



## The vanishing boundaries between technical and political: normativism and pragmatism in the Brazilian courts' adjustment of public policies\*

### *Os esvaecidos limites entre técnica e política: normativismo e pragmatismo no ajuste de políticas públicas realizado pelas cortes brasileiras*

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“O único sentido íntimo das cousas  
É elas não terem sentido íntimo nenhum”

*Alberto Caeiro<sup>1</sup>*

#### **Abstract**

In law, normativism and pragmatism have always been under tension and this has been revealed in many different ways. One of its manifestations can be found in adjudication, where the technical/judicial role of the judge has, in many countries, assumed political contours, a phenomenon described as “judicialization of politics”. This paper will examine the vanishing boundaries between the technical and the political, using Brazil as an example, and will analyze the hypothesis that the

#### **Resumo**

*No Direito, normativismo e pragmatismo sempre estiveram sob tensão e isso tem se revelado das mais diversas formas. Uma das manifestações dessa tensão pode ser encontrada no julgamento de casos concretos, em que se percebe (em muitos países) que o papel técnico/jurídico do juiz assumiu contornos políticos, um fenômeno descrito como “judicialização da política”. Este trabalho irá examinar os esvaecidos limites entre o técnico e o político a partir do exemplo brasileiro, e analisará a hipótese de que a existência de*

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<sup>1</sup> “The only intimal sense of things / Is that they have no intimal sense at all.” CAEIRO, Alberto (Fernando Pessoa). Poema V. In: **Poesia**. São Paulo: Companhia das Letras, 2001, p. 32.

existence of clear borderlines, in these terms, is thing of the past. The formalist assumption that judges only subsume facts into abstract rules has been ruled out by most scholars, but the institutional design and the concept of separation of powers that come with it have not. The investigation of the courts' current practices and the consideration of legal theory show that these limits should be redesigned.

**Keywords:** separation of powers; institutional design; legal theory; politics; judicialization of politics

*fronteiras claras, nos termos mencionados, é coisa do passado. A suposição formalista de que juízes apenas subsumem fatos a regras abstratas foi descartada pela maioria dos doutrinadores, mas o desenho institucional e o conceito de separação de poderes que a acompanham não o foram. A análise das práticas atuais dos tribunais e a consideração de aspectos de teoria do direito mostrarão que esses limites devem ser redesenhados.*

**Palavras-chave:** separação de poderes; desenho institucional; teoria do Direito; política; judicialização da política.

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### 1. NORMATIVISM AND PRAGMATISM IN ADJUDICATION: THE TECHNICAL AND THE POLITICAL

The tension between normativism and pragmatism in law appears under many different facets. It has been contemplated as the core of juridical science: the Is/Ought dichotomy and the logical gap between indicative and directive discourses gave law scholars a proper object of study.

In order to comply with a positivist concept of science, scholars at first decided that the science of law would analyze the law in a descriptive manner, never producing judgments of value regarding their object of study.<sup>1</sup> This solved the issue, for the law, expressed in directive discourses (the Ought), was in conflict with the current definition of scientific knowledge: systematized objective knowledge, expressed by indicative discourses alone (the Is). Only indicative propositions can be true or false – for prescriptive discourse, the distinction makes no sense.<sup>2</sup> So, the science of law was metalinguistic discourse about law, an objective description of law and its valid rules.<sup>3</sup> This was the solution pointed by Kelsen, since he could not accept norms being treated as facts.<sup>4</sup>

The solution was only apparent. This concept of the science of law was criticized in many ways. The departure point is false, since propositions about law are equivalent to the prescription contained in a rule: saying “the rule that obligates people to pay

<sup>1</sup> Criticizing this concept: HACHEM, Daniel Wunder. O Estado moderno, a construção cientificista do Direito e o princípio da legalidade no constitucionalismo liberal oitocentista. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 11, n. 46, p. 199-219, out./dez. 2011.

<sup>2</sup> PINTORE, Anna, **Law without truth**, Liverpool, U.K.: Deborah Charles Publications, 2000, p. 3 and 13.

<sup>3</sup> TROPER, Michel, **A filosofia do direito**, São Paulo: Martins Fontes, 2008, p. 35–41.

<sup>4</sup> Kelsen departed from Hume's law: no prescriptions can derive from descriptions, and vice-versa. KELSEN, Hans, **Teoria pura do direito**, São Paulo: Martins Fontes, 2006, p. 79–86.

taxes is valid" is the same as saying "you are obliged to pay taxes".<sup>5</sup> These propositions express valid rules do exist, and all rules express judgments of value.<sup>6</sup>

The problem of the science of law is only one of the facades that express how the world of norms and the world of facts may be irreconcilable or, at least, only partially reconcilable.

Another one of these facades is present in adjudication, for courts may be torn between the pragmatic concerns of a concrete case and the possible normative implications of the decision for society. This specific version of the tension is most evident in common law systems, where the existence of binding precedents brings (potential) normative repercussions to every single case.

Traditionally, in civil law systems, this aspect of the courts' activity has been denied by the legalist conception of how legal rules are applied to concrete cases: through logical and formal reasoning alone, subsuming the cases into abstract rules. In this conception, adjudication only affects the single case under scrutiny.

In Brazil, the courts have been called upon to implement the 1988 Constitution and have succeed in some cases, but they have also given rise to concerns about the political activity of the Judiciary. To reinforce the boundaries between the technical (the juridical, the application of rules by courts) and the political (to be defined by the elected representatives of the people), scholars tried to constraint judges, restricting their ability to define public policy. The Supreme Court has also tried to reestablish such limits and thus control this abnormal judicial activity.

The limits proposed, nevertheless, have not worked as planned. The Supreme Court itself, surprisingly, defines polemic policy issues while stating it is not doing so. Other attempts to constrain judicial activity in such matters have failed for different reasons and the global phenomenon of the "judicialization of politics" seems to be unstoppable.

Using Brazil as an example, this paper will examine the vanishing boundaries between the technical and the political and analyze the hypothesis that the existence of clear borderlines, in these terms, is a thing of the past. The formalist assumption that judges only subsume facts into abstract rules has been ruled out by most scholars, but the institutional design and the concept of separation of powers that come with it have not. An investigation of the courts' current practices and a consideration of legal theory suggest that these limits should be redesigned.

In order to pursue this analysis, I will begin with the cases commonly used as examples of judicialization of politics in the Brazilian context, then describe how scholars have evaluated these breaches of the separation between law and politics. For most

<sup>5</sup> ROSS, Alf, **Direito e justiça**, Bauru: EDIPRO, 2007, p. 24.

<sup>6</sup> TROPER, **A filosofia do direito**, p. 49.

authors, this diagnosis demands a reaction, since these breaches need to be controlled, and they have attempted to create limits to this polemic activity of the courts. They have not succeeded, however. I will then consider hypothetical explanations for the failure of such measures. Finally, (although far from reaching a conclusion) I will propose that a fixed separation of the technical and the political, even if it were possible, is incompatible with most contemporary understandings of law (for example, post-positivist conceptions of legal theory). Thus, the institutional design and the roles of the different branches of government need to be reevaluated to accommodate current notions of law, adjudication and interpretation.

## 2. BREAKING THE LIMITS: THE BRAZILIAN CASE

In 1964, a coup d'état conducted by the military overthrew the government of democratically-elected President João Goulart. The military dictatorship that followed lasted 21 years: in 1985, a civilian president elected by representatives took office, but democracy was only reinstated in 1988, with the promulgation of the current Constitution. The first democratic elections took place in 1989 after almost 30 years of military rule.

The 1988 Constitution is considered highly progressive and established goals and objectives for the nation, such as national development and the termination of poverty. Many social and political rights are guaranteed in its text, which at first generated a conflict between scholars concerning the efficacy of the constitutional norms. Some scholars argued that many social rights were to be considered “programmatic norms” to be slowly implemented by the Legislative and Executive branches; while another group affirmed they were fully efficacious and should be applied by the Judiciary in concrete cases.<sup>7</sup> The “effectiveness doctrine”, as it became known, was victorious and the courts followed suit, considering the Constitution completely and immediately effective.<sup>8</sup> All “fundamental rights” could be implemented and protected through adjudication.

Under this interpretation, all public policies were potentially subject to judicial control, since they were deemed to be in accordance with the Constitution and aimed towards its realization. Litigation provided important advances in different fields, but one of the most famous cases of success involved HIV policy. NGOs provided innovative legal assistance, going beyond reactions to the violation of rights and formulating alternative proposals for public policies.

The judicial claims started in 1990 and tried to pressure the Executive into offering universal assistance to people with HIV based on the fundamental right to free

<sup>7</sup> This discussion was influenced by Portuguese scholarship – the Portuguese Constitution established different regimes for liberties and for social, economic and cultural rights.

<sup>8</sup> KELSEN, Hans, *Teoria pura do direito*, São Paulo: Martins Fontes, 2006, p. 79–86.

public healthcare. In 1991, the medication AZT, an antiretroviral drug, started being distributed by SUS (Unified Healthcare System); and in 1995 the different drugs composing the so-called "HIV cocktail" were circulated free of charge.<sup>9</sup> These changes in policy were promoted by individual claims that established judicial precedents and also put pressure on the Legislative branch, which passed Act 9313 in 1996, making SUS responsible for providing all the medication necessary for the treatment of HIV.<sup>10</sup>

Other claims related to the right to public healthcare reached the Judiciary, some as successful as the HIV case. Nonetheless, many cases produced only individual results, providing treatment for the plaintiff alone and failing to alter policies for all citizens. Even though these cases are commonly considered as examples of the courts' adjustment of public policies, they do not even address them. The plaintiffs only ask for individual treatment, which is not a matter of policy – even if may affect it through budgetary consequences. Nevertheless, the HIV cases demonstrate some possibility of altering political decisions through the Judiciary, forcing the limits between the technical and the political.

Boundaries between law and politics were also challenged in the 1990 Consumer Protection Act, particularly because the statute strengthened the collective civil procedure system. Different statutes have built this system throughout the years, but the Consumer Act defined collective rights (which cannot be individually claimed, since they are considered indivisible by nature) and introduced the possibility of collective protection to violated individual rights, somewhat similar to US class actions.

Litigating for the protection of collective rights or to protect individual rights that belong to a considerably large group of people has been compared to regulation. Adjudication, in these cases, affects many citizens and will regulate the rights involved in the given situation.<sup>11</sup> In the Brazilian case, the entire population may suffer the impact of a single decision. Obviously, this regulation differs from the one that emanates from the Executive or Legislative branches, in particular because it was developed to work within the institution of civil adjudication.<sup>12</sup>

Regulation through collective procedure certainly blurs the lines separating the juridical and the political. In civil law countries, and particularly in Brazil, this is

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<sup>9</sup> VENTURA, Miriam, Strategies to promote and guarantee the rights of people living with HIV/AIDS, **Divulgação em Saúde para Debate**, v. 27, p. 239–246, 2003, p. 244–245.

<sup>10</sup> These drugs were the object of compulsory patents licensing, which generated a WTO complaint by the US against Brazil in 2001, arguing that the policy (more specifically, an article of the Brazilian Patent Law on the possibilities of compulsory licenses) was violating the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The complaint was withdrawn and the discussion ended with the unanimous approval (at the WTO) of a declaration establishing that the TRIPS agreement should not relegate public health issues to a secondary position.

<sup>11</sup> BONE, Robert G., The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions, **George Washington Law Review**, v. 79, n. 2, p. 577, 2011, p. 595.

<sup>12</sup> *Ibid.*, p. 596.

noteworthy, for historically a judicial decision will only affect the parties involved in litigation, even though the same decision could be applied to analogous cases. In a collective procedure dispute, this “rule” is broken, either because all are holders of the same collective right, or because all individual cases will receive exactly the same treatment.

The above-mentioned Consumer Act also establishes a mechanism of private enforcement, mobilizing private litigants to assure the implementation of the statute.<sup>13</sup> No public agency is specifically designed to safeguard consumers’ rights; the only agency dealing with such issues works exclusively as a mediator in consumer disputes. The statute was enacted through lawsuits from the start, and it contains other procedural rules that corroborate to this hypothesis. These rules clearly protect consumers and facilitate the filing of the suit. The burden of proof lies with the defendant, unless the claims are implausible, and as a general rule (not only in the case of consumers’ rights) the winning plaintiffs will recover all expenses from the defendants. Both aspects create the most favorable scenario for consumers and stimulate private enforcement through adjudication.

Private enforcement is common in other countries, such as the US,<sup>14</sup> and statutes and administrative regulations are enacted through these means. In the American context, consumer rights and job discrimination statutes have been privately enforced for some time.<sup>15</sup> This sort of implementation also challenges the limits between the political and the technical, since the social goal that determines the creation of a statute, piece of regulation or public policy depends entirely on adjudication. The politically established objectives will only be reached through the actions of private subjects in the Judiciary.

Private enforcement may be the most effective way of enacting regulation, especially for those situations in which monitoring compliance is particularly difficult or expensive. Consumer law fits this description exactly, since consumers themselves are in the best position to verify observance. Of course, the efficiency of this sort of enforcement depends directly on the incentives to adjudicate, for if they are not advantageous enough consumers may be discouraged from filing suit – and the enforcement will fail or not occur at all.

Finally, the defining limits have been breached by the growing similarities between civil law and common law countries.<sup>16</sup> Many countries with civil law traditions

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<sup>13</sup> On private enforcement: FARHANG, Sean, Public Regulation and Private Lawsuits in the American Separation of Powers System, *American Journal of Political Science*, v. 52, n. 4, p. 821–839, 2008, p. 822.

<sup>14</sup> In fact, all scholarship on private enforcement cited on this paper comes from the US. The theme is yet to be profoundly discussed in Brazil.

<sup>15</sup> BURBANK, Stephen B.; FARHANG, Sean; KRITZER, Herbert M., *Private Enforcement of Statutory and Administrative Law in the United States (and Other Common Law Countries)*, 2011.

<sup>16</sup> The theme has been frequently discussed in Brazil and Italy. MARINONI, Luiz Guilherme, *Aproximação crítica entre as jurisdições de civil law e de common law e a necessidade de respeito aos precedentes no Brasil*,

have been adopting some version of *stare decisis*. The Brazilian Judiciary is currently overloaded with cases and the problem is particularly serious in the higher courts. Any case can potentially be brought before the Supreme Court through the appeal system (at least theoretically). The court decides more than 70,000 cases every year. In fact, the number has been reduced after several reforms of the civil procedure code, which previously surpassed 100,000 decisions per year.

Most of these reforms attempted to bind the inferior courts to the judgments of the Supreme Court (and also those of the Superior Court of Justice). Others have tried to bind the courts to their own precedents, with the objective of avoiding irrational and useless appeals. The Supreme Court's precedents, that previously affected the entire population only in exceptional cases (when judicial review was performed in abstract, as is done in the European tradition), may determine the outcome of many cases at once. This has been a remarkable innovation and an impressive break with tradition. Today, the Supreme Court has mechanisms to establish guidelines (called *súmulas vinculantes*) that bind not only the Judiciary, but also the Executive and all its agencies, and all cases tried can (or at least should) influence lower courts' decisions.<sup>17</sup>

Once again, this can be understood as an infringement of the boundaries between the political and the juridical. The Judiciary has never had these competences, as they are not part of the civil law tradition, and the normative repercussions of judgments have never been this visible before. Some of these infringements have been neglected by Brazilian scholars, and their political implications have been ignored, while others, particularly of the first kind/ (the implementation of fundamental rights through adjudication), have been ferociously criticized, as they were classified as effects of the judicialization of politics.

### 3. THE JUDICIALIZATION OF POLITICS: DEFENDING THE BOUNDARIES

The judicialization of politics or the politicization of the Judiciary is seen as a worldwide phenomenon. It refers to the expansion of the Judiciary's role in the decision-making processes that govern contemporary democracies. Comparative research

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**Revista da Faculdade de Direito UFPR**, v. 49, p. 11–58, 2010; TARUFFO, Michele, Observações sobre os modelos processuais de civil law e de common law, **Revista de Processo**, v. 110, n. 28, p. 141–158, abr./jun. 2003.

<sup>17</sup> On the Brazilian binding mechanisms: BARBOZA, Estefânia Maria de Queiroz. Escrevendo um romance por meio dos precedentes judiciais: uma possibilidade de segurança jurídica para a jurisdição constitucional brasileira. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 14, n. 56, p. 177-207, abr./jun. 2014.

shows that this enlargement takes place in many countries and assumes different characteristics according to the local social structures and political arrangements.<sup>18</sup>

The term “judicialization” can also refer to the dislocation of these decision-making processes from the political branches (Executive and Legislative) to the Judiciary, the technical branch *par excellence*. However, it can also be used to describe the use of judicial decision-making methods by the other branches. In the first case, there is judicialization from without; in the second case, from within.<sup>19</sup> Note that the criterion for determining what is within and what is without are the political branches, indicating that political issues belong in the Executive or in the Legislative.

The phenomenon is generally considered as something to be combatted or at least, controlled.<sup>20</sup> The counter-majoritarian character of the Judiciary is considered to be in tension with democracy and the legitimacy of judicial review of statutes, policy, regulation – anything that represents a political decision made by the elected branches – is questioned.<sup>21</sup>

Since the phenomenon is present in many different countries, ascertaining a single cause for the politicization of courts is challenging. Constitutionalism has been mostly to blame: in the 20<sup>th</sup> century, many nations have adopted Constitutions defining government and State power; one of the biggest concerns in the process has been the control of power. Different versions of a checks and balances system, balancing the three classical branches, have been implemented. Since political matters had been included in the Constitution, it was only a matter of time before the judicial branch started addressing political issues as constitutional ones.<sup>22</sup>

In addition, many of these Constitutions determine fundamental/human rights, which are protected against the parliamentary majority. Even some countries in the common law tradition, such as New Zealand, have embraced some form of Bill of Rights. The Judiciary, in some cases,<sup>23</sup> is in charge of this protection and enforces it through judicial review. These rights also need to be materialized and guaranteed, and

<sup>18</sup> TATE, Chester Neal; VALLINDER, Torbjorn, **The global expansion of judicial power**, New York: New York University Press, 1995.

<sup>19</sup> *Ibid.*, p. 16; BARBOZA, Estefania Queiroz; KOZICKI, Katya, **Judicialization of Politics and the Judicial Review of Public Policies by the Brazilian Supreme Court**, Rochester, NY: Social Science Research Network, 2014, p. 408–409.

<sup>20</sup> For the legitimation of judicial review, as long as it is controlled, check: ELY, John Hart, **Democracy and Distrust: A Theory of Judicial Review**, Cambridge: Harvard University Press, 1981.

<sup>21</sup> BICKEL, Alexander M., **The Least Dangerous Branch: The Supreme Court at the Bar of Politics**, [s.l.]: Yale University Press, 1986.

<sup>22</sup> BARBOZA; KOZICKI, **Judicialization of Politics and the Judicial Review of Public Policies by the Brazilian Supreme Court**, p. 409–410.

<sup>23</sup> Some of the countries that traditionally did not allow the Judiciary to perform this control have implemented some form of judicial review. This has happened in the French case.

this demands a creative approach to adjudication: a judge-made law approach, more typical of common law systems.<sup>24</sup>

To sum up, according to this account, the inclusion of political matters, especially those concerning the checks and balances system, along with the inclusion of fundamental rights in contemporary Constitutions have been mainly responsible for the judicialization of politics.

Some scholars, without discarding the previous explanation, emphasize the subjective dimension of the issue, affirming that the phenomenon requires judges who are willing to participate in policy-making and would rather alter policies than simply leave the task to the other branches.<sup>25</sup> Other explanations are the crisis of the representative system of contemporary democracies and a general distrust in the legislature.

This expansion of the Judiciary's activity, however, is commonly described in an ahistorical manner. There is little description of how the Judiciary acted *before* these comprehensive Constitutions arose – before judicialization.<sup>26</sup> It is not clear whether it did not interfere with politics or rather just did so in some way other than the effectuation of constitutional rights. In fact, the political and the technical are so close that perhaps this strict separation exists only as an ideal.<sup>27</sup>

In the Brazilian case, every description of the judicialization of politics starts in 1988 and with the post-'88 factors that have contributed to the phenomenon. Even papers that exclusively examine the Supreme Court and depart from some empirical research do not describe the prior conditions.<sup>28</sup> Democracy is widely considered practically a prerequisite for judicialization, and Brazil endured 21 years of dictatorship. There are, nevertheless, cases decided during the military regime in which the Supreme Court altered policies and even engaged in political conflict with the legislature.<sup>29</sup>

The innovative approaches usually try to elaborate new solutions to the issue,<sup>30</sup> but there is a lack of investigations directed towards the past. Different diagnoses are

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<sup>24</sup> BARBOZA; KOZICKI, **Judicialization of Politics and the Judicial Review of Public Policies by the Brazilian Supreme Court**, p. 413.

<sup>25</sup> MACIEL, Débora Alves; KOERNER, Andrei, Sentidos da judicialização da política: duas análises, **Lua nova**, v. 57, p. 113–133, 2002, p. 114.

<sup>26</sup> There is an article that deals with judicial activism with historic concerns, in a specific period of time. Tushnet describes the liberal judicial restraint of the US Supreme Court in the early decades of the 20th century, comparing it to the judicial engagement of the 50s and 60s. TUSHNET, Mark, From Judicial Restraint to Judicial Engagement: A Short Intellectual History, **Geo. Mason L. Rev.**, v. 19, p. 1043, 2011.

<sup>27</sup> Or maybe as a regulatory idea.

<sup>28</sup> CASTRO, Marcos Faro de. O Supremo Tribunal Federal e a judicialização da política, 1997. Disponível em: <[http://www.anpocs.org.br/portal/publicacoes/rbcs\\_00\\_34/rbcs34\\_09](http://www.anpocs.org.br/portal/publicacoes/rbcs_00_34/rbcs34_09)>. Acesso em: 10 out. 2014.

<sup>29</sup> FONSECA, Juliana Ponde. **(Des)Controle do Estado no Judiciário Brasileiro: direito e política em processo**. 2015. 316 f. Tese (Doutorado em Direito) – Faculdade de Direito, Universidade Federal do Paraná, 2015, p. 85 e ss.

<sup>30</sup> CARVALHO, Ernani Rodrigues de. Em busca da judicialização da política no Brasil: apontamentos para uma nova abordagem, **Revista de sociologia e política**, v. 23, n. 23, p. 115–126, 2004.

also very rare. All cited papers view judicialization as a consequence of the inclusion of political matters and fundamental rights in the contemporary Constitutions, since this would have led to a brand new role for the Judiciary.

#### 4. REESTABLISHING THE LIMITS

The intense discussions concerning the judicialization of politics and the judicial review of public policies have provoked reactions from the courts and from scholars. Worried about the political activity of the Judiciary, its lack of accountability and technical knowledge, its deficiency in/weak/lack of democratic legitimacy and with the unequal treatment that was being promoted by such lawsuits, they designed new limits for policy concerning adjudication.

The courts themselves were, and still are, fierce advocates for the limitation of the political activity of the Judiciary. The Supreme Court designed two of these new limits, one generic and one specific. Generically, the Supreme Court has stated it can only act as a negative legislator, never as a positive one, with respect to innovation in the system.<sup>31</sup> It can only invalidate those statutes and policies that are shown to be in conflict with the 1988 Constitution through judicial review. This guideline is to be followed by all courts, since every judge in Brazil is supposed to perform judicial review in concrete cases.<sup>32</sup> Policies are supposed to be elaborated by the other branches, and the Judiciary will only invalidate the ones deemed unconstitutional.

The Supreme Court has also designed a specific limit concerning cases involving the right to free public healthcare. In this case, the court established criteria to order or to deny the treatment or medication being requested by the petitioner.<sup>33</sup> The first standard concerns whether the treatment is part of a public policy. Sometimes, the policy exists but it is not implemented in all areas in the country. If the treatment is provided by policy and not delivered to the population, the Judiciary should ensure its effectuation.

If the treatment is not foreseen in a public health policy, it is important to examine the reasons for such exclusion – whether it is caused by: a) an omission (from the Legislative or the Executive); b) a policy decision not to provide such treatment; or c) a legal prohibition. Legal prohibitions take place when the treatment has been considered unsafe by the governmental agency that regulates drug administration or when

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<sup>31</sup> Judgments by the STF, the Brazilian Supreme Court: RE 412.670/SC and RE 431.001/AC. This guideline was affirmed by justices (or ministers, as they are known) with opposing views in many matters.

<sup>32</sup> The Brazilian system is a hybrid that mixes the US judicial review with the European tradition. It can analyze statutes and policies in abstract or within the framework of concrete cases, but the first can only be executed by the Supreme Court.

<sup>33</sup> The criteria were established in SL 47 and STA 175 (STF judgments).

it has not yet been tested by the agency. If the treatment is forbidden, the Judiciary should promptly deny the claim.

Problems arise in the two other cases. If there is an omission or a negative decision, the judge should investigate whether there is an analogous treatment provided by policy. If there is, the plaintiff should use the offered treatment, unless it is proven to be ineffective or inadequate in that concrete case. The criteria therefore determine that the Judiciary will only order the government to provide a treatment that is different from the one determined by policy if that treatment is inefficient.

In cases where no treatment is defined in policy, the judge should at first inquire whether the care sought by the plaintiff is experimental and thus not approved by the governmental agency. If it is, she should deny the claim. Only if it is already approved is the judge allowed to further scrutinize the merits of the case. The criteria are reasonably clear and should provide rational guidelines for the Judiciary, but they are not as effective as the Supreme Court thought they would be.

Scholars have also tried to define limits on the political activity of the Judiciary and created categories to define what citizens could demand from the government (changing policy) through adjudication. The categories were developed after many claims demanding medical treatments were initiated, based on the right to free public healthcare. Thus, these sorts of claims inspired both the limitations developed by the courts themselves and the ones elaborated through scholarship.

The first one, "*reserva do possível*" (reasonableness exemption), affirms that the government is not obliged to provide what is beyond reasonable expectations. When determining what is reasonable, one must consider the resources available to effectuate fundamental rights, the government's budgetary constraints and the adequacy and reasonableness of what the citizen requires.<sup>34</sup> The category was inspired by a 1972 judgment of the German Constitutional Court.

"*Mínimo existencial*" (existential minimum) is the second category, and asserts that the constitutional social rights can be claimed through the Judiciary only to the extent they are indispensable to a decent existence. Anything beyond that is subject to political decisions involving the definition of public policy.<sup>35</sup> Some scholars affirm that the minimum can only be defined in a concrete case and never *a priori*,<sup>36</sup> while others claim that it includes basic education (high school level), basic healthcare, social assistance (food, clothes and shelter) and access to the Judiciary (in Brazil, universal

<sup>34</sup> SARLET, Ingo Wolfgang, **A eficácia dos direitos fundamentais: uma teoria geral dos direitos fundamentais na perspectiva constitucional**, 10. ed. Porto Alegre: Livraria do Advogado, 2010, p. 287.

<sup>35</sup> TORRES, Ricardo Lobo, **O direito ao mínimo existencial**, Rio de Janeiro: Renovar, 2009, p. 41–43.

<sup>36</sup> *Ibid.*, p. 13.

access to the courts is considered a fundamental right, and involves total exemption of expenses and free legal counseling).<sup>37</sup>

The first category is negative, creating an exemption or a limitation of governmental responsibility in effectuating constitutional rights, while the second is positive, defining what can actually be pursued by citizens through adjudication. This difference is expressed by the fact that scholars differ on the simultaneous use of the two categories. Some insist the existential minimum is warranted and should never be subject to the reasonableness exemption – only what is beyond the minimum can be considered beyond reasonable expectations.<sup>38</sup> Others take contrary view (the minimum is subject to the “*reserva do possível*”),<sup>39</sup> which renders the existential minimum useless, for only the reasonable can be demanded through adjudication, even if what is considered feasible is well below the basic needs for a decent existence.

The scholars’ attempts to limit the Judiciary have not been confined to these categories. Since adjudication in civil law countries usually affects only the litigating parties, the perverse effects of an individual change in policy were also addressed. Take the claims involving the right to free public healthcare once again: one plaintiff can obtain very expensive medical treatment, while others under the same conditions, suffering from the same disease, will not receive it because they have not filed suit. Considering that the aforementioned right to access the Judiciary has not yet been implemented in Brazil, it is likely that the poorest part of the population will never go to court and will therefore be given unequal treatment. The problem can also be analyzed through the lens of governmental budgetary constraints. The necessary funding for such treatment will come out of the general healthcare budget, impairing the services provided for all citizens. Nevertheless, all these concerns can be described as mainly political. This also applies to the categories of reasonableness exemption and existential minimum, which impose a specific kind of political reasoning to the decision making process.

These concerns shift the micro justice focus, typical of adjudication in civil law countries – which only affects the parties and is concerned exclusively with their issues – to the macro justice point of view. Micro-level justice focuses on the needs of the individual victim or plaintiff, and on the relationships between individuals. On the other

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<sup>37</sup> BARCELLOS, Ana Paula de, **A eficácia jurídica dos princípios constitucionais: o princípio da dignidade da pessoa humana**, 3. ed. Rio de Janeiro: Renovar, 2011, p. 300–302.

<sup>38</sup> TORRES, Ricardo Lobo, O mínimo existencial, os direitos sociais e os desafios de natureza orçamentária, *in*: SARLET, Ingo Wolfgang; TIMM, Luciano Benetti (Orgs.), **Direitos fundamentais: orçamento e “reserva do possível”**, 2. ed. Porto Alegre: Livraria do Advogado, 2010, p. 74.

<sup>39</sup> SARLET, Ingo Wolfgang; FIGUEIREDO, Mariana Fichtner, Reserva do possível, mínimo existencial e direito à saúde: algumas aproximações, *in*: SARLET, Ingo Wolfgang; TIMM, Luciano Benetti (Orgs.), **Direitos fundamentais: orçamento e “reserva do possível”**, 2. ed. Porto Alegre: Livraria do Advogado, 2010, p. 27.

hand, macro-level justice focuses the needs of society as a whole and is concerned with the development of the social order.<sup>40</sup>

Micro and macro justice cannot be automatically linked to any of the existing typological distinctions in the justice literature.<sup>41</sup> They denote different points of view that may be applied to distributive justice (which focus on the fairness of outcome distributions), procedural justice (fairness of the procedures determining these outcomes), interactional justice (which refers to the treatment people receive), restorative justice (focused on the dignity of victims) and retributive justice (referring to the punishment of perpetrators). Considering distributive justice, for example, a macro perspective would focus on equality, while a micro-justice analysis would focus on equity and regard outcomes as fair if they are proportional to inputs and contributions.

Scholars have claimed, therefore, that any interference with public policy through adjudication has to must be advanced through collective procedure,<sup>42</sup> in theory more permeable to the macro justice perspective. The legitimacy of the Judiciary to intervene in political issues would be strengthened by the collective protection of rights and the problems of macro-level justice would be solved.

These efforts to limit the political activity of the Judiciary have, nonetheless, failed. The immediate reasons for this failure are examined next.

## 5. VANISHING BOUNDARIES

None of the attempts to restrain the Judiciary in public policy issues have reached their desired goals. It is impossible to determine the exact causes of this failure, but one can certainly speculate, given some facts that involve the implementation of the mentioned limits.

The Supreme Court has established the generic limit of the negative legislator, but it has failed to act as one in many important judgments in the past few years. In the 2011 judgment of ADI 4277 and ADPF 132 (decided together), the court vetoed any interpretation of the concept of family in Brazilian law that excluded same-sex couples. The decision made the civil union of homosexual and trans couples legal. Some months later, the National Council of Justice (CNJ) determined that the justices of the peace

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<sup>40</sup> LILLIE, Christine; JANOFF-BULMAN, Ronnie, Macro versus micro justice and perceived fairness of truth and reconciliation commissions., *Peace and Conflict: Journal of Peace Psychology*, v. 13, n. 2, p. 221–236, 2007, p. 222.

<sup>41</sup> Some authors disagree and always link macro justice with equality and micro justice with equity. SINCLAIR, Robert C.; MARK, Melvin M., Mood and the Endorsement of Egalitarian Macrojustice Versus Equity-Based Microjustice Principles, *Personality and Social Psychology Bulletin*, v. 17, n. 4, p. 369–375, 1991, p. 369.

<sup>42</sup> BARCELLOS, Ana Paula de, Constitucionalização das políticas públicas em matéria de direitos fundamentais: o controle político-social e o controle jurídico no espaço democrático, in: SARLET, Ingo Wolfgang; TIMM, Luciano Benetti (Orgs.), *Direitos fundamentais: orçamento e “reserva do possível”*, 2. ed. Porto Alegre: Livraria do Advogado, 2010, p. 116–124.

were to perform same-sex marriages all over the country, going beyond the Supreme Court decision (civil union and marriage have similar legal consequences, but are still different categories in under Brazilian law).

In the 2012 judgment of ADPF 54, the Supreme Court allowed the abortion of anencephalic fetuses, creating a new carve-out for the crime of abortion,<sup>43</sup> permitted only when the pregnancy will harm the mother's health and or when it was in consequence of rape.<sup>44</sup> The topic is extremely controversial in a predominantly catholic and protestant country.

Other cases, involving freedom of the press and free speech, and elections, demonstrate that the court does act as a positive legislator, introducing innovations into the system and surpassing the limits it has created for itself (and the rest of the Judiciary).

The specific limits created to guide the judges in cases involving the right to free public healthcare have been just as unsuccessful. The federal government's expenditure with medical treatments ordered by the courts has grown from 2.5 million Brazilian reais in 2005 to 266 million reais in 2011.<sup>45</sup> Thus, judges do not seem to follow the guidelines suggested by the higher courts, and tend to order the government to cover treatments and medications that are not predicted in the SUS policies. When the life of the plaintiff is at stake, the judges focus exclusively on micro-justice matters. In these cases, the categories designed by scholarship fail as well. The right to public healthcare is considered to be within the existential minimum and only experimental treatments or drugs have been denied.

Even if these categories had been successful, they would still have their own problems. The reasonableness exemption demands proof of the lack of resources to effectuate the violated fundamental right. If the resources are unavailable because they are destined for other ends, as determined in the governmental budget (which is a piece of legislation designed by the Executive and approved by the Legislative every year), the effective application of these resources has to be demonstrated.

The government's annual budget follows a series of prerequisites established by law and all formalities are always respected, but there is no obligation to actually spend the resources. The unspent funds are redirected to the payment of federal public debt.

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<sup>43</sup> Abortion is considered a crime in Brazil.

<sup>44</sup> These were the practical effects of the decision. The Court actually used the euphemism "interruption of pregnancy" to describe the procedure, stating that it was not an abortion *per se*, because the fetus would never be an alive human person.

<sup>45</sup> TRIBUNAL DE CONTAS DA UNIÃO, **Relatório sistêmico de fiscalização da saúde**, Brasília: Tribunal de Contas da União, 2013, p. 139.

Studies show that in some cases less than 1% of the funding is actually directed to the goals established in the budget.<sup>46</sup>

Demonstrating an efficient allocation of public resources, or even the simple fulfillment of the annual budget, is difficult in Brazil. If taken seriously, it is practically impossible to prove that the reasonableness exemption is applicable because of the lack of such resources.

The existential minimum, on the other hand, establishes that only the bare minimum conditions to a decent existence can be object of adjudication. If the minimum is to be defined in a concrete case, the limitation to the political activity of the Judiciary may be non-existent, since the magistrate is always able to set the minimum to whatever the plaintiff demands. On the other hand, if the magistrate adopts an austere definition of the minimum, this may obstruct all possibilities of effectuating constitutional rights through adjudication. The category, in fact, is unable to limit the Judiciary, for it creates no standard at all. Besides, if both categories are used in the same case, the existential minimum loses all usefulness and only the reasonable exemption is to be applied, as mentioned above.

Finally, the scholarly suggestion that policy change is to be made by the Judiciary only through collective procedure has also failed. The collective procedure is still under development, in the sense that the courts have yet to develop trustworthy precedents on the matter. Many cases have been trialed at the lower courts only to be extinguished by the higher courts at the appeals. Litigating individually is sometimes the safest option for the plaintiffs, even though the collective litigation is theoretically more efficient and more legitimate from the macro justice perspective.

Some courts do not favor collective actions and the system that controls the judges' efficiency – created by the National Council of Justice (CNJ) – hinders their progress, for the complex collective cases are compared to simple and repetitive cases: they have the same "value" for the efficiency system. The judges would rather decide a hundred easy cases than adjudicate a single collective action.

Scholars who recommend the collective procedure as a possible solution in re-establishing the limits of the Judiciary's political activity do not know, or prefer to ignore, that this is not a viable option today. Or, at least, is not a safe and trustworthy path, since the risks involved are high. If this suggestion were to be taken seriously within the current view and application of collective procedure, all possible ways of questioning policy by the Judiciary would be blocked. Collective procedure has to be minimally

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<sup>46</sup> In 2005, only 28.33% of the funding destined to the National Penitentiary Fund was spent, while only 0.3% of the money that should have been invested in the country's electric energy system was spent. MENDONÇA, Eduardo, Da faculdade de gastar ao dever de agir: o esvaziamento contramajoritário de políticas públicas, in: SOUZA NETO, Cláudio Pereira de; SARMENTO, Daniel (Orgs.), **Direitos Sociais: Fundamentos, Judicialização e Direitos Sociais em Espécie**, Rio de Janeiro: Lumen Juris, 2008, p. 232.

successful in order to be considered an alternative for the people. It cannot be taken as a solution as it is today.<sup>47</sup>

One can also question the possibility of discussing macro justice issues through collective procedure, since it was based on the same procedural rules that discipline individual litigation. All collective categories are still bound to the classical individual ones. The system is clearly under development, and not even its basic aspects are clearly defined. The definition of a collective right, for example, is not sufficiently clear. All the examples of collective rights provided by scholarship are rigorously the same, such as the right to a healthy and sustainable environment or the right to free public healthcare. The system may have potential to deal with macro justice issues, however it is not able to do it just yet.

Collective adjudication is, moreover, a breach of the original boundary between the political and the technical, due to its resemblance to regulation. Even if perfected, the system will still give the magistrate a possibility to adjust or create public policy. It might be done in a more legitimate way, but it would still be a case of “judicialization of politics”.

## 6. LAW AND POLITICS: REDEFINING THE SEPARATION OF POWERS?

In the modern state, the authority to resolve disputes and the power to make rules are divided into two separate figures; however, it is not easy to detach the judge and the legislator. This becomes even more difficult once legal theory, even in civil law tradition, recognizes the creative role of the judge. The amount of “creative power” differs depending on which concept of law is adopted, but today the formalist conception, affirming that the judge would only apply the law made by the Legislature (never creating anything, just following the political decisions which were already made by the legislators), is not taken seriously by scholars. Only from this simplistic point of view, politics and law, pragmatism and normativism, are completely separated.

There is no evidence that the judges ever performed their tasks in the formalist manner. Certainly their activities were explained and justified in that way, but this does not mean the model was an accurate description of reality. In fact, there is only evidence that they did not.<sup>48</sup> Legal theory may have been formalist in the 1800s, but legal practice (the law in action) did not follow the theoretical description, since the role of the judge’s perspective on natural law and of the scholarly interpretations of the

<sup>47</sup> In my Ph.D. dissertation, I point out to some possible interpretations of current statutory law that could minimize the risks and make collective procedure more effective, not only in adjudication but specially in the remedial phase.

<sup>48</sup> HESPANHA, António Manuel. “Tomando a história a sério”: os exegetas segundo eles mesmos. In: FONSECA, Ricardo Marcelo (Org.). **As formas do Direito: ordem, razão e decisão (experiências jurídicas antes e depois da modernidade)**. Curitiba: Juruá, 2013.

statutes were very preeminent. Furthermore, the formalist conception of law would exempt the judge from responsibility; after all, he is not responsible for a political decision taken by another branch (and he is only applying the law to concrete cases).

In fact, one can argue that judicialization might not be new at all. Perhaps the phenomenon has intensified in the recent decades, but any move towards a triadic dispute resolution will judicialize political life. A triadic dispute resolution model is composed by two disputants and a dispute resolver. The triad can be formed consensually by the disputants, or it can be compulsory – as happens in the case of jurisdiction.<sup>49</sup> And triadic dispute resolution is certainly no novelty.

Triad rule-making is legislative by nature, because it constantly adapts the given normative structure to the demands of the disputants. At the same time, the legislator also performs a dispute resolution function, for the laws prevent conflicts from arising and help solve them once they occur. If the judge is supposed to enforce the lawmaker's binding law, the dispute resolution has to be coercive. In this case, dispute resolution is also authoritative rulemaking; thus, the legislator shares the rule-making power with the judge.<sup>50</sup> The first makes generic and prospective rules, while the second makes particular and retrospective ones.

Both will face serious legitimacy issues. The legitimacy of the triadic dispute resolution depends on the neutrality of the judge, and this neutrality is hampered by her capacity to make rules. The legislator, on the other hand, has to create rules for an entire community, which generates its own legitimacy problems.<sup>51</sup> These are aggravated by the crisis of the representation model in contemporary democracies.

The phenomenon of judicialization of politics can also be considered, therefore, the result of regular use of triadic dispute resolution – not something completely new, but the evolution of something that was already there.

It is doubtful the judge ever had a passive and mechanical role towards the law. In fact, "law has been identified to subsumption not only because of the myopia or stubbornness of some analysts and Law professionals, but also because subsuming is the role of the Judicial Branch in the context of separation of powers in its classical view."<sup>52</sup>

If the law is a complete and coherent system – as the past formalists would believe – the judge can simply subsume and apply the given law to any concrete case. As

<sup>49</sup> STONE SWEET, Alec, Judicialization and the Construction of Governance, *Comparative Political Studies*, v. 31, p. 147–184, 1999, p. 150.

<sup>50</sup> *Ibid.*, p. 161–162.

<sup>51</sup> *Ibid.*, p. 162.

<sup>52</sup> RODRIGUEZ, Jose R., The Persistence of Formalism: Towards a Situated Critique beyond the Classic Separation of Powers, *The Law and Development Review*, v. 3, n. 2, 2010, p. 52.

mentioned, all political discussions have been finished in parliament and the rules are clear and stable. The outcomes are predictable and this favors economic activity.<sup>53</sup>

This conception has institutional consequences and a complete separation of the main functions (not all functions, for there are still checks and balances) on the two branches. However, if the standard mode of reproducing the law ceases to be through subsumption, the scheme will fail – or should fail, at least. What, after all, should the Judiciary do if the application of law is considered a complex activity? If no law is ready to be automatically applied, the role of the judge is suddenly creative, but this role is also difficult to limit.

Most critiques of the judicialization of politics focus on condemning the cases in which the magistrates have crossed the line and invaded political territory. Scholars can say, in those cases, what the Judiciary *should not do*. However, there is no definition of what the Judiciary *should do*, especially in abstract terms. In the Brazilian cases involving the right to free public healthcare, should the judges defer to the political branches and wait until they decide it is time to provide this or that treatment? Should they follow the formalist logic by the book?

The new role of the Judiciary and the Legislative is yet to be defined, but this definition is inevitable, for the current concept of separation of powers is incompatible with contemporary notions of law.

One can certainly not ignore the inherent conflict between popular sovereignty and the rule of law, especially if you consider the fundamental rights that are protected from the parliament's majority.<sup>54</sup> However, one can also consider the Judiciary as another space of political dispute.

If the creation and the application of legal rules are not distinct and opposed by nature, it is possible to perceive that there is an ongoing and procedurally established conflict (since the interaction between Legislative and Judiciary is defined by the checks and balances system) for the creation and application of these rules.<sup>55</sup> Their sense is not defined by a single branch, and it may even be defined by none of the branches.

The Judiciary is another space of political dispute. The law, perceived by Marxist thought as part of an ideology that perpetuates the domination of the working classes, has been used by these working classes and has submitted to their interests – at least in part.<sup>56</sup> The social rights included in the Constitutions (in many cases, fundamental

<sup>53</sup> *Ibid.*, p. 52–55.

<sup>54</sup> NEUMANN, Franz, **O Império do Direito: teoria política e sistema jurídico na sociedade moderna**, São Paulo: Quartier Latin, 2013, p. 32.

<sup>55</sup> *Ibid.*, p. 19.

<sup>56</sup> RODRIGUEZ, José Rodrigo, Franz Neumann: o direito liberal para além de si mesmo, in: MARCOS NOBRE (Org.), **Curso livre de teoria crítica**, Campinas: Papyrus, 2008, p. 107.

rights protected from parliamentary majority) are conquests of these working classes by political processes. The “creation” of the law has always been seen as a part of these processes, where all society (theoretically), working class or not, can take part and try to find a way to defend their interests.

Once these rules have been created, they need to be applied and effectuated, and this is another part of the mentioned political processes. The Judiciary is the arena where the non-application or non-enforcement of these rules is to be discussed. After all, the political dispute does not end with a piece of legislation, and it may be far from ending if this piece is not enforced.

It seems more important to perfect the judicial process in order to allow the political disputes to take place than to insist in an old concept of separation of powers, and with it, an inadequate concept of law. Great changes in the way law is perceived, applied, created and reproduced have already brought transformations to the three branches. There is no crime in that. After all, there is no such thing as the true essence of law.

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