Judicial Activism: an (Un)expected Result of Legal Interpretation in Complex Societies?

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Abstract

Judicial activism has been accused of being an undue activity of judges, who should restrict themselves to the interpretation of the law. In this article, we argue that this conception is wrong: judicial activism does not imply a distortion in political and judicial structures, but it should be understood as an expected feature of legal interpretation in complex political systems. In contemporary liberal democracies, legislation cannot regulate all situations, and thus the only way to affirm its universality is through flexible interpretation, which grants to society the ability to adapt its legal system to new circumstances without the need to change it through legislative innovations. Finally, as the texture of the regulatory system becomes more open, the practical application of the law demands from the jurists a greater capacity of dealing with legal texts composed of broad principles and not of precise rules.

1. Introduction: featuring contemporary judicial activism

There is currently much debate about the proper role of judges in contemporary democracies. On the one hand, some scholars hold the position that judicial activism is a way of ensuring the effectiveness of legal rights. This perspective includes the works of legal scholars that argue in favor of an evaluatively thick reading of the constitution, such as the reading proposed by Ronald Dworkin (1985, 9-28) and Robert Alexy (2010, 373-375), who acknowledge the need to reinforce the political power of the judiciary bureaucracy. On the other hand, some scholars defend that judges should restrain themselves, in order to avoid assuming political functions that don’t fit their roles.

The scholars who advocate judicial restraint tend to assume that the executive and legislative branches are endowed with a strong political dimension, while the judiciary should be politically neutral, in order to apply the law in a technical and impartial manner. This notion is based on the diagnosis that these are times of a judicialization of politics, which is characterized by a judicial invasion of territories that should be occupied by the legislature and the executive branch. The very meaning of judicialization, outlined by Vallinder, identifies this process as an increase in activism by the judiciary (Vallinder 1994, 91).

It is becoming common the perception that the judiciary branch has crossed the boundaries of being a simple interpreter of the law. In Brazil, this diagnosis has been used to criticize the role of the Supreme Court in precedents such as the recent ones in which were judged constitutional the same-sex civil union (ADPF 132 and ADI 4277), the abortion of anencephalic fetuses (ADPF 54) and the system of racial quotas for the

1 The Supreme Court in Brazil is named Supremo Tribunal Federal (STF), which could be translated as Supreme Federal Court.
admission to public universities (ADI 3330 and ADPF 186). Moreover, after decades of an established consensus around the idea that the function of the Supreme Court was to act as negative legislator, just declaring the nullity of statutes that violate the constitution, some justices now argue that the Court should create rights and obligations that are not present in the legislation. Due to views like this, many people think that the court has exceeded the limits of their own constitutional jurisdiction. But is this diagnosis correct? Are judges really trespassing the boundaries of their democratic authority when they judge causes referring to evaluatively thick arguments?

This article holds that this diagnosis is incorrect. The judicial activism of contemporary courts does not imply a distortion in the current political system. We doubt that such a strong activism is convenient, but we are sure that this matter should be discussed in a political domain, and not in a theoretical one, especially when the basis of the disagreement is the foundation of a specific theory of separation of powers. The rejection of activism based on arguments of presumed principles of political philosophy (such as the separation of powers), and based not on arguments of political expediency, is founded on a formal conception of the duties of the judicial system (Maciel and Koerner 2002, 129) and on an idealized separation of powers scheme that is not compatible with the effective organization of the Brazilian contemporary State. Furthermore, this diagnosis usually assumes that the use of a specific rational decision making technique would be able to turn the judiciary branch into an apolitical institution.

Our argument assumes a different premise: the judicial system is a state institution whose function is to conduct a political activity of fundamental importance - the interpretation of the law. This is not a technical function, although legal discourse makes a great effort to qualify itself as a scientific one. The duty of the judiciary is precisely to change the law through a discourse that presents itself as a duty of mere application of norms, although, as a matter of fact, it institutionalizes subtle changes in law, without harming the integrity of the system. Thus, the judiciary plays a prominent political role in drafting the law, since the judicial practice contributes to a constant redefinition of the meanings of legal norms.

The amplitude of the exercise of this role depends crucially on the specific configuration of the normative system of law. There is a necessary correlation between the structure of the legal system and the legal theories concerned with its application, since both form a single system. Rules only become concrete when interpreted and, to that extent, the creation of law and its interpretation should not be considered separate processes, a mistake stimulated by the adoption of a strong model of the separation of powers.

The last part of this work deals with the very relation between political structures and hermeneutical theories, by outlining three elements of the contemporary legal system that are connected to the increasing judicialization of political issues. The first element relates to the fact that the phenomenon of constitutionalization implies that a substantial part of law can only be changed by means of judicial interpretation. This
situation induces the development of a legal hermeneutics that is sufficiently sophisticated to face this challenge of providing change of the constitutional rules. This process is similar to the one triggered by the Quran in Islamic culture or by the Corpus Juris Civilis in medieval Europe: texts that cannot be changed by legislation must be adapted to new circumstances through interpretation, and this operation requires a more interventionist hermeneutics.

The second element is that the universalization of the jurisdiction favors hermeneutic strategies rather than legislative ones, because it is impossible for the legislation to regulate all situations and the only means of granting its universality is through the flexible interpretation of existing texts. Finally, as the texture of the regulatory system becomes more open, the practical application of the law demands from the jurists a greater capacity of dealing with legal texts composed of broad principles and not of precise rules. In this context, the adoption of an activist approach not only turns out to be a viable ideological option, but an attitude fully adapted to the conformation of the normative structure of contemporary Western societies. So, the attempts to describe judicial activism as incompatible with the constitutional systems are not consistent with the contemporary political order. It does not mean that we should not promote at least a certain degree of judicial self-restraint, but the criticism of the judicial activism shall be understood as a political demand and must be complemented with proposals that deal with the social structures that are linked with the active posture of the judiciary.

1.1 The role of judges

What is the role of judges? On the one hand, conservatives tend to adopt a rigid conception about how judges should behave while interpreting the law. According to this view, which resembles the Montesquieu model of separation of powers, judges should be the mouth that utters the words of the law, without moderating their strength and severity. On the other hand, activists tend to oppose to this view, by defending that judges should adopt a more active role, interpreting the law as if it embodied a particular conception of justice that is revealed through judicial review. However, judges tend to see themselves exactly as the conservative view portrays them: as merely putting the law into effect.

It is evident that this description is not compatible with the facts. Since Hans Kelsen published the Pure Theory of Law, almost a century ago, it became clear that the judicial practice of law is creative because the open texture of legal rules depends on evaluative political choices to be applied to concrete situations (Kelsen 1978, 352). The politically neutral application of the rules is logically impossible, given the very conformation of normative language. Judges cannot change the text of the law, but it is too naive a notion that considers the text as if it was the norm. The twentieth-century analytic philosophy has made it clear that, when it comes to the law, that which puts us under its compliance is not the words of legal texts, but the meaning we give to them. Based on this concept and resuming the old Greek distinction between reality and shadows, Kelsen held that judicial practice was merely a simulacrum of neutrality and
that a writer that “extolls a specific interpretation among many possible ones as the only ‘correct’ one, does not render a function of legal science, but of legal politics”. (Kelsen 1978, 356)

Despite the soundness of this assertion, ninety years later, scholars are still involved in trying to establish interpretive approaches that allow a rational judicial action based on strict adherence to positive law. This mismatch between philosophical theory and dogmatic practice shows that the judicial activity was quite impervious to Kelsen’s criticism, which was expected since he adopted an external perspective of analysis, deconstructing the judicial activity rather than offering it a new guidance. Practical jurists, including magistrates, do not seek a realistic understanding of their own political activity, but a dogmatic orientation that allows them to continue performing its social function (interpreting the rules) based on a discourse compatible with the fact that society recognizes the Court as it presents itself – a politically neutral institution. The mythical aspect of this neutrality does not matter because it remains necessary to the legitimation of the Court decisions.

The judicial activity continues to insert changes in the legal system through a legal discourse that hides its creative bias. The kind of legal mutation conducted by judges that pretend to be mere officers for the application of the law is the oldest strategy of change in law. Since prehistoric times, when traditional customs had a sacred nature and could not be modified by the political leaders, the activity of interpretation has done its part to introduce subtle changes in the normative systems of the societies.

Where law is considered immutable, only hermeneutic activity may introduce slight, but effective, modifications. Thus, it does not make sense to present the creative function of interpreters as an idiosyncratic element of contemporary systems. Judges play a creative activity since before the very birth of the legislation, which only came up a few thousand years ago with the first governments that could impose legislative standards on society. As shown by the anthropologist Pierre Clastres, the centralized political power seems natural to us, but the legislative policy is a relatively new invention, which finds no counterpart in indigenous societies (Clastres 2003, 207-209). However, from the beginning, the activity of the interpreters is so innovative in practice as it is conservative in speech, since the legitimacy of hermeneutic change is rooted in a discourse that presents itself as a respectful application of traditional and immutable standards.

1.2 Interpretation and evolution

There cannot be a system of rules without an interpretive system able of qualifying an act as forbidden. Nevertheless law students normally are taught to think

\[2\] According to the anthropologist Christopher Boehm (1999, 180-194), pre-historic tribes were moral communities organized by a set of moral norms which embodies a shared conception about the kind of society in which its members wished to live. In these moral communities, norms were interpreted and applied by all the community, and as such they couldn’t be changed intentionally, but only unconsciously and incrementally. As Glenn (2010, 73) states, law in these communities “is thus not command, or decision, and can be found only in the bran-tub of information which guides all forms of action in the chthonic community”.
the opposite way: that the forbiddance of an act presupposes the existence of a norm that qualifies it as legally right or wrong. This is the lesson of Kelsen: the legal meaning of a human behavior act derives from a norm that confers legality or illegality to the act (Kelsen 1978, 4). So, the existence of a valid norm is a logical condition to the legal qualification of behaviors. But Hegel was wrong when he insisted in the Platonic idea that “what is rational is real; and what is real is rational” (Hegel 2008 p. xix), because logical necessity does not imply historical precedence.

The very concept of logical necessity of norms only emerges in discourses that re-describe the social practices in terms of normative patterns. We are so used to describe patterns as normative patterns. It is normal to think this way that even natural phenomena follow a normative order of natural laws. Kelsen was very aware of this bias (1978, p. 103), but at the same time he understood that thinking legally means to interpret the social facts as if they were based in valid rules, so that he described a norm as a scheme of interpretation (1978, p. 3) that attributed legal meaning to an act. The act is not legal per se, its legality is derived from the application of a juridical pattern of interpretation. So, a legal discourse that is presumed meaningful is attached to the supposition that it qualifies the facts based on valid rules. This very supposition is called by Kelsen as the hypothetical basic norm (Kelsen 1978, 203), and the pure theory of law should be understood as a hermeneutical effort to comprehend the modern legal discourse and reveal its structure, including the fact that it interprets social patterns in terms of obligations derived from rules.

This kind of social discourse, whose logical structure is analyzed by Kelsen, has a history that can be narrated in evolutionary terms. The capacity to interpret behaviors in terms of normativity was developed by human beings and it is interconnected with the evolution of our linguistic skills. Although a complete account about the evolving of human language isn’t available, it is reasonable to think that our first linguistic systems attributed semantic meanings to our patterns of behavior, patterns that were not deontic at least until we became able to describe them as so.

Human social groups were, throughout evolution, preceded by societies without rules, organized by non-deontic patterns, as is the case in beehives or wolf packs. Complex social relations can be based on the coordination of genetically defined behaviors. These patterns of behavior, which are present also in other primate societies, involve a series of social relations based in coordinated emotional reactions and feelings. Fear, sympathy and anger are the names given to certain states of the body that arise in certain circumstances on a regular basis, triggered by some kinds of interaction between the organism and the environment. Each emotion is a “complex collection of chemical and neural responses forming a distinct pattern” (Damasio 2003, 55), and

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3We use the distinction between emotions and feelings defined by Antonio Damasio: “emotions are actions or movements, many of them public, visible to other as they occur in the face, in the voice, in the behaviors. [...] Feelings, on the other hand, as always hidden, like all mental images necessarily are, unseen to anyone other than their rightful owner. [...] Emotions play out in the theater of the body. Feelings play out in the theater of the mind. As we shall see, emotions and the host of related reactions that underlie them are part of the basic mechanisms of life regulation; feelings also contribute to life regulation, but at a higher level.” (Damasio 2003, 28)
these states of the body can affect other individuals because they normally have a
visible aspect, that can be heard in our voices or seen in our faces. The neural system
interconnects all parts of the body and some states of the body (emotions) trigger
reactions of the neural system that we call feelings. The neural system draws constantly
what Damasio calls metaphorically the “brain’s body maps” (Damasio 2003, 85), that
are the result of a special kind of perception: the perception that the neural system has of
the body, including itself. This map is not an abstract image, but a state of the neural
system, and when this state forms some specific patterns, some reactions are triggered:
not emotions, but feelings (Damasio 2003, 86).

According to Antonio Damasio, “feelings, along with the appetites and emotions
that most often cause them, play a decisively role in social behavior”. (Damasio 2003,
140) These aspects of our organisms, coupled with some psychological biases, induced
the production of some behavior patterns that shaped our social organization much
earlier than the development of a government or a law. The psychological constitution
of primates propitiates complex interactions between the members of a group, and since
all primate species have a great capacity of adopting new patterns of behavior due to the
conditioning of emotional responses, primate societies can constitute an environment
where the members become strongly conditioned to perform or to avoid some acts.

The perception of the stability of social behaviors due to the stability of
psychological biases and of conditioned reactions can lead some people to describe this
stability in terms of an immanent law. However, there is no reason to describe every
organization as a deontic organization and every system of stable social behaviors as
the result of an intrinsic set of rules. In human societies, feelings, emotions and
reciprocal conditionings certainly precede our capacity to interpret them in a normative
way, because our linguistic skills were developed much later than many of the societal
patterns they describe. And we shall take seriously the fact that language is a kind of
communication that arose very recently in evolutionary terms. As stressed by Buckley
and Steele, “evidences show that the evolution of language is linked to a co-evolution
of the human life history strategy and of speech adaptations in the genus Homo” (2002,
41), what means that the evolution of human language is a kind of adaptation of human
speeches that does not precede human society, but that occurs interconnected with the
evolution of social patterns.

Arbib claims that “that the first Homo sapiens were language-ready but did not
have language in the modern sense”, which involves a “change from action-object
frames to verb-argument structures to syntax and semantics” that took place around
100,000 years ago (Arbib 2005, 118). Although brain capacity and anatomy were
compatible with language at least 150,000 years ago, the culture that certainly depends

\[^{4}\text{This phrase adopts the distinction made by Maturana and Varela (2002, p. 231) between communication (the mutual triggering of coordinated behaviors) and linguistic domain (a communication that can be described in semantic terms). This distinction is important because there are many systems of coordinated patterns of behavior that have no semantic dimension, such as the communication between ants or schooling fishes. In these cases, the communication patterns cannot be properly described in terms of grammar rules, meaning or information, concepts that are only related to the linguistic domain.}^{4}\]
on language arose much later. According to Fabrega, “no one denies that ‘culture’ was
evident at 40,000 B.C., yet virtually no one ventures to consider ‘culture’ prior to this
‘explosion’”. (Arbib 2005, 132) Regardless of the lack of precision of these dates,
complex societies arose much earlier than human species and there appears to be no
evidence of the existence of verbal language much before 100,000 years ago.

The development of the linguistic ability of moral qualification, in an ambiance
formed by patterns of behavior shaped by coordinated emotional reactions, made
possible that we interpreted our own social relations in terms of duty. This is the
beginning of the social normative discourse that is the core of religion, morality and
law. So, it is unconceivable the existence of social normativeness without an
interpretive discourse because the social establishment of obligatory rules requires the
human capacity of determining that certain acts are mandatory. In a moment of the
evolution of our language, we became able to convert ought to into must, explicitly
interpreting certain acts as obligatory, and not only desirable.

This interpretive activity was, as it still is, diffuse through society, because all of
its members are capable of interpreting norms. The development of patterns of
interpretation precedes the development of an abstract normative system, and it occurs
in legal systems as well as in linguistic systems. Language patterns historically precede
formal grammars because the work of the linguists is an effort to identify and describe
these patterns. Before grammarians came to highlight the implicit standards in the social
uses of language ("finding" a deontic system behind an effective practice), there was a
social practice guided by patterns of grammatical correctness. However, the
development of an abstract language, or of an abstract law, involves a shared conception
of what is grammatically correct and wrong. Thus, the normative discourse of
grammarians and jurists are the result of efforts devoted to understand a social
experience (the practice of language and of laws) through the identification of abstract
standards that regulate behavior.

The idea that it is possible to reduce a social practice to a defined set of consistent
deontic standards is an abstract concept that is relatively new in human evolution. It
could not arise except when the social practices grammarians and jurists tried to clarify
evolved to the point that allowed such abstract approach, typical of contemporary
theories. This perspective assumes a metaphysical presupposition: every social practice
can be comprehended as the expression of an underlying normative system (Habermas
1984, 1:38-39). This assumption, however, is not a factual issue, but the enunciation of
a philosophical dogma that can only be believed, but not proved.

The derivation of a normative system from a social practice is an exercise of
Aristotelian abstraction in which it is necessary to establish the facts and its relations in
order to find the abstract structures that give them purpose and meaning. Defining
the legal rules from the standards by which society measures the correct action, as well as
defining the grammar rules from the standards by which a society measures
grammatical correctness, is a creative activity. Converting custom in a statement
requires a process of abstraction that changes the very custom itself, and this procedure
tends to alter the social practice which is described. Just as the teaching of grammar rules redefines our understanding of language, the teaching of legal rules redefines the understanding of the customary law.

This is the feedback operation that puts the system in motion. The interpretation of the normative system changes the correction patterns because it involves operations of generalization and abstraction that should reveal the system that organizes a social practice. The assumption that the practice follows an identifiable pattern is the key that enables the metaphysical discourses that redefine continuously the described systems. When dealing with legal texts, interpreters end up determining them, redefining its contours, its meanings, its sources, its consequences and all these processes are part of the hermeneutic activity.

This interpretation of customary/religious law was the first actual legal activity, and this kind of process enhances the stability of social practices, because the identification of a system that can be linguistically taught connects the interpreter to it. Furthermore, it favors subtle changes, since the interpretation changes the practice itself, which in its turn changes the interpretation in an infinite and circular hermeneutical process.

This social dynamic allows substantial changes to take place over a few centuries, while at each moment the consuetudinary law (as well as the language) is socially perceived as immutable. The adaptive capacity that derives from this pace of change enables human societies to improve its structural coupling to environments that vary quickly in linguistically terms. This is a quite singular situation when we consider the whole scope of human ancestral history. In Pleistocene (the geological period which lasted from about 2,600,000 to 11,700 years ago), our ancestors lived in a natural environment that showed an increasing rate of climatic variability, unlike the more stable previous 4,000,000 years. According to some scholars, this climatic variability is one of the factors that explain why our ancestors evolved as a cultural species, since culture enhances the adaptability to novel environments that change quickly. Our ancestors probably evolved culture because they already had some innate capacities to deal with this instability (Richerson and Boyd 2005, 138-139).

A stable environment demands less ability to cope with change than more unstable environments. This means that less complex organisms may respond adequately to the challenges imposed by its environment by using only the cognitive resources it inherited genetically. In extremely variable environments, on the other hand, genetic information is of little use, since there is no time for a species to adapt genetically in time to respond successfully to the changing demands. Evolution, in such an environment, should favor the natural selection of individuals that can learn individually how to behave. There is, however, a mid-term in this span: in environments with a moderate rate of variation, like the ones in which our ancestors lived, an individual should do better if he imitated the behavior adopted by others. It was precisely in environments like this that culture emerged as a system that enabled human
groups to adapt rapidly to the rates of change in the environment, which became progressively complex due to conflicts between different hominin groups.

Furthermore, the migration processes by which the *Homo sapiens* left the African continent and colonized almost all the world represented to each tribe a necessity to adapt to rapid environmental changes, imposed by the novelty of the territories that were occupied. About 125,000 years ago, some tribes departed from Africa to the Near East (Armitage et al. 2011), and then to the rest of the world, occupying, slowly but progressively, many different surroundings. The rhythm of structural adaptation based on (i) slow and random processes of customary change, like mutation and cultural drift, (ii) on natural selection of cultural norms and (iii) on conscious and rational decisions that were transmitted to other members of the tribe through processes of social transmission are appropriate to cope with this pace of environmental mutation. These processes slowly altered the way the system of rules that regulated these societies were interpreted, while kept the stability of the normative system, which remained perceived as sacred and immutable, albeit the changes it passed through.

The hominin past also posed other challenge: our ancestors lived in environments composed not only by nature, but also by other hominin populations. Nature poses relatively stable problems that need to be coped with by a being, but the problems caused by the contact with other human tribes that dispute the same resources are much more complex than the issues posed by the natural environment (climate change and attack by other animals, for instance). Human intelligence and cultural innovations made confrontation with other groups much more unpredictable. Thus, the environment of ancestral human societies was not primarily that of nature, but that of different societies. Changes in the environment became much faster, and survival required a greater ability to make changes in the behavior of society.

The increasing contact with increasingly larger tribes that were equipped with cultural innovations that increased the odds of winning a war against less advanced tribes possibly led to the selection of structurally more organized societies, endowed with a government that could legislate. Ancient human tribes, such as the ones that lived until 10,000 B.C., were uncentralized societies in which decisions were made mostly by debate and communal consent. The leader acted as a voice that incarnated the decisions made by the collective body, but did not have the power to govern the society in any

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5This statement is based on Peter Richerson and Robert Boyd assumption that genetic mutation is sufficient to the adaptation of a species to a slowly changing environment (Boyd and Richerson 2005, 70-71). Although culture evolves faster than genes, the mutation rate through the mentioned processes can sustain a much slower rate of evolution than conscious decisions made by institutions of more complex societies.

6In this sense, Sterelny (2003, 20-26)distinguish between informationally transparent and translucent environments. In informationally transparent environments, an agent's cognitive capacities are sufficient to extract all the relevant information from the environment. On the other hand, translucent environments are the ones in which the cognitive capacities of an agent are insufficient to extract all the relevant information in order to succeed. One environment can be translucent in some aspects, and transparent in others. In the course of human evolution, natural environments became relatively transparent, since culture made it possible to deal with most of the challenges posed by animals and even by some natural disasters (although not others, such as tsunamis), but the interaction between humans became more complex, due to the unpredictability posed by human intelligence that led to socially translucent environments.
significant way. When these societies became larger, it turned out to be impossible to maintain the structure of the older decision-making processes. More complex and differentiated societies, in which power became more centralized in a bureaucratic structure, were selected due to their ability to take quicker and more efficient decisions.

The new structures of government allowed the introduction of legislative changes much faster than the customary processes, although the possibility of political change was limited by the fact that the sacredness of customs restricted innovation in this field. But the price of this new flexibility was high: a greater degree of centralization generated new social tensions and also a great dependence on the capabilities of political leaders to choose and impose adequate patterns of behavior.

One of the ways of limiting this price was the maintenance of a body of traditional rules that could not be changed by the political leaders. For millennia, our cultures have created concepts that describe this difference between traditional immutable law (natural law, *li*, *jus aeternum*) and mutable legislative rules (positive law, *fa*, *human law*). As a matter of fact, the legal rules that a society considers immutable are gradually changed by the work of the interpreters. These processes became even more important with the recent development of *written law*, a technological device that caused major changes in social organization, making possible the production of very stable *texts* (as the Quran, the Bible or the *Corpus juris civilis*), whose adaptation to the new historical contexts demanded more sophisticated hermeneutical systems (Hodgson and Knudsen 2010, 200).

Throughout the last five hundred years, legislative written law have become increasingly relevant to the modern societies and have occupied fields that were traditionally regulated by religious or customary law. In this process, we created in the last century a new kind of legislation, which can be opposed to all political authorities: the constitution. The Renaissance thinkers crafted the idea that proper government was a kind of sovereign power (*potestas*), what means that no law could be imposed to it. Modern constitutionalism developed the opposite idea: a proper government should be defined by a law that could not be changed, and every rule that cannot be modified by the government must be changeable by the interpreters – otherwise, a given society could not change in order to deal with new challenges that demanded slightly different norms.

All these patterns of social organization combine structural stability and discrete methods of social change, and the balance between these elements creates the possibility of social evolution. But we shall not confuse progress with evolution. Progress is a movement towards a better society, and it can only be measured in terms of a set of values that are taken for granted. Evolution is only the possibility of keeping the structural coupling between the social system and the environment, what requires this peculiar combination of stability and change.

3. Interpretation, revelation and change in the law
As Hobbes wrote in mid-seventeenth century, "all laws, written and unwritten, have need of interpretation". (1976, p. 187) The application of every law requires the activity of interpreters, whose role involves constant reinterpretation of the law, since the hermeneut always exerts his/her function from his/her own place in history and culture. As natural and cultural environments change continuously, the sensibility of the interpreters and the meaning of the law are also subject to constant modification.

Since these changes are usually very subtle, they do not appear as a break in the tradition, but as continuity. Interpretation takes place within a discourse of rules application. Even when this interpretation is far from the literal meaning of the statutes, the interpreter seeks to establish that literality is not as important as the intention of the legislator, or as the *mens legis*, the systematic meaning, the general principles of law or any other category used where they intend to construct a meaning that conflicts with literality. Thus, interpreters always promote a renovation of the meaning by a discourse that presents itself as the *revelation* of the actual meaning.

*Revelation* is an important word because it emphasizes the religious source of hermeneutics, which was originally connected with the interpretation of rules that had a sacred dimension. When a prophet reveals a law, he/she does not present himself/herself as a creator, but only as a privileged interpreter, able to access a truth which is not visible to others. Similarly, when a person interprets a rule, he/she reveals the meaning of the text, based on the understanding that his/her role is not to create rights and obligations, but only to clarify them.

In the context of religious laws, especially in those religions based on sacred books, no one can change the text itself, which must be treated with reverential care. Extracting an appropriate meaning of an unchanging book is an old religious task of hermeneutics. In this context, the activity of the interpreter is to dispel the doubts and reveal the correct meaning of texts. Therefore, the good hermeneut must deal with a subtle dialectic of darkness, showing that certain points that seem clear are truly obscure, in order to enlighten with his/her own art. The interpreter must create the gap he/she fills, the antinomies he/she solves and the obscurities he/she explains.

This activity is capable of introducing subtle changes in the meaning of the laws, which are presented to each moment as a fulfillment of the law itself. However, accumulated over time, such changes can lead to significant changes in the law. The text of the Bible has not changed in centuries, but its interpretation varied dramatically. The text of the U.S. Constitution is basically the same for 200 years, although the interpretive activity of judges has radically changed its interpretation. The same is true about the Brazilian Constitution of 1988, which in its few decades has been construed in very different ways by the Supreme Court.

Although the politic relevance of interpretive activity has not been an invention of the 20th century, the importance of judicial interpretation has achieved special relevance in the last century, a period when, in a worldwide phenomenon, courts established its authority to interpret directly the constitutional text and make judgments with *erga omnes* effects. If judges could only interpret the statutory law, they would have to expel
from the legal system statutes that collide with the constitution. However, once it was established that judges could perform judicial review of laws based in a direct interpretation of the constitution, how can we hold that they surpass the limits of their attributions when they carry out this very activity?

Judges will always interpret the rules that constitute the valid law of their time. There were historical moments when law had a religious dimension and was composed only by traditional customs. There were times in which the solution of cases should be based on a reinterpretation of the Roman civil law. We are in an age in which statutory law achieved a higher relevance and the rules of constitutional and infra-constitutional law cover broader aspects of our lives.

Add to this the fact that our legal systems are increasingly filled with vague standards, open guidelines, general political promises. These abstract normative structures can only be applied to concrete cases through a highly creative hermeneutic activity. The structure of contemporary law, as well as its amplitude, requires from the judges a much more active stance than that required of a magistrate in the eighteenth or nineteenth centuries. This indicates that the diagnosis of a judicialization of politics presented as a behavioral deviation has a foundation less solid than it might seem at a first glance.

When the law changes, the role of interpreters also changes, and so the tools they can use and the hermeneutical canons that guide their activity. The introduction of modifications in the law is one of the most typical political activities, and it is normally identified as a legislative function. But it must also be seen as a typical task of judges to change the rules gradually, through a process of reinterpretation. To that extent, judges have always been political actors. It does not mean that judges are authorized to revolutionize the law, since interpretive activity usually admits only subtle changes, on penalty of being understood as creation and not interpretation. But it is clear that the boundary between these lands is composed of a large gray area, because hermeneutic activity is both dependent on the text and the context and also because it always involves a dose of creativity. Today, which is the correct dose?

This question seems to be the most appropriate to address the current debate. It avoids the mystification that we need to create a rational and scientific method that prevents judicial innovation. But we also need to avoid the opposite mystification, which is to assume that the absence of an impersonal method generates a field of discretion where judges can decide whatever they want, without any criteria that impose restrictions on their activity.

The role of judges is politically established from the compositions of interests held within society. There are political limits to judicial action, even if they cannot be immediately identified as legal limits. The Supreme Court is the final interpreter of the Constitution, but that does not mean it has complete discretion. Formally, there are no legal limits to its power. Substantially, there are several and severe limitations, because the power of the Supreme Court is based on the social perception of its legitimacy, which needs to be reasserted in every trial. Today, we witness a boom of political
activism. But this influence is best understood as an *increase in judicial protagonism* or as an *undue judicialization of politics*?

4. Current legal context

4.1 Universalization of statutory law

To define if judges are crossing the boundaries of its powers, it is important not to mystify the function of the legislature. In particular, we must bear in mind that the Rule of Law and constitutionalism have altered both the role of legislators and the role of judges. We are so accustomed to thinking of legislators as producers of rules that govern various aspects of social life that we usually forget this is a fairly new function, dating back to the Enlightenment project of rationalization of the social order. But we must not fall into the trap of taking for granted what sounds familiar.

There is nothing natural in the possibility of a legislative regulation of all spheres of social life. Before modernity, large parts of the law could not be changed by legislation, even within the absolutist monarchies. This was the situation, for example, of the Portuguese Empire during the 17th century, when it was governed by the Philippine Ordinances of 1603. This law defined the organization of the Portuguese State, and the Book III, Title 64, stated that cases that were not regulated directly by the Ordinances should be judged according to the statutes, to the precedents of the courts or to the local customary law. When these three sources were silent, the case should be judged according to Roman Law, or if the issue involved sin, according to Canon Law. If the *Corpus Iuris Civilis* did not offer any solution to the case, it should be judged based on commentaries of Accursius and Bartolus, famous European jurists. Finally, if the judges did not find in any of these sources adequate subsidies for the trial, the matter should be referred to the monarch himself to decide.

Judges were magistrates that acted on behalf of the kings and their duty involved the application of customary law, Roman law and Canon law, which were not modifiable by the authority of monarchs. Before the codification process of the 19th century, the statutes had a narrower scope and much of the social norms derived from the autonomous regulation of the various social orders, such as families (organized by the disciplinary authority of the father), guilds, and territorial communities. In that context, even the Ordinances were limited to organizing the state, establishing criminal penalties and organizing the legal process. In other issues, Law did not typically adopt a legislative form.

Legislation played a less prominent role even in the regulation of judicial process. The Portuguese historian Antonio Hespanha said that "in relation to the doctrine, the law was not just a lesser phenomenon, but also a subordinate phenomenon". (1993, 13) This indicates that judges enjoyed a reasonable degree of independence because the vast majority of cases should be subject to a trial based on the system of sources of law that was more complex and more comprehensive than the modern combination of statutory law and judicial precedents.
The best proof of that judicial independence was the fact that in 1769, the Marquess of Pombal edited the Law of Good Reason, by which Portugal required all judges to enforce strictly the laws enacted by the Portuguese crown (Gilissen 1995, 335). The main purpose of this statute was to limit the relevance of Roman law, since its content could not be changed by the king and so it represented a limit to the monarchical authority. The Law of Good Reason was the instrument used to change the system established by the Philippine Ordinances, creating an absolute subordination of Roman law to statutory law, which implied a much greater submission of the judges to the will of the king.

António Hespanha calls this expansion of statutory law a project of reduction of pluralism (1993, 18). It integrated the Enlightenment project, contributing to supplant the local customs and Roman law by a modern legislation that regulates the various aspects of social life in a rational and detailed fashion. This movement culminated in the production of codes that repealed the medieval systems, establishing a unified legislated law for the Liberal States. This process altered radically the role of legislators, especially in continental Europe, because while the legislative activity of the absolutist monarchs was very limited, the liberal legislatures developed a comprehensive law that should regulate all social life.

In classical and medieval periods, there was not a claim that positive law should regulate all social relations. Even in the early modern age, it was recognized that the existing law should not be exhaustive and that it was up to the legislatures to create rights and obligations or not, depending on the social interests involved. But the development of Roman law studies allowed Enlightenment scholars to dream with the establishment of a complete law system, capable of offering solutions to all conflicts of interest. In the 17th century view, this reasoning is exemplified by the Ordinances of Portugal. Law could be broad, but it was also incomplete, and the unregulated cases should be sent to the autonomous decision of the king. However, in view of the Enlightenment, a rational analysis of the law should be able to solve all cases.

This change in perspective has led to a broadening of the boundaries of legislation: from a selective legal strategy (only certain matters should be regulated by written law), it became potentially universal (because every action could be regulated by the statutes). During the Enlightenment, the legislative power (potestas legislatoria) becomes the prominent state power, and the jurisdictio is changed in one of the subaltern activities dedicated to enforce the law. Before that, justice was not only one of the political activities, but it was the main, if not the only, exercise of power (Hespanha 1993, 384). As the statutory law did not regulate most social relations, the king did not administrate justice applying its own words, but he decided in the name of the law, intervening as an interpreter and not as a lawgiver. As Hespanha points, the king had the power to overrule the law in cases of extreme necessity (suprema necessitas), but this was an extraordinary power (potestas extraordinaria) that was always understood as exceptional (Hespanha 1993, 387).
After the bourgeois revolutions, the exception became the rule: all social relations should be regulated by the law. This recognition resulted in the formulation of the principle of legality embodied in the 4th article of the Declaration of the Rights of Man and of the Citizen: only the legislation (loi and not droit) can determine the limits of the natural rights of liberty, property, security, and resistance to oppression (1789). This process of legalization of the law culminated in the formulations of the legal theory of the 19th century that presented the law as a complete system, able of providing solutions to all relevant social conflicts.

This claim of completeness is an idealization, especially considering that it is embedded in the Enlightenment project of reducing the law to the legislation. This combination of factors led to the drafting of codes, statutes that should meet the Enlightenment demand for a Law that should be simultaneously legislated and complete. This change in the structure of the law implied a radical change in the judicial function: the universalization of jurisdiction.

4.2 Universalization of jurisdiction

After the bourgeois revolutions, the Enlightenment project led the legislators themselves to forbid the non liquet. Before that, issues were judiciable only if they corresponded to one of the existing bills (actio). Other requests were judged as not liquids, meaning that the law was silent about the matter. With the French Revolution and the codification, it was determined that magistrates should judge all cases which were presented to the Judiciary, and that the denial of justice (rejecting to judge a case) would be a major offense.

Thus, the legislature established that judges should treat the law as a system that covered all possible applications. Codes provided a comprehensive system, but it did not mean that they could regulate objectively all the relations between citizens, so that the judges were given a seemingly impossible mission: to judge every individual conflict, based on a set of rules ideally considered complete, but incomplete as a matter of fact. In this context, judges were forced to a more intensive use of hermeneutical strategies aimed at providing answers that could be perceived as extracted from the law, although they surpassed the literal sense. Throughout the 19th century, this process led to the development of arguments that supplanted the literality, making references to the will of the legislature or using systematic and historical arguments that were aimed to reveal the meaning of the law.

This system showed signs of exhaustion at the end of the 19th century, when social changes linked to the processes of industrialization and urbanization had made the civil law largely obsolete, especially to deal with new employment relationships. At that time, lawyers had to exercise their hermeneutical creativity to seek beyond the law elements to guide their decisions. In that moment many schools of sociological bias emerged, presenting the law as an instrument of social regulation that needed to be suitable for social purposes.
This strategy of opening the legal hermeneutics to social factors was gradually abandoned in the early 20th century, since the problem that they faced ceased to exist: the old codes were replaced by new legislation, more adapted to social realities. The 19th century legal system did not offer adequate responses to the new employment relationships and the issues of a new urban and industrial society, a problem that led to a restructuring of the state in the early decades of that century. During the 20th century, there was an expansion of political participation, universal suffrage, the legal protection of employment and the provision of statutory social security and education. This movement has made the law more comprehensive, as it has been extended to new areas. In addition, it has made the law more flexible because social rights were often presented as guidelines that demanded much interpretation to be applied.

In this context, there was a change in legal interpretation. In the passage from the 19th to the 20th century, the crisis of legitimacy (then interpreted as a kind of "rebellion of the facts against the code") triggered an attempt to incorporate social values to the legal discourse. Throughout the 20th century, these social values were crystallized in the form of legislation, which made the law much more permeable to social values, especially through increasingly open legal formulations. In this process, all social and political arguments became part of the very legislative system.

The combination of a universal legislation and a universal jurisdiction increased the relevance of the judiciary, which received the task of ensuring the enforcement of rights under the new legislation. The social effects of this change could be unnoticed if only individual conflicts continued to be judged, and not issues of general interest. But the combination of the former elements with the universalization of judicial review caused the political relevance of the judiciary to rise dramatically.

4.3. Judicial Review and social rights

Being law enforcers, judges play an important interpretative function, but the result of their activity is most often applied to only a small fraction of all the judicial cases: the social conflicts brought to the courts were so few and had little repercussion, since magistrates only solved conflicts between individuals. This situation changed dramatically with the consolidation, in the 19th century, of the possibility that judges reviewed the legal validity of the acts executed by the executive branch. This judicial review of public administration was understood as a consequence of the rule of law, which required that all authorities were subject to law. In constitutional states, the principle the “king can do wrong” was replaced by a discourse in which rights were enforceable against the state itself, by means of judicial intervention.

This movement was radicalized when judges took control of the State activity through the direct interpretation of the Constitution, which allowed them to begin to judge the constitutionality of legislative and executive acts. One should remember that judicial review was invented in Marbury v. Madison, a case which raised doubts about the validity of the procedural system of appointment of judges by the President, which is a more executive than legislative question.
The procedure adopted in *Marbury v. Madison* was not truly an innovation, since evaluating the compatibility between an upper normative standard and a lower one had always been part of the role of judges. Such judgments have always been important for both parties and for those who used these precedents to judge future cases. However, since the courts began to evaluate the compatibility of statutes by using the constitution as a normative reference, they became able to expel from the legal system a series of legislative acts. These decisions, as a result, started to have an overall impact on society as a whole.

Judicial review was a predictable development of constitutionalization, as the Federalists had intuited (Hamilton 1961, 524). Nevertheless, such judicial intervention in legislative acts was perceived by many, from the outset, as a trespassing of the frontiers that the judicial system should respect. In contrast, the judiciary claims, since *Marbury v. Madison* (5 U.S. 137), that this intervention is the only way to properly enforce constitutional norms.

The consolidation of judicial review, as well as the creation of the European model of Constitutional Courts, greatly amplified the political role of the judiciary. But this process could have had limited results if there had not been a change in the very structure of the constitutions, which progressively became more principles-based. When constitutions were read as a mere system of rules, similar to other statutes, they were more restricted, less programmatic and less principles-based, and judicial action could be more self restricted, as the Constitution itself offered more formal and structural parameters and less content guidelines. But with the gradual expansion of the declarations of rights, the judicial system was made responsible to be the official interpreter of a constitution whose text, nonetheless, had a radically open texture.

As the 19th century developed ways to incorporate meta-legal criteria to the interpretation of the law, the 20th century incorporated these criteria in constitutional law itself. The need to make law *fair* turned out to be interpreted by lawyers as the need to enforce a constitution which enshrined the principles of equality and social justice. This new structure of law stimulated the judges to adopt a new attitude: enforcing the constitution by extracting from it all its dimensions, taking it to its limits, requiring statutes that showed maximum compatibility with the constitutional rules.

Even in countries where the text has remained unchanged, there was material change in the very understanding of the first generation fundamental rights, which came to be understood as denser evaluative guidelines. In particular, the formal reading of equality and freedom, typical of 19th century liberalism, was replaced by more substantial readings, whose most emblematic case was the replacement of the *separate but equal* U.S. legal doctrine by the affirmation of an effectively equal treatment between members of different races.

In this sense, constitutions currently have a more open axiological structure, whose application to specific cases depends on a series of ideological and evaluative decisions that are made by the interpreters. This challenge to the courts required the establishment of a series of new interpretive strategies and lifted the judiciary to the
position of a decisive institution in the regulation of politically relevant issues. Judges, who once had relevance for the parties only in a specific judicial case, and whose decisions had general repercussion due to the establishment of precedents, now have the ability to intervene in the very core of positive law, by declaring null and void any legal norm that violates fundamental rights.

5. Concluding remarks: activism among Brazilian judges

What results can arise from the combination of (1) a very comprehensive law, (2) universal jurisdiction and (3) an open constitutional structure?

One of the most obvious changes occurred in the current political discourse, which progressively showed itself as a legal discourse of fundamental rights enforcement. The black, feminist and LGBT movements, and the movement of landless rural workers (especially in Brazil) are built upon a discourse founded less on the invention of new rights than on the enforcing rights that are already guaranteed by constitutions, statutes and international treaties. In the 19th century, the discourse of social justice was developed as a rebellion against an incomplete and outdated law. In the 20th century, the expansion of the human rights movement allowed the construction of a social policy arena of recognition and enforcement of rights that became considered as a constitutive core of the law itself (Neves 2005).

This was a structural change in the political domain. The legislative response to social demands have been made progressively through the elaboration of generic normative texts (statutes) that acknowledge a series of rights that are little more than abstract promises. As Hespanha emphasized, while 19th century laws were instruments that expressed rights and duties, 20th century laws not only play a regulatory role, but also a symbolic one. "Very often the law is used to spell out intentions of power in a solemn and propagandistic way, without taking into account whether such intentions are actually feasible or if the political institutions actually intend to enforce them". (Hespanha 1993, 23)

In this context, where statutes have been used to establish abstract principles rather than specific regulations, what should be the attitude of the judges? The first possibility would be to recognize that many legal rules are essentially programmatic and, to that extent, do not embody rights that may be invoked as trumps (Dworkin 1986, 160), since they establish only generic policies that need to be implemented by legislative action before they may be effectively enforced. This strategy was widely used by courts that weren’t willing to play a more active role, but soon it became clear that it only diminished the relevance of legislation itself, especially the constitutional principles, which were reduced to empty promises.

In this context, magistrates were compelled to solve a political dilemma: either they abdicate their role as enforcers (recognizing that constitutional principles are inherently programmatic), or they assume that their role is to interpret the law actively, adopting deep ideological positions. There is no way to interpret an open texture law without referring to social values which give normative density to the structurally open
legal concepts, such as due process, overall impact, equality, reasonableness. Brazilian Constitution almost demands that judges play an active role. In its article 5, § 1, it states that "the rules defining fundamental rights and their guarantees have immediate application." This means that, judges are forbidden to interpret fundamental rights as mere programmatic guidelines: in this sense, it is unsurprising that, since 1988, when the Brazilian Constitution was promulgated, there has been a growing level of activism among judges.

But didn’t this process of judicial prominence take us too far from reasonable standards? Doesn’t this interpretive burden destroy the advantages of the separation of powers, which forbids that executive, judiciary and legislative branches concentrate in any of them sovereignty itself? We believe that the Brazilian judiciary has not yet decided in such a way that would be generally felt to be absurd, but it seems that we can be very close to reaching a point where the creative exercise of constitutional hermeneutics opens the possibility that the courts, especially the Supreme Court, rule in manners held absurd by society as a whole. We have no specific protection mechanisms against unreasonable rulings and, as a consequence, the only effective way to avoid this risk would be to neutralize judicial review. But we think there are more risks to democracy to let the legislature out of control than to leave the judiciary out of control.

In fact, we do not think that the judicialization of politics is necessarily a bad thing. We also do not agree with those, such as Jeremy Waldron (1999), who defend that legislative decisions are more appropriate than judicial ones. That people are represented by elected legislatures is a fiction, as well as the idea that the judiciary function is limited to revealing the meaning of legal rules. None of these two fictions, albeit the popularity they have achieved in legal theory, deserve much credit. The theoretical constraints posed by them hide the real question that we should address: to evaluate the decision making processes and choose the procedures that are considered as the most appropriate to a democracy. This is a political role, in the sense that it demands a decision about the extent our society will reproduce stratified and established patterns or will implement changes in its organization. This focus on decision making processes and institutional structures is not a typical approach for most politicians or lawyers, who typically only consider the outcome of judicial decisions in order to evaluate its adequacy, and do not reflect about the arguments or the processes that led to it.

When they reflect about the correctness of the Brazilian Supreme Court's decision on same-sex union or on the discussion about the ‘Faultless Record Act’7, they are concerned with the result of the ruling, not its argumentative foundations. This is especially serious in Brazil because, in our system, the reasons adopted as the ruling argumentative foundation are not a binding precedent because only the dispositions of judicial decisions are binding. Differently of the stare decisis model, in Brazilian courts

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7The “Lei da Ficha Limpa” (Faultless Record Act) is a law whose validity was judged in a controversial case where it was debated the constitutionality of the law, which imposed that no one who had been sentenced as guilty of a criminal offense could run for political office.
the votes of the judges are summed when they agree in the disposition, even when the *rationes decidendi* are incompatible. This situation makes possible to decide a case without establishing a *ratio decidendi*, a situation that represents a problem to the consistency of the legal system, especially when the courts judge cases of great political repercussions.

We should be careful when thinking about what kind of argument should be considered acceptable by the courts, especially in a context when the level of activism involved in the *interpretation and enforcement of constitutional norms* is being expanded. By judging these issues, the judicial system enshrines certain political choices that become, as a result, immune to political debate. A statute can be changed due to an agreement between political forces, and so the text of the constitution. A judicial interpretation, however, is less subject to alteration, since it depends on a judge changing its opinion about the particular issue or on a change of a court composition.

When a court interprets the law, the legislative body can always change its legal meaning by publishing a new legal text. Thus, even if courts establish the particular meaning of law, other political actors can intervene and play an important role by modifying old statutes or creating new ones. However, since the courts ultimately base their decisions in Constitution itself, the subject discussed in a specific case cannot be judged by using standards derived from *compositions of interest*, as a legislature could do when altering/creating a statute. In this sense, the separation of powers establishes a particular division of labor between courts and legislative bodies, which regulate a society through different *rationalities*. The judicialization of politics optimally ensures the *consistency* and *systematicity* of the legal order, as it prevents that multiple issues be regulated inconsistently with the basic principles of law that are designed by courts. However, it remains an open possibility that the requirements of systematicity conflict with the dominant conceptions of justice.

As Vallinder noted, judicial and legislative comprise two different models of political decision-making. The first one, adopted in judicial review, is based on the determination of a "correct interpretation" (Dworkin 1986, 225-274), and the other one, immanent to legislative discourse, is grounded in the pursuit of a "politically acceptable solution". (Vallinder 1994, 92) Even if we assume that the correct interpretation of the rule is merely a regulative principle of judicial rhetoric, the adoption of this criterion correction leads to the production of consistent decisions, rather than decisions *desired* by the parties in conflict. Accordingly, the effective interests of society (although this is also an idealized concept) cannot be debated when courts are judging a particular judicial case, given that the criterion of correctness is guided by other categories of reasoning.

Judging conflicts of interest by referring to a *discourse of rights* implies that political problems are seen as separate or apart from hermeneutical issues. This strategy, however, is insufficient to take into account social complexity, because it forbids that sensitive issues be solved politically, taking into account the composition of effective social interests at stake. To some extent, the judiciary can always reaffirm the old adage
Fiat justicia pereat mundus, since there are no discursive elements in the law that can establish a proper weighing of conflicting rights. This danger has been dealt with through the development of legal arguments that constrain the meaning of specific rights in a given judicial case.

There is, for example, an increasingly wider use of balancing strategies that permits the accommodation of rights that theoretically are mutually incompatible. This strategy brings to the judicial system the possibility to take into account compositions of interest. In addition, the possibility of modulating the effects of judicial sentences (for instance, limiting the effects of a declaration that a particular statute is void only in a particular period, but not at other times), as it has been increasingly noticed in Brazil, allows the judiciary to establish the right to change the future without referring to criteria established in the past, a role that was usually exercised by legislators. This indicates that the judicialization of politics requires a correlated motion of politicization of the judiciary, to the extent that the resolution of regulatory issues requires the development of activities and speeches that do not present themselves as the identification of a correct solution, but as ways of bringing values and social needs to the judicial decisions.

These strategies are essential to ensure that the rights discourse and the need for systematicity do not lead to decisions that will be perceived as absurd. However, when a court attempts to "extract" from the constitution the exact limits of its meaning, it ends up establishing that some choices are intangible, which turns out to impose an undue and rigid limitation on other powers. As a direct effect, these options become too rigid because "judges are not very much inclined to review judicial review and adapt it to a changing political and social situation". (Landfried 1992, 65)

The enforcement of culturally well-settled constitutional principles, such as liberty and equality, can lead to more effective protection of fundamental rights. However, many judicial decisions are taken far beyond these limits, as it occurred, for example, when the Brazilian Supreme Court had to judge the constitutionality of legal rules that demanded representatives to be loyal to their political party. This discussion did not involve a guarantee of human rights, but only a certain structure of political organization (ADI 3999 and ADI 4086).

Therefore, although it doesn’t seem right to limit abstractly the exercise of judicial review, it’s possible to establish more stringent procedures in terms of justification. Although the judicial ruling of political issues is not a malum in se, it seems that it is a mistake to decide political issues without taking into consideration their possible direct and side effects. Courts should ask for the advice of experts and effectively hear the concerned parties (and not only accept their intervention as a mere bureaucratic procedure, as it happens frequently) before deciding these issues, since it is not possible to define appropriate solutions to the society based on a merely technical and formal application of the law.

Judicialization of politics is not a problem; the real question concerns to how it should be institutionalized. Therefore, our challenge is not to limit the participation of
the judicial system in the state decision making processes, but to develop criteria that make its intervention a useful contribution to a democratic society. This approach requires the development of processes that prevent the mystification of the judicial function as a revelation of implicit meanings, rather than the creation of an appropriate meaning. In judicial system, there’s more phronesis than technique, more considerations about fairness than mere subsumptions of facts to norms. Admitting the political nature of judicial action is the first step in order to turn it politically useful and democratically legitimate.

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