Periódicos Eletrônicos - UFMA, 10*(28). https://periodicoseletronicos.ufma.br/index.php/revistahumus/article/view/13451/7822

Pessoa, F. & Neves, I. F. (2021). Ativismo judicial e judicialização da política: Conceitos e contextos. *Consultor Jurídico*. https://www.conjur.com.br/2021-jan-02/diario-classe-ativismo-judicial-judicializacao-politica-conceitos-contextos

Ramos, L. F. (2021). *Análise histórico-evolutiva do ativismo judicial no Brasil e no mundo com enfoque na atuação do STF*. PUC - Campinas. https://repositorio.sis.puc-campinas.edu.br/bitstream/handle/123456789/14673/cchsa_direito_tcc_ramos_lf.pdf?sequence=1&isAllowed=y

Sarmento, D. (2016). O mínimo existencial. *Revista de Direito da Cidade, 8*(4), 1644-1689. https://www.e-publicacoes.uerj.br/index.php/rdc/article/view/26034/19156

Silva, G. M. da. (2016). *O mínimo existencial na jurisprudência do Supremo Tribunal Federal (Orientadora: Milena Ginjo).* Escola de Formação da Sociedade Brasileira de Direito Público – SBDP. https://sbdp.org.br/wp/wp-content/uploads/2018/04/GiovannaMalavolta.pdf

Silva, J. A. da. (2009). *Curso de direito constitucional positivo* (33ª ed.). Malheiros.

Tassinari, C. (2012). *Ativismo judicial: Uma análise da atuação do Judiciário nas experiências brasileira e norte-americana* (Orientador: Lênio Luiz Streck). Universidade do Vale do Rio dos Sinos. https://repositorio.jesuita.org.br/bitstream/handle/UNISINOS/3522/ativismo_judicial.pdf?sequence=1&isAllowed=y

Torres, R. L. (1992). O mandado de injunção e a legalidade financeira. *Revista de Direito Administrativo*, 94-110.

Vieira Júnior, R. J. A. (2015). Separação de poderes, estado de coisas inconstitucional e compromisso significativo: Novas balizas à atuação do Supremo Tribunal Federal. *Núcleo de Estudos e Pesquisas da Consultoria Legislativa, Brasília*, 5-38. https://www2.senado.leg.br/bdsf/bitstream/handle/id/516692/TD186-RonaldoJorgeAJr.pdf?sequence=1&isAllowed=y