Judicial activism and the new legal hermeneutics in Brazilian Supreme Court: analysis of ADO 26 on criminalization of homotransphobia

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Abstract. The purpose of this article is to analyze qualitatively Supremo Tribunal Federal's (STF) Ação Direta de Inconstitucionalidade por Omissão (ADO) no. 26 decision, which introduced into the Brazilian legal system the crime of homotransphobia, in order to verify its potentially activist tendency. Our hypothesis is that the methodology of legal interpretation in Brazil currently goes through a time strongly marked by judicial activism and judicialization of politics, especially at the highest courts of Judiciary. We aim to demonstrate the hypothesis through a case study on the arguments and interpretation of STF in ADO 26.

Keywords. Judicial activism, Jurisprudence, Legal interpretation, LGBTphobia, Hermeneutics.

1. Introduction

"Judicial activism" and "judicialization of politics" are intrinsically related terms. On the one hand, "judicialization" means that some issues of wide political or social repercussions are being decided by the Judiciary, and not by traditional political instances, such as the Legislative and Executive powers [1]. On the other hand, "judicial activism" is a term that has been used to appreciate judicial institutions and agents in contemporary democracies, in opposition to "judicial self-restraint" [2].

Both phenomena have stood out in Brazilian legal and academic debates, especially in the last decade. As José Eduardo Faria points out, "since the end of the Brazilian military dictatorship in January 1985 and the country's re-democratization — with the promulgation of the Constitution in October 1988 — the protagonism of the courts has increased both in scope and in complexity" [3]. Such protagonism resulted partially from the strengthening of collective and litigation rights assured by the new Constitution, but also due to the weakening of political power and corruption scandals [4].

Another factor is the increasingly accelerated social transformations that demand a sophisticated legal response, for instance, new technologies and climate change, etc. Not rarely, the courts are called upon to decide on these matters even before they have been properly regulated by the legislative bodies. This is the classic situation of Dworkin's "hard cases", which occur when there is no rule that regulates them, in other words, when they cannot be submitted to a clear and previously established rule [5].

Although one could argue this situation is not the ideal, considering the principle of legal certainty, social demands cannot wait for the slow timing of the Legislature for regulating new matters. In Brazil, this time interval is undeniably long because legislators are focused in solving much more basic issues, such as eradicating hunger and wealth distribution. As a result of these circumstances, judicial courts – especially superior courts – are given the role to give those novel and unregulated issues an answer.

Therefore, "as of 2010, the more trial and appellate courts decided novel types of litigation, the more they were accused of exceeding their powers, applying statutes in a non-technical manner, and allowing judge's partisan leanings to influence their decisions by interpreting statutes beyond their literal sense" [6]. The corollary is: the more political demands of a society are judicialized, the more the Judiciary is accused of judicial activism.

A notorious example of a judicial decision that had huge repercussions due to its potentially activist character is Ação Direta de Inconstitucionalidade por Omissão (ADO) no. 26, set by Brazil's Supreme Court – Supremo Tribunal Federal (STF) [7]. The reasoning adopted by the Court in the case considered homotransphobia as analogous to the crime of racism and, hence, the decision outcome was the

criminalization of homotransphobia. However, there was not – and there still is not – any rules in the Brazilian legal system on the criminal nature of LGBTphobia besides this precedent.

The purpose of this article is to qualitatively analyze STF's ADO 26 decision in order to verify its potentially activist tendency. Our hypothesis is that the methodology of legal interpretation in Brazil currently goes through a time strongly marked by judicial activism and judicialization of politics, especially at the highest courts of Judiciary. We hope to prove the hypothesis through a case study on the arguments and interpretation of STF in ADO 26.

Before we turn our attentions to the decision itself, we will present a short literature review on the concepts of judicial activism. Then, we will proceed to the description and analysis of ADO 26. Finally, we come to the paper's conclusions.

2. Judicial activism: concepts and developments

Arthur Schlesinger is credited with having used the term "judicial activism" for the first time in 1947 [8]. Since then, the debate around the term has grown and popularized.

The term has different designations, such as a model for judicial decisions; attitudes or behaviors of the judges; or tendency of judicial decisions as a whole [9]. Among the several positions on the subject, there are also those who defend it as part of the legitimate role of judges, and those who criticize it. For the purposes of this article, we will consider a few of those positions within the Brazilian academic debate.

According to Elival da Silva Ramos, judicial activism is an *inconvenient model of conduct* of the Judiciary. In his view, judicial activism means that judges are creating the law instead of interpreting it. This conduct not only violates the separation of powers and the jurisdictional role they received, but also generates changes in the Constitution without altering its text [10]. It is possible to state that Ramos' position is consistent with the view of classical Legal Positivism on the matter.

Similarly, Andrei Koerner defends that judicial activism indicates an extreme situation of the fluid borders between two different worlds: politics and law. By going beyond these borders and entering a domain that is not his own, the judicial agent produces risks, extrapolates his functions, distances himself from his reference frames and acts under the effect of undesirable influences, such as personal values, preferences, interests or political programs [11]. That would jeopardize the delicate balance between those two worlds and, for that reason, must be curbed.

A different perspective is presented by Mayra Miarelli and Rogério Lima, according to whom judicial activism is a consequence of the judges' duty to not only interpret the Constitution, but also to make it effective. Moreover, activism would result from an objective need arising from the so-called ineffectiveness of the other powers and the pathological omission of the Legislative Power [12]. Such view considers judicial activism as a *tendency of judicial decisions as a whole* resulting from the transformations of law in the current social and economic conjunctures.

To Luís Roberto Barroso, who is also a judge at STF, judicial activism is an *attitude*, that is, the choice of a specific and proactive way of interpreting the Constitution, by expanding its meaning and scope. He sympathizes with Miarelli and Lima's opinion by highlighting that it usually installs in situations of retraction of the Legislature and of a certain detachment between the politicians and the society, preventing social demands from being effectively addressed [13]. By considering judicial activism as an attitude, it is possible to affirm that Barroso's view considers it as a matter of choice for each interpreter and that, therefore, can be avoided.

Influenced by Dworkin's theory of interpretation, José Eduardo Faria defines judicial activism as a "proactive interpretation strategy used by judges to fulfill constitutional promises, applying them to situations not precisely addressed in the Constitution". This type of interpretation "assures judges the flexibility to deal with problems not objectively covered by the Constitution" or infra-constitutional rules [14]. Such view connects with Ronald Dworkin's model of rules, in which he defends that a legal system is composed not only of objective rules, but also of other legal standards, such as principles [15]. From this point of view, judicial activism would not necessarily be a problem or an extrapolation of the powers of the judge. On the contrary, it would be the manifestation of Dworkin´s "interpretive attitude" [16].

As one can see, there is an intense academic debate on the topic. The purpose of this work, however, is not to choose one definition of judicial activism as the most appropriate one, but, instead, to briefly present the concept and use it as a paradigm to appreciate the methodology of legal interpretation in Brazilian superior courts nowadays. In the following section, we will investigate one of the most controversial and paradigmatic judicial decisions in recent years in Brazil, in order to understand if its activist features help to prove our hypothesis.

3. ADO 26, STF: criminalization of homotransphobia

The decision to be analyzed has been issued within

the scope of a procedure called "*ação direta de inconstitucionalidade por omissão*" (ADO), meaning direct action of unconstitutionality by omission. It is a means of abstract control of constitutionality exercised by STF, which consists of a legislative omission that goes against the constitutional obligation to legislate. In other words, the idea of omission is based on the legislator's failure to comply with a constitutional duty to legislate on a matter. Thus, ADO is the appropriate procedure to remedy such omission.

ADO 26 was proposed before STF in 2013 by the Popular Socialist Party (PPS), claiming the criminalization of homophobic and transphobic conducts in all its forms, that is, offenses, homicides, assaults, etc. The arguments brought by the claimant were the warrant for the criminalization of racism and the discriminations that violate fundamental freedoms, all provided for by the Constitution.

Their thesis is that homophobia and transphobia are species of the racism genre, as they necessarily imply the downgrading of the LGBT population. Following this logic, all forms of homotransphobia must be punished with the same severity applied within the Brazilian Racism Law (Law no. 7.716/1989), under penalty of hierarchizing the types of prejudice.

In June 2019, the Court by majority upheld the action and recognized the legislative omission concerning the criminalization of LGBTphobia. STF then notified the Brazilian Parliament and attributed criminal status to all kinds of discriminatory conducts against the LGBTQIA+ population, until the Federal Legislature properly regulates the matter.

According to the decision, homotransphobic practice – acts of segregation that demean members of the LGBT group because of sexual orientation or gender identity – is considered to be of racist type, in the dimension of "social racism", incorporated by STF in a previous judgment [17]. Such understanding is supported by the interpretation that the concept of "racism" goes beyond biological and phenotypic differences. It also results from the society's cultural and historic background, motivated by the objective of justifying inequality. It is intended for ideological control, political domination, social subjection and denial of otherness, dignity and humanity of people who belong to a vulnerable social group. Therefore, the definition of racism adopted by STF is a "segregationist ideology that preaches the inferiority of some in relation to others" [18].

This broader concept of racism is precisely one of the most controversial aspects of the decision. It is difficult not to consider as activist the Court's interpretation of the Brazilian legal rulings concluding that LGBTphobia is a species of the racism genre. Both the Racism Law and the Constitution refer to the crime of racism as specifically resulting from discrimination or prejudice based on race, color, ethnicity, religion, or national origin. There is no denying that the vocabulary used by the legal statutes is sufficiently restricted. It is not the case of an indeterminate or ambiguous norm that requires calling upon principles in order to interpret it. The interpretation here is direct.

It is undeniable that homotransphobia is a conduct as repressible as racism *stricto sensu*. However, they are different social phenomena and cannot be brought together under the single legal concept of "racism" as established by the Brazilian Racism Law without resorting to judicial activism.

It is noteworthy that this is not a value judgement on the ADO 26 decision. This is not the opportunity to judge whether the decision outcomes were positive or negative or, in more abstract terms, if judicial activism itself is good or bad. We understand, though, that it fulfills all features recognized by the majority literature to configure an example of judicial activism. In their argumentation, STF judges wittingly recognize that the legal definition of the crime of racism is too narrow to include homotransphobia without a relevant interpretive effort. Such interpretive effort implies replacing the legal concept of racism for a broader, more abstract one. This replacement implies, in turn, a substantial change in the constitutional text itself and, consequently, brings up the leap taken by STF from the world of law enforcement towards the world of legislative politics.

4. Conclusion

Although the analysis of a single judicial decision is not enough to verify a methodological tendency in Brazilian Legal Hermeneutics, we observe that ADO 26 is an example of STF caselaw with strong activist evidence. If not the majority tendency, then at least one can say that judicial activism is a noteworthy phenomenon in Brazilian jurisprudence.

Regardless of conjunctural and sociological reasons, the fact is that the Brazilian Judiciary decided to give the arising issue of LGBTphobia an answer before the other powers did. The alternative solution to the identified legal gap would be to change the rules through due legislative process. For example, by creating within the scope of criminal law a more general category of crimes resulting from prejudice and discrimination.

However, the criminalization of homotransphobia was conducted by the Judiciary through legal interpretation, which was made possible due to the appropriation of legal principles belonging to the legal system as a whole. Such (activist) interpretive exercise particularly resembles Dworkin's own *interpretivism* theory. In conclusion, it is possible to infer that Legal Hermeneutics in Brazil might be currently closer to Dworkin's theory of law than to Legal Positivism, to which it has traditionally been associated throughout history.

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