

THE JUDICIAL ACTIVISM AND ITS VALIDITY WITHIN THE SCOPE OF THE DEMOCRATIC STATE OF LAW

O ATIVISMO JUDICIAL E SUA VALIDADE NO ÂMBITO DO ESTADO DEMOCRÁTICO DE DIREITO

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Abstract:

The actual article aims to analyze the validity of judicial activism within the scope of the Democratic State of Law under the bias of the Systems Theory. For that purpose, the following aspects will be investigated: the distinction between society, system, communication, programming and coding; the luhmannian theory and its systems; the evolution of systems and the and the communicative forms of propagation; the time according to Luhmann, the conception of a systemic unity and the existence of autonomous branches of the law, and the distinction between judicial activism, motivated free conviction of the judge and judicial pro-activity and the risk to the Democratic State of Law in the face of an eventual dictatorship of the judiciary. In order to obtain the results intended by this research, the method of approach to be followed will be the empirico-dialectic, making use of a bibliographic and legislative research, having as a background a reference system based on the linguistic turnaround, represented by the Logical Semantic Constructivism taken from Paulo de Barros Carvalho. In conclusion, it is demonstrated that judicial activism does not have validity within the Democratic State of Law, if it is based on the theoretical framework adopted here.

Keywords:

Principles. Undetermined Legal Concepts. Democracy. Intersubjective Normative Interpretation. Systems Theory.

Resumo:

O presente artigo visa a analisar a validade do ativismo judicial no âmbito do Estado Democrático de Direito diante da Teoria dos Sistemas. Com esse intuito, são investigadas a distinção entre Sociedade, sistema, comunicação, programação e codificação; a teoria luhmanniana e seus sistemas; a evolução do sistema e as formas de propagação comunicativas; o tempo segundo luhmann, a concepção de uma unidade sistêmica e a existência de ramos autônomos do direito, e a distinção entre ativismo judicial, livre convencimento motivado do juiz e pró-atividade judicial e o risco ao Estado Democrático de Direito diante de uma eventual ditadura do Poder Judiciário. Para a obtenção dos resultados almejados pela pesquisa, o método de abordagem a ser seguido será o empírico-dialético, utilizando-se de pesquisa bibliográfica e legislativa, tendo como pano de fundo um sistema de referência pautado no giro linguístico, representado por meio do Construtivismo Lógico-Semântico de Paulo de Barros Carvalho. Em conclusão, aponta-se que o ativismo judicial não tem validade no âmbito do Estado Democrático de Direito, tendo-se por base o referencial teórico adotado.

Palavras-chave:

Princípios. Conceitos jurídicos indeterminados. Democracia. Interpretação normativa intersubjetiva. Teoria dos sistemas.

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1 INTRODUCTION

The history of legal thinking goes through an intense period of changes after the Industrial Revolution, especially from the second half of the twentieth century.

This period, referred as postmodernity, is characterized by the socialization and constitutionalisation of law, assuming, constitutional principiology, a place formerly occupied by legal positivism, represented by codifications.

This reality requires that the judge adopt a more qualified position in the construction of the content of the statements under his analysis, and his decision, therefore, cannot be a mere statement of subsumption of the fact of life to the positive legal norm.

In this scenario, judicial activism emerges and with it the following questions arise: how should the task of interpreting legal statements be understood? Does judicial activism have validity under the Democratic State of Law in relation to Systems Theory?

The justification to research the presented theme is the need to discuss the legal validity of judicial activism within the scope of the Democratic State of Law based on an analysis guided by the Systems Theory.

Regarding the objective to be achieved, it is an attempt to clarify a possible invalidity of judicial activism within the context of a Democratic State of Law.

Still talking about the paramount importance of the addressed subject, we assume that it lacks a more in-depth investigation under the prism that is intended to prioritize here. We understand this as a gap. However, with the contribution of this work, we believe that it will certainly bring doctrinal assistance to the interpreter and to the applicator of Law, contributing to the legal norms being applied in a more effectively and in-line way with constitutional norms.

In order to obtain the results intended by the research, the method of approach to be followed will be the empirico-dialectic, using bibliographical and legislative research, having as background a reference system based on Niklas Luhmann's Theory of Systems.

2 SOCIETY, SYSTEM, COMMUNICATION, PROGRAMMING AND CODING?

According to systems theory, the society is composed exclusively of communication. Thus, the society is formed by the communications made between the different social subsystems that compose it, being that, one society differs from the other according to its

degree of development, since, the more developed the society, the more social subsystems will compose it (LUHMANN, 1990, p. 28).

Nowadays, notably characterized by the existence of the world wide web (Internet) and by the new information technologies (NTICs) that enhance it, it can be said that there are no boundaries between different societies, since they, as mentioned earlier, are composed exclusively of the communications made between their social subsystems, information that travels, via internet, at a speed never before experienced by societies.

In this way, information communicated within a social subsystem of a given society, such as a judicial decision handed down within the scope of the USA Law subsystem, arrives at a very fast speed to the other social systems in the world, in a way, at most sometimes influencing them.

Society is composed of several communicative social systems, that is, systems that generate conditions for themselves and for others around them. There are several other smaller systems within the social system, such as political, economic, religious, etc. All are part of a macro system: the social one.

Luhmann provides a radical change of perspective by considering, as with living organisms, that social systems operate locked on their own operational base, differing from all other things, creating its own limit of operation. He also states that "closure is the condition of the opening of the system to the environment: the system is only able to be attentive and to respond to external causality through the operations that itself has developed" (RODRIGUES, 2012, p. 79, my own translation).

The social systems are self-referential because they are able to operate on their own constituent operations. They are autopoietic because they self-reproduce or produce themselves as a systemic unit. The difference between system and environment, in turn, emphasizes that everything that does not relate to the observed system is considered as an environment, even the different types of systems that coexist in the same space-time dimension (RODRIGUES; NEVES, 2012, p. 34; 78).

The communicative interaction between the different social subsystems takes place through the structural coupling between the subsystems, and from the irritations caused by such coupling, a cognitive opening arises, through which a social subsystem absorbs the causes of the irritations to its interior. On the other social subsystem, processing them as information, aiming to mitigate them by applying their own principles and norms.

In effect, society is a self-organizing system of communication, that is, a system that observes itself and its environment. Thus, society is a system capable of learning from its own

elements (self-reference) and from the influence of external elements (heteroreference). Then the society is a dynamism of forms of communication.

In this context, systems are characterized by being functionally differentiated, that is, by having a unit that differentiates them from the environment, thus differentiating them from other systems in society, which are environments that are part of the surroundings.

The basic element of reproduction in the social system is the communication process. Thus, communication is society reproducing itself (ARNAUD, 2004, p. 305).

In this way, it is not the human being who communicates, but the social system, "communication does not die when someone dies and is not born when one is born, it pervades the existence of anyone". While "the social system exists and is reproduced as a system of communication the psychic systems, the consciousnesses, reproduce the thoughts (RODRIGUES; NEVES, 2012, p. 59; 81).

The language holds the human being as its means of existence and development in communication. Therefore, it can be said that the interaction between human beings, through communication is what creates society, and not the simple sense of union or human grouping, that is, society; is not a set of individuals, but rather a system created through the communicative interaction between human beings.

The concept of communication therefore occupies a central place in Luhmann's theory of social systems. The communication covers the selection of information, the selection of the act of communicating and the selection made in the act of understanding, these three components being intertwined in a circular and dynamic manner. However, communication occurs only when there is understanding about the difference between the information and the act of communicating. In this sense, for Luhmann (2010, p. 298), while this understanding does not occur, there is no communication, but a simple perception.

The communication is an operation par excellence. It is a synthesis of concatenated selections of *alter* and *ego*. It is explained, while *alter* selects information and successively a form of sharing, *ego* selects an understanding by observing what was shared by *alter*. From this it can be deduced that communication is not simply an action, since it involves the understanding on the part of the *ego* that has high independence of the information selection and the behavior shared by *alter* (speech, gesture, dance, etc.). But not only that, both are linked by the situation, by the reference to the same scope of meaning portrayed by symbolically generalized means of communication.

This double contingency begins to be solved by linking a situation of communication with the next one, which ends up being stabilized in the linearity of the communication with the symbolic means in various spheres of meaning.

It is through the act of understanding that communication generates a new communication, in a constant and autopoietic movement. Luhmann (2010, p. 304) states that the synthesis by which communication becomes possible is attained in the act of understanding. When there is a distinction between information and the act of communicating, the act of understanding can deal with the information or with the expressive behavior of the other, thus performing the autopoiesis of the system, that is, generating a new communication.

For communication to happen and reach the scope of decision making, it is essential that all participants collaborate with knowledge and also with non-knowledge, because communication forks reality: it creates two versions of the world (one yes version and a non-version), which forces the selection, and guarantees the continuity of the communication through the successive choices of alternatives (LUHMANN, 2010, p. 303).

In Luhmann's theory, programs complement the information/non-information distinction, classifying what can be understood as information and what remains without informative value. There are three areas of programming news and reporting (journalism); advertising; and entertainment.

In this communication context, arises the need to have a programming, because due to the liberality of the operations system's context, it is necessary that there be conditions for it to occur. Thus, semantics of additional criteria values the operations, and the programs are necessary as rules of decision that determine the aspects and which occasions the system processes the knowledge.

The programs give the content for the use of the code, thus, for the code to be defined, it is necessary to have programs.

The code is the difference guide, and cannot be questioned. This difference is only an orientation model, serving to classify the communications in the system.

In fact, coding is the internal communication unit that differentiates systems by having as its identity an invariable structure, which Luhmann calls the reference binary code, which consists of opposite values (negative/positive, external / internal). Thus, this valuation / binary classification allows the passage of one side or another of the coding, allowing to verify its compatibility with a certain system.

The code, therefore, implies operational closure of the system, but the choice of program depends on the environment. In this way, the system has an operational closure, since it has a self-control of the code, but, at the same time, it also has a cognitive openness, since it depends on the social environment to define the program.

According to Luhmann (2010, p. 120), the difference between coding and programming is, at the same time, the difference between identity and difference.

The definitions discussed above affect the way in which Systems Theory interprets society, which is understood as an environment for the individual, since, according to Luhmann, human beings are the psychic environment of social systems. Such a perspective comes into conflict with all the sociological tradition that considers society as formed by human beings who establish relationships and reproduce what is known as society. Still, this does not mean that consciousness has no role for social systems, as each of these systems is the condition for the possibility of the other's existence (RODRIGO; NEVES, 2012, p. 59-60; 81).

From these definitions it is concluded that society is a system of communication, an organizer of information, but not just this, but a self-organizer, since it is understood as a set of information, capable of describing it according to the values that society itself offers it, which in the course of time has come to face common acceptance, however, through an open system whose communication has no frontiers and may undergo changes in the future, according to the evolution of society (although they are structurally closed). It is then that the social system is one that comprises the various systems that coexist harmoniously and are composed of information that differentiate them according to a specific code.

3 LUHMANNIAN THEORY AND ITS SYSTEMS (SUBSYSTEMS)

Within Luhmann's theory, the complexity and the social differentiation are also central aspects. The differentiated functions that mark modern society manifest themselves as subsystems, such as economy, religion, politics, science, education, law, and so on.

As stated earlier, the system is always closed, from the perspective of its internal operations, in this way, it differentiates itself from everything that is not itself, defining its limits from its difference in relation to the surroundings.

The systems also have, as one of their characteristics, the reduction of chaos or complexity, which is understood as the total lack of uncertainty and the lack of predictability for the individual. When they reach a high level of complexity, the systems produce relative

autonomies, in order to differentiate themselves and also aim at reducing this complexity, that is, the differentiation reveals itself as a reduction of complexity.

The self-reproduction of the social system is driven by processes of complexity reduction, through successive differentiations, which exert influence on the evolution of society. It is this process that bases the existence of functional systems (and subsystems) as differentiated autopoietic social systems within the macro social system, understood as the society. Therefore, to reduce complexity or chaos, a system differentiates itself from itself in order to produce partial subsystems, which, in relation to the original system, are considered environment.

As mentioned, in Luhmann's theory the following functional systems (and subsystems) are presented as social systems: economics, science, law, politics, religion, educational system, art, love, social movements, etc., not being the subsystems mentioned *numerus clausus*, since there are others, such as the human being, which can also be considered as a subsystem of its own, as Luhmann asserts:

Man lives as an organism commanded by a psychic system (personality). The possibilities structurally allowed for this psychic-organic system are not identical with those of society as a social system. (LUHMANN, 1983, p. 169, my own translation).

Thus, the system of society admits a multitude of subsystems that individualize the way of its concretion. In Luhmann's language, social systems are characterized by being functionally differentiated, that is, by the fact that they hold a unity that differentiates the system from its surroundings, as well as the system of the other systems of society, since these are integral to the surroundings of the system communication reference.

From the differentiation, the social subsystems begin to constitute surroundings for each other, that is, there is no longer the system-environment relationship, but the system-system relationship, in this way, there is now a relationship between systems determined by its own structure, which is called by Luhmann as structural coupling, which defines the way in which society organizes its communications..

At this point, human beings can be mentioned again as an example, since they are not part of society, they are situated in the environment. Despite this, awareness is very relevant to communication, because without consciousness there is no communication. Structural coupling serves as a link between them, coupling the psychic and social systems, so as to overcome the obstacle that such systems operate differently. There is, in structural coupling, a

mutual, comprehensive and permanent influence of the systems, in order to stimulate the system to irritations. In this sense Luhmann states that "language increases the irritability of consciousness through communication and the irritability of society through consciousness" (LUHMANN, 1997, p. 85, my own translation). Thus, structural coupling is necessary to maintain the difference between systems, given the existence of an irritation between two systems.

The existing couplings in society are the coupling between politics and economics, in the case, for example, of taxes; the coupling between law and politics, in the case, for example, of the Constitution; the coupling between law and economics, in the case, for example, of contracts; the coupling between science and education, in the case, for example, of universities; the coupling between education and economics, in the case, for example, of technical qualifications and their certificates. Outside of society, but still within social systems, there are couplings in organizations and interactions. There are also couplings in machine systems, organic systems and psychic systems.

The systems are structurally coupled to their surroundings, so that the system and environment are at the same time differentiated and linked, concluding that they are never separated. Whoever distinguishes a system from its surroundings is an observer when observing.

In fact, there is a consensus that there are infinite structural couplings existing in society, so that each of its subsystems of communication can at any time couple structurally with others, absorbing their influences and processing them according to their internal meanings.

4 THE EVOLUTION OF THE SYSTEM AND THE COMMUNICATIVE FORMS OF PROPAGATION

The self-reproduction of the social system is directed by processes of reduction of complexity, through successive differentiations, which influence the evolution of society. It is this process that ensures the existence of functional systems (and subsystems) as distinct autopoietic social systems within the macro social system, understood as society itself. Therefore, to reduce complexity or chaos, a system differentiates itself from itself in order to produce partial subsystems, which, in relation to the original system, are considered environment.

From the differentiation, the social subsystems start to constitute environments for each other, that is, there is no longer the system-environment relationship, but the system-system relationship, which means that there is a relationship between systems determined by its own structure, which is called by Luhmann as structural coupling, which defines the way in which society organizes its communications.

Thus, to evolve means increasing the social complexity — and, along with that, of the systems that comprise it —, emphasizing the constant opening for change and thus also for dissent. In this way, the more complex a system is, consequently more evolved it will be.

Social evolution is due to the constant imbalance between the systemic complexity and the complexity of the environment, which forces the system to respond to the complexity of the environment, the latter always being greater than its internal complexity. From this, it is noted that, with social evolution, the structures of expectations need to expand their numbers in such a way that absolute consensus no longer becomes possible, but rather controlled dissent. It starts, then, to create social structures that can embrace the breadth of technology and reduce the level of comprehensiveness; In this context, the systemic differentiation of law is inserted.

The law levels of complexity accompanied the same increase in complexity of the social system, differentiating its evolutionary milestones into three stages: the law of the archaic society, whose social functions are based on the kinship element; classical or old society law, in which a process of differentiation of the legal system begins, starting from the creation of roles and procedures; and, finally, the law of modern society, in which the overproduction of norms, process creation and abstraction are evolutionary achievements of the legal system. The growing complexity of society drove the evolution of the partial systems, among them, the legal system, which has come a long way until arriving at the modern configuration.

The intensification of society complexity promotes new problems to be absorbed in all spheres of meaning, among them the law; in this way, they are obliged to create new forms of assimilation of this complexity, that is, the stabilization of new structures.

Partial systems of society begin to differentiate as a result of the inexistence of a common bond, such as beliefs.

Modern society is marked by the differentiation of functional systems, among them the system of law, whose selectivity is regulated by the process of positivation.

The initial impulse to generate the partial systems comes from the environment, that is, from the increasing complexity of the social system; but when they become autonomous,

systems can self-structure; they become autopoietic. With this, systems must respond to the pressures of the environment, increasingly becoming more complex, either through increasing indifference or increasing their self-irritability.

The functional differentiation entails the increase of normative projects in the other subsystems, obliging it to support the growth of its decision-making burden in all generalization plans. It creates a sensitive instability of conceptual art and the rule of law by the law itself; new figures are born, still undetermined, such as labor law, traffic law, economic law, among others. For this instability to be resolved within the legal system itself, it has become increasingly necessary to resort to legislation.

It is then by the process of positivation that the legal norm becomes characterized as legislated, modifiable and conditioned, guaranteeing the rationality of law (LUHMANN, 1983, p. 230). This is why, unlike what happened in archaic societies and in ancient cultures, law became mandatory because of its simple "validity"; In addition, the idea of a hierarchy assimilated in the previous evolutionary process is transposed into law so as to ensure a phasing of the normative order and channel the reactions to inadequacies, ambivalences and absence of norms.

The detachment of law from the religious order was made possible by the creation of the idea of natural law, which considered the legal order as the result of a divine will, through the idea of religious justification of law; however, this invariance of normative contents became, due to the increasing complexities, unsustainable, insofar as social reality did not exhaust the possibilities of variation of law.

The basic element of modern societies is the achievement of the stabilization of positive law, marked by the fact that its validity is based exclusively on the decision also modifiable by another decision. This factor raises the complexity and contingency of law, adapting it to the changes of its equally complex environment. Modern law arises from the overload of expectations that require an intensified selectivity of the system, so that it must be able to make selections through its own structures; with this, the law must define its own borders.

The positivity of modern law makes it open to the future, inasmuch as it vige not because of a higher or supernatural order, but because its selectivity fulfills the role of the establishment of congruence. "Controlled instability" thus becomes its characteristic; each selection made by law will correspond to the expansion of the contingency. This is due to the fact that positivity allows the law to proceed from the selection promoted by the system, so that its validity is tied to an act of choice (decision) among other existing possibilities,

demonstrating its revocability and mutability. Thus, "the historically new factor of the positivity of the law is the legalization of legislative changes, with all the risks that this entails" (LUHMANN, 1985, p. 9, my own translation).

Therefore, it can be stated that the defining element of modernity is not in the acquisition of a consensus, but in the always evident possibility of dissent and in the incredible capacity of revocability and mutability of the selections of the normative system, which allows the elasticity that is necessary adaptation of social changes without this leading to their dedifferentiation.

5 TIME, ACCORDING TO LUHMANN

The functions of time in Luhmann are the procedure, as temporal differentiation of law; the distinction between the future presents and present futures / achieved states; and the dichotomy, analogue time and digital time.

In the first form of temporal differentiation of law, the procedure reveals itself as an episode for decision making in order to allow generalizations and normative expectations to be stabilized so that the system has time to resolve uncertainties in the code application, through production of uncertainties.

The procedure's primary function is not the indisputable application of law but, above all, to confer legitimacy on the decisions and positions taken, reducing complexities, adapting to existing structures or creating new structures for the congruent generalization of expectations.

Now, for Luhmann's second time function, it is characterized as the distinction between analogue time and digital time, which reveals the time of law and the time of the other systems. Jonathan Barros Vita (2010, p. 80) explains that:

Analogue time is the time of the environment / social system, it is the time of the level of events, of raw data, of dynamic objects; it is the identical time for all systems, in their constituent externality, in the level of structural couplings. That is to say, when two systems are structurally coupled, there is an external synchrony between the moment of irritation and between a dyssynchrony in its operation, that is, the structural coupling forces this temporal bond from the beginning of the irritation.

The analog time is the time counted by the environment, but not accessed by the system, which is unknown as the time frame, it is only at the beginning of the operational couplings that the digital time arises only at the time of the internalization, therefore, the analog time memory is not accessed by the system (my own translation).

Finally, the digital time registers the processing speed of each of the systems, in their internal relations.

The notions of past and future exist only within each reference system, within digital time, in closed operativity, it is therefore not related to the notion of analogical past and future. Jonathan Barros Vita (2010, p. 81) says that:

Law gains the ability to project itself into the past by reconstructing a new interpretive semantics to (re) work/schedule a past event and a prospective property of anticipating new interactions and re-educating interpretive semantics for the future (my own translation).

Systems, externally, do not measure their own time, being perceived by the environment in an analogous way, but have their own measure of time through their internal, digital time, which differs from other systemic times.

The third time function of Luhmann corresponds to the distinction between present-future, in which future present/states achieved are fundamental elements.

The current set of possibilities to support communication and decision, within the current predictability capacity of the system structures and the current interpretative semantic milestone, reveals itself as the present future.

The effective results of the current programming in the present-future, obtained in the future, correspond to the present futures/states achieved, ie, the confirmation in the future, whether or not programming was stabilized, whether or not it was part of the resulting body/structures of the system's evolutionary process. That this distinction is fundamental to operationalizing the deception of the system or its adaptability allowing the (semantic) perception of the program to be adaptable through interpretation.

The temporal criterion is the temporal milestone that establishes, juridically, the constitutive moment of the reality of law language, in its closed operability, although it is distinct from the moment for its constitution in the phenomenic world.

Within this specific context, the legal fact, with its three delimitations of materiality, space and time, are constructed at a precise moment, in which the differentiation between time (within fact) and time (within fact) becomes necessary.

The time of the fact is the moment of its realization, in the plane of law language, it is the moment in which the speech act emitted correspond to the legal creation of the legal fact.

So, in this context, it is doctrinally stated that the idea of automatic and infallible incidence of the legal norm does not exist, since its existence and incidence in the concrete case depends on the human acts of interpretation and application.

Thereby, juridically, time in fact, is the time selected as the time of the occurrence of the legal fact. It is clear that time, within the juridical fact, does not necessarily coincide with the phenomonic reality, because the criterion of selection and the distinction between system communications and environment is carried out in an asymmetrical manner, by the closed operability and creations of second category simulacra by the law (BAUDRILLARD, 1991, p. 7).

This form of internal time differentiation allows the creation of redundancy networks, recursion and system memory networks, identifying redundancies and producing comparisons within specific time lines.

In this way, law begins to manipulate its own memory through time, creating and recreating, producing and reproducing orderings and legal systems.

6 THE CONCEPTION OF A SYSTEMIC UNIT AND THE EXISTENCE OF AUTONOMOUS BRANCHES OF LAW

Starting from the conception of systemic unity, it is possible to affirm that there are no autonomous branches in the law, since it reveals itself as a phenomenon that is expressed and exists as a schematized language in a communication context, organized in the form of a single system.

In this way, law is a single system, being its divisions of approach or distinctions between the branches of law merely methodological, since simplification is the basis of any scientific study. Thus, we can affirm the existence of a division in the science of law, but this is not the same for positive law.

The purpose of the system is to maintain normative expectations, it is to preserve the uncertainty and congruent generalization of expectations that serve, through the code, as the foundation of the unit of the system, since it does not stop operating, using the finished cases as a form of expanding the matrix of the system, an infinite autopoiesis, which uses binary code as a form of expression.

Structural coupling allows for operational closure and cognitive openness as elements of differentiation between systems (temporal and spatial). It also allows analog

systems to work in external synchrony and internal dyssynchrony between them, assuming each other reciprocally.

Operational closure is the form of differentiation between the system and the environment, from which autopoiesis is a way of generating operations within it and differentiating it from it.

Therefore, the operational closure corresponds to the delimitation of couplings between operations within a given system, manifesting itself through the autopoiesis and the synchrony between the system and its environment, elucidating the irritations/operations of the environment, that are internalized immediately, logically, by the system.

The emulation form of contact between social systems is carried out by means of structural couplings, using structures that connect existing structures in different systems.

An important structural coupling is that which occurs between the system of consciousness and the social system, produced through language structure, which allows for cognitive openness.

Cognitive openness authorizes second-order observations by a system, that is, authorizes it to make observations in another system, but using its own internal code, in order to reproduce in the system responses that it has not yet produced.

7 JUDICIALIZATION: JUDICIAL ACTIVISM, FREE MOTIVATED CONVICTION OF THE JUDGE AND PRO-JUDICIAL ACTIVITY

At this point it is necessary to differentiate the species judicial activism and free convinced conviction of the judge, in the judicialization genre.

Regarding free motivated conviction, Nelson Nery Júnior (2004, p. 519, my own translation) states that the judge:

[...] is sovereign in the analysis of the evidence produced in the records. He must decide according to his conviction. It is up to the magistrate to give the reasons for his conviction. Decision without rationale is null *pleno jure* (CF 93 IX). Não pode utilizar-se de fórmulas genéricas que nada dizem. The judge cannot use generic formulas that say nothing. It is not enough for the judge, when deciding, to affirm that he grants or denies the request for lack of legal protection; it is necessary to say which law device prohibits the claim of the party or interested party and because it is applicable in a particular case (my own translation).

It is in this respect that the exercise of free motivated conviction moves away from judicial activism, because free motivated conviction occurs before the judicialization, that is, this occurs when there is provocation coming from the Judiciary to be manifest in the scope of the process and within the limits of the requests formulated, consubstantiating in the duty of the Judiciary to act in an efficient and adequate manner in the jurisdictional provision, as foreseen in article 5, XXXV, of the Federal Constitution of 1988.

The judicialization proves to be a phenomenon in which the Judiciary is provoked to manifest itself on existing demands in the society, that is, individuals or legal entities, of public or private law, that provoke the Judiciary Power through the proposition of a Procedural Action, so that the same, in the constitutional exercise of the judicial provision, manifests itself on the demand placed under his analysis and judgment, thus, the judicialization occurs independently of the will of the Judiciary Power.

In the judicialization, the Judiciary also acts with the exercise of free conviction motivated by the judge, because it is what he has to constitutionally do, with no alternative (BARROSO, 2012, p. 25).

Before the judicialization, the judge freely analyzes the evidence produced in the case and forms his conviction, substantiating it with specific formulas, which contains the law devices that prohibits or authorizes a certain claim and motivating it with why such law device is applicable in this case.

The free conviction of the judge is not as free as some may think, a clear example of this are the so-called binding precedents, provided for in article 103-A of the Federal Constitution of 1988, whose regulations are contained in Law 11.417/2006. Such precedents bind the judges and courts to their statements, under penalty of, in the face of their disregard, the judicial decision be annulled, as provided in paragraph 3 of article 103-A of the Federal Constitution of 1988.

In postmodernity, binding precedents are seen as a strong judicial activism in social relations, since the Federal Supreme Court has created a considerable number of binding precedents, in order to act as the Law Creator, legislating broadly, and limiting the interpretation of the rules by the courts and members of the Judiciary, in concrete cases.

Unlike judicialization, where the judiciary manifests itself after being provoked, in judicial activism the judiciary is not always pre-provoked, in many cases it anticipates any provocation, that is, it acts without there being any provocation, in which concerns the interpretation of the norm.

The justification for this anticipation, on the part of the Judiciary, most of the time, is based on the allegation of inertia of the Legislative and Executive Powers, situations in which the Judiciary acts to decide and to fill normative gaps left by such constituted Powers.

In judicial activism, the legal interpreter, when analyzing the legal thesis or the factual plan in which the litigation takes place, goes beyond the normative context sphere, in order to impose its interpretative position of the norm, making its subjective will on the object prevail normative, to the detriment of the interpretation given by another constituted Power, thus exceeding the limits of the positive system.

The jurist Elival da Silva Ramos (2010, p. 129) treats judicial activism based on the intervention of the Judiciary in other spheres of power, defining it as the exercise of the jurisdictional function "beyond the limits imposed by the proper order that is institutionally responsible for the Judiciary to act, resulting in denaturation of the typical activity of the Judiciary, to the detriment of other Powers" (my own translation).

Lênio Streck (2014, p. 50) explains that when the Judiciary acts outside the orbit for which it was originally legitimized, it will be an activist, because it will be acting outside the limits imposed by the autonomy of the Law.

In the judicial pro-activity, the interpreter, before a demand characterized by a high level of subjectivity, seeks the best interpretation to resolve demand in the legal order, prioritizing the maintenance of the system's order, through an objective interpretation of the juridical material, to the detriment of its interpretive subjectivity, because the interpretation of the norm is only legitimized when carried out based on the legal system and not against it.

The rule is that judicial discretion occurs in exceptional situations, in view of the illegitimacy of the judge to create the Law, since it is the Legislative Branch that is entrusted with this function, through the representatives elected by the people.

Judicial activism must act in such a way as to extract the maximum potential of the normative text, without, however, invading the field of free creation of the Law (BARROSO, 2012, p.26), under penalty of establishing a rupture with the democratic system, thus becoming unconstitutional.

The excessive judicial activism brings, as a consequence, the enlargement of the power attributed to the Judiciary, through the legitimization of the action based on exacerbated subjectivism. This, therefore, departs from the bases contained in the legal system, giving opportunity for the emergence of a dictatorship of this Power, which would affect the sphere of competence of the other Powers constituted, which are the Executive Branch and the Legislative Branch.

8 THE JUDICIARY DICTATORSHIP AND THE RISK TO THE DEMOCRATIC STATE OF LAW

In the event that a dictatorship of the Judiciary is perpetuated, the Democratic Rule of Law would be threatened by non-observance of the democratic principle of the separation of Powers, since, based on exacerbated subjectivism, the Judiciary would invade the spheres of the Executive and Legislative Powers, in order to exercise political power and state legislation without the necessary public legitimacy.

The guarantee of effectiveness of the Democratic State of Law is based on the existence of criteria that allow judicial submissions to be assessed in the determination of rationality.

It is true that the judge has no access to the objects, but to the language that constructs them. However, this alone does not justify the fact that the judge must operate exclusively from his subjectivity, but rather through common codes, which compose the logic of social communication of the group where he lives, which receives the name of language (ARAÚJO, 2005, p.19).

It is through language that the human beings access reality, therefore it must be able to reveal in itself and in its use the essence of objects.

Judicial decisions must overcome the linguistic aspects of normative texts; however, such decisions should not ignore or depart themselves from the logic of social reality, nor move beyond the positive system (ADEODATO, 2017, p. 137).

Thus, judicial decisions must be carried out through a structured process that is amenable to verification and intersubjective justification, since what is derived from the teachings of Jünger Habermas is that intersubjectivity is the path to communicative reason, whose basic principle is language.

As already said, communication takes place through language, there is no communication without language, be it spoken, written, signs etc. Armino José Longhi (2005, p. 16) validates this statement, also stating that without language there is neither knowledge nor access to the world, because:

[...] language essentially mediates any significant relationship between subject and object. It is inevitably present in all human communication, which implies a mutual understanding of the meaning of all words and the sense of "being" of all things mediated by these meanings of the word. Language has, primarily, a communicative meaning, that is, we live in language. To communicate, our only alternative is

language. Without it, we have neither knowledge nor access to the world (my own translation).

In the same vein, Marcio Giusti Trevisol values the mutual understanding intersubjectively mediated by language in view of the subjectivism of Kant's Account of Reason, for language is qualified by the act of human understanding and consensus on issues pertaining to ethics, politics, law, morality, aesthetics, power etc. (TREVISOL, 2010, p. 03).

Subjectivism must make room for intersubjectivism, thus, in a Democratic State of Law, the resolutions of conflicts that eventually arise can only be legitimated if they can be subjected to verification and justification by society, because the legitimizer of the Law is the people (RIBEIRO; MIRANDA, 2013, p. 52). Desta forma, “normas e decisões políticas só podem se legitimar porque podem ser questionadas e aceitas no discurso entre cidadãos livres e igualitários” (SILVA, 2011, p. 128, my own translation).

In this line of thought, the discretion of the judicial decision cannot be based on mere subjectivism from the judge, in order to move away from the social reality that permeates it, since it has substantial externalized limits in the absence of demands that are regulated by legal norms and the obligation to be within the scope of usages and traditions of a given society, in other words, by what is socially accepted.

9 CONCLUSION

By express constitutional provision, Article 93, IX, of the Federal Constitution of 1988, every judicial decision must be substantiated. According to Niklas Luhmann's Theory of Systems, based on the information produced from the interaction between the systems, one must discern what Law and non-Law would be.

The subsystems themselves select the environmental information that will be incorporated by it, so a new legal decision will only be incorporated into the subsystem of law if the system tolerates it.

The legal system's internal scope is delimited by the positive norms, which are revealed as the interpretative basis of law and as a selective basis of external information, of the environment, which will decree what is and what is not the law. In this way, external facts will be incorporated into the legal system if they are contrary to law, an opportunity in which they will be within the range of judicial decisions. However, if external facts are not contrary to law, they will not be incorporated into the legal system, so if there are judicial decisions

regarding them that are incorporated into other subsystems, the process known as judicial activism will occur.

Judicial activism therefore consists in the external communication of the subsystem of law with the environment, in order to reach external facts not contrary to law, thus, not incorporated into the legal system, invading the space of other systems or subsystems.

Based on Niklas Luhmann's Theory of Systems, it is concluded that judicial activism has no validity, since judicial decisions should be restricted to its own scope, that is, to decide about external facts incorporated by the legal system, contrary to the law.

Thus, the judicial decisions that go beyond the internal limits of the legal system, invading other systems or subsystems, are not supported by the positive norms that delimit such limits, therefore, departing from the constitutional provision contained in Article 93, IX of Federal Constitution of 1988, that every judicial decision must be substantiated, and thus not being endowed with validity before the Systems Theory.

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