*The robe, the safe and the pen: the conflict among the Republic branches in the judicial activism of public politics**

Alaim Giovani Fortes Stefanello
Advogado da CAIXA no Paraná
Mestre em Direito Ambiental pela Universidade do Estado do Amazonas - UEA/AM
Doutor em Direito Econômico e Socioambiental pela Pontifícia Universidade Católica do Paraná - PUC/PR

ABSTRACT

In a time of political crisis and the loss of the credibility of institutions, be it from the executive power, legislative power, or judiciary power, it is opportune to analyze the existing conflicts among the Republic's entities, through the perspective of the law, considering what is is being denominated as judicial activism or the judicialization of politics. It is the juridical analysis of the theme, taking into account the attributions of each sphere of power, in a constitutional point of view.

Keywords: Constitutional Law. Judicialization of politics. Judicial Activism. Political crisis.

RESUMO

Em tempos de crise política e perda de credibilidade das instituições, sejam do poder executivo, legislativo, ou judiciário, torna-se oportuno analisar os conflitos existentes entre os Entes da República, pela ótica do direito, considerando o que se tem chamado de ativismo judicial ou judicialização da política. Trata-se de análise jurídica do tema, levando-se em conta as atribuições de cada esfera do poder, do ponto de vista constitucional.

Palavras-chave: Direito Constitucional. Judicialização da Política. Ativismo Judicial. Crise política.

* Nota explicativa: a Revista de Direito da ADVOCEF informa que os textos ora publicados em inglês estão disponíveis também em português no site da Associação. O objetivo de publicar textos noutros idiomas serve tanto aos propósitos acadêmicos e científicos deste periódico, seguindo as orientações do sistema QUALIS da CAPES\MEC, quanto às comemorações de 10 anos da Revista. Tradução realizada por Camila Gonçalves Lemos.

Introduction

The present paper aims to make a brief analysis of judicial activism of the public policies in Brazil. Initially the theme will be contextualized from the perspective of the law, to, posteriorly, discourse about the conflicts of the Republic branches in the exercise of their attributions.

The judicialization of politics is being been studied in Brazil and abroad under the judicial control of political variables, the judicial activism, politicization of justice and the expansion of the judiciary, among others synonymous denominations that designate an interference caused by judicial decisions on issues that, in principle, should be restricted to the political decisions of the Executive or Legislative branch[1].

One of the polemic aspects of the subject are the judicial decisions which, under the argument of asserting effectiveness to the public policies ruled by the 1988 Federal Constitution, end up interfering in the Executive branch´s budget[2], which, in last analysis, is the detainer of the " "vault's key".

---

1 It is a controversial theme, especially in the Supreme Federal Court, as demonstrates the judgment by the STF plenary which declared unfounded, in 2008, the Direct Unconstitutionality Action 3999 and 4086, filed by the Christian Social Party and by the General Attorney´s office against Resolution 22610/07, of the Supreme Electoral Tribunal, which regulates the lawsuit of loss of elective office by disloyalty to a party. There were discordant votes by Eros Grau and Marco Aurelio. They understood that the TSE legislated when editing the resolution, introducing the matter into a privative competence of the Legislative branch. The minister Marco Aurelio ponders that, upon learning of the inertia of the Congress on the theme, the TSE arrogated STFs competence, to whom, exclusively, competes the judgment of Writ of Injunction, lawsuit appropriate to supply gaps in the regulation of the constitutional provisions resulting from the inertia of the Congress. <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=98954> Accessed in: 01/03/2015

2 As an example we mention the recent decision of minister Celso de Mello, from the Supreme Federal Court, who in 2014, denied the continuation of the Extraordinary appeal with motion, (ARE) 727864, interposed by the State of Paraná against the decision of the Justice Court of that state (TJ-PR) that determinate the payment, by the, through the hospital services provided by private institutions to patients of the Unified Health System (SUS) served by the Mobile Emergency Service (SAMU), in the absence of beds in a public hospital. For the minister, the intervention of the Judiciary branch on the refusal by the Executive "to confer real significance to the right of health" is completely legitimate "among the many reasons that justify this affirmative behavior of the Judiciary branch, it includes the necessity to enforce the primacy of the Republic Constitution, often transgressed and disrespected by pure, simple and convenient omission of the public branches" he highlights.

Other aspect that generates impetuous debates is when the Judiciary branch, in special in the Supreme Federal Court scope, under the argument of the Constitution interpretation, advances in the field of the Legislative branch´s activity to give decisions or edit a *summula* that, in principle, are subjects that should be regulated by the Legislative branch[3].

In Brazil, it is a phenomenon strengthened after the 1988 Federal Constitution, still in a true maturation and development, which consequences are completely unexpected.

The protagonim of the Judicial Power after the 1988 Constitution, to Claudia Maria Barbosa, was a consequence, among other factors, of the constitutionalisation of the law, which has made that the Judiciary branch to be seen as the last available resource for citizens to assert their fundamental rights, despite the insufficient jurisdictional service (BARBOSA, 2007, p. 82).

The Public Ministry, in this context, has a relevant function when bringing up questions until now restricted to the decisive and discretionary power of the elected political agent, judicializing public policies that aim to give effect to social rights.

The expression "judicialization of politics", according to Debora Maciel and Andrei Koerner, was introduced in the scope of social and juridical science by Neal Tate and Torbjorn Vallinder, with the same meaning of "justice politization", indicating the Judiciary branch expansion in a decisive process of contemporary democracy (MACIEL; KOERNER; 2002, p.114).

It is worth to highlighting the use and the meaning of the term judicial activism in the present paper, once , as a rule, all subject or theme taken to be examined in the judiciary is "judicial activism", according with article 5º, incise XXXV of the Federal Constitution: "The law will not exclude the appreciation of the Judiciary Branch injury or threat to the right."

However, the expression referred in the present context denotes a specific judicial demand, where the debated subject would

"Between protecting the inviolable right to life and health or enforcing a financial interest and secondary of the State, I understand that reasons of ethic juridical order impose to the judge only one option: the one that privileges the indeclinable respect to human life and health". <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=274982&caixaBusca=N> accessed in 01/03/215.

[3] In this sense we cite as an example the Direct Unconstitutionality Action 3510, judged in 2008 by the Supreme Federal Court, where the majority understood that it is permitted, for research and therapy, the use of embryonic stem cells obtained from human embryos produced by in vitro fertilization and not used in the respective procedure.

not be the competence of the Judiciary Branch by involving an eminently political decision that only affects the Executive Branch or Legislative Branch.

For this reason that the expression "politic judicial activism" is a synonym of the "politization of justice", in other words, it would be the expansion of the judicial actuation beyond the limits of its jurisdiction, entering into political subjects in other spheres of the branch, which would result inevitably and consequently in the politization of justice.

The politics judicial activism, however, might occur in different ways that are not, necessarily, an intromission in the competence of other branches, once the constitutional control and revision of the administrative acts are the competence of the Judiciary Branch, which might result in alterations, revisions, or even cancellations of public policies.

In this sense, according with Tate and Vallinder, one of the judicial politics activism more frequent forms is the constitutionality control (or judicial revision) of the Executive and Legislative actuations, which base to realize the referred control is the Country Constitution (TATE; VALLINDER; 1996, p.13).

In the case of Brazil, in reason of the 1988 Federal Constitution characteristics that provide an ample roll of social rights and public policies that are so elevated to the constitutional level, the possibilities of action of the Judiciary branch amplify significantly.

In relation to the public policies, the judicial control can occur, according to Eduardo Appio, during its formulation, execution or valuation. For the author, the judicial analysis of public policies is not new, because it has been occurring with the legality and legitimacy control of the administrative acts, specifically in reason of the administrative improbity law (APPIO, 2009, p. 135).

However, the theme motivates some disquiet and doubts that seem not to have been effectively elucidated by the law. In this sense, could the judiciary interfere in the political decisions of the Legislative and the Executive in the formulation and implementation of public policies? How far go the limits of jurisdictional action in the analysis of the convenience and opportunity of the administrative act of the elected political agent?

Depending on the concrete case, as well the "place of the law from where one stands", we will have different answers to the question above. There are arguments to ground the position that the Judiciary branch cannot interfere in the political decisions of the Legislative and Executive, under penalty of a fatal wound to the harmony among the branches, as well, similarly, there are fundaments to defend that the constitution legitimates the judici-

al action to interfere and modify the will and the political decisions of the others branches.

In the present paper, therefore, the conflict existent among the Judiciary branch, Executive branch and the Legislative branch will be explored. Specifically when judicial activism occurs in public policies in Brazil.

In the title of the article, the Judiciary branch was symbolized by the robe, one of the main insignia of the magistrates, in which more and more judges take on a political character [4] (broad sense) to the their decisions, contemplated in a perspective of contemporaneous constitutional interpretation to justify the expanded actuation in the control of other branches.

The Executive branch was referenced as the "safe", because it is responsible for the physical and budgetary execution of public policies, constituting itself in the passive individual receiver of the judicial determinations that cause expenses of the public resources, many times not due to budget planning, or even in the redistribution of resources that were expected for other priorities in the program of the political agent.

The Legislative power was mentioned as "the pen", that symbolizes the writing of the laws and the consequent affirmation of the people's will through their elected representatives, which final results are many times is altered by the control and analysis of the constitutionality and the legality effectuated by the Judiciary branch, or, also, "complemented" by the Supreme Federal Court in the edition of certain bindings[5] in subjects that are the competence of the Legislative.

---

4 It is worth highlighting the opinion of the 3rd Region Regional Federal Court Magistrate, Consuelo Yoshida on the theme: "It is a reality the increasing judicial activism of politics, and of public policies, especially in the social area, and, in reverse, as the other side of the coin, the Judiciary politization, in a good sense. Effectively. The judicial decisions are not strictly technical juridical decisions, but also political decision, interfering in the spheres of other branches and with ample social repercussion" (YOSHIDA, 2005, p. 434, our translation).

5 As an example, the binding summula n°11: The use of handcuffs is only licit in case of resistance and the founded apprehension of flight or danger to their own physical integrity or another´s, by the prisoner or others, the written exception justified, under penalty of disciplinary and civil responsibility and fines to the agent or authority and the annulment of the prison or procedure act it refers to, without prejudice of the State civil responsibility.

Article 474, § 3rd of the Criminal Procedure Code deals with the use of handcuffs at the Jury: the use of handcuffs by the defendant will be not allowed during the period they remain in the jury plenary, except if absolutely necessary to the order of work, to the safety of the witnesses or to ensure the physical integrity of those present.

The examples of the conflicts previously mentioned are relative to the expansion of the power from the detainers of the robe (judiciary) to decide how the "vault´s owner" (Executive) should use their resources, as well as, when the judges take advantage of the normative hollow in face of the pen's owners (Legislative) omission to decide about subjects not contemplated in the law.

The robe, the vault and the pen symbolize, thus, the three spheres of power that should act in harmony and with independence in the search of the common good and the concretization of objectives and constitutional principles (article 2º of the 1988 Federal Constitution).

When one of the branches, however, invades the other´s competence, in evident the overreach of its attributions and actuating with excess of power, or using of its competences to predominate over the others (the great power of the "robe"; the infinitive possibilities of the "vault"; and the creative force of the "pen"), ends up compromising the structural basis of the Democratic State of the Law, as well the effectiveness of public policies, which is the interest of the study in the present paper.

1 Law's view of Public Policies

It is necessary to delineate juridically what is understood as public policies, once that the theme does not have a long tradition of analysis and study by the law, which, fortunately, little by little and gradually is coming open in a transdisciplinary form to the knowledge of other spheres.

In this sense, Maria Paula Bucci, comments that the study of public policies is derived from Political Science and Public Administration Science, which field of the interests occur in the relations between politics and the act of the Public Power, has been treated by the Science of Law in the State Theory, of the Constitutional Law, Administrative Law or Financial Law (BUCCI, 2006, p. 01).

As can it be noticed, since the beginning, the relevance to the right of the study, under the judiciary view, of the public politics, once by constituting an object of analysis, control and revision by the Judiciary branch, there is the need to consolidate the subject as an important focus of the interest to Science of Law.

The theme, however, is not recent only for the law. Marcus Melo, when carrying out an analysis of public policies as a disciplinary field, comments that the study of public policies constitutes an intellectual tradition of strong North American

identity, which started to be developed timidly in political sciences, sociology, economy and public administration´s departments, in the first decades of the last century (MELO, 1999, p. 61).

The importance of the subject, however, has attracted the attention of several fields of scientific and academic knowledge to evaluate the impact and the results (positive and negative) of public policies in the society.

Despite the fact that the subject is relatively incipient in the judicial area, to Maria Paula Bucci what has stimulated the more attention from the law scholars to the theme of public policies is precisely its judicial control, from the perspective of possibility and limits of this control (BUCCI, 2006, p.20).

The author highlights that the judicial actuation in public policies, in principle, would be improper, once its formulation it is, as a rule, the Executive branch's responsibility within the defined parameters by the Legislative branch. However, the debate could not be more juridical, since it concerns the implementation of social rights (BUCCI, 2006, p.20).

The possibility of judicial control of public policies is increasing. Similarly, its conformation and acceptance by the jurisprudence has also increased. The limits, however, are being constantly redefined, in a way that does not seem to be clearly defined.

In Cristiane Derani´s opinion, the policies are denominated of public because they are manifestations of the relations of social forces reflected in the state's institutions. They are public policies because they are undertaken by the public agents competent to do so, having the society as a receiver, reason why the finality of those policieswill always need to be resigned by the law (DERANI, 2002, p. 239).

It is evident, consequently, the interest of the law in the concept of public policies, (re)cognizing its finalities, contour and social implications.

To understand the amplitude and the scope of the subject, it is interesting to emphasize public policies as an intervention in social reality, as explains Sonia Draibe, for whom public policies are developed in the public sphere of the society, not restrictedthe state or the government politics, possibly including non-governmental organizations of any kind, so long as it is always present in the public character (DRAIBE, 2001, p. 14).

It is each day more common for the State to use the Third Sector to execute public policies, as an example the several Non-governmental Organizations that receive public resources to act in the execution of public health policies,, especially in the Amazon.

About the definition of public policies, Eduardo Appio understands that they can be seen as instruments for the execution of the political programs based in the state´s intervention in the society with the purpose to affirm the equality of the opportunities for all, objectivizing a worthy existence for citizens. In reason of this, the judicial control of public policies occurs because of the socials inequalities that fragmentsociety (APPIO, 2009, p. 136 e 137).

In a formulation of a juridical concept that contemplates the importance of the subject under the bias of the law, Maria Paula Bucci formulated the following proposition:

> Public policies are a governmental program of action that results from one or several of legally regulated processes – electoral process, planning process, government process, budgetary process, legislative process, administrative process, judicial process – aiming to co-ordinate the available means available for the State and private activities, to accomplish socially relevant and politically determined objectives.
> As an ideal, public policies must aim for the accomplishment of defined objectives, expressing the selection of priorities, the reserve of necessary means to the consecution and the timeframe in which to expect. (BUCCI, 2006, p.39, our translation).

We highlight, therefore, as relevant the conceptualization of public policies, that have their own juridical regime, resulting from the public intervention that objectives the social improvements of collective interest, which the formulation, execution and attendance must be in consonance with the juridical ordainment, once that, independently of the political desires of those responsible, public policies are submitted to the constitutionals and legal principles.

Consequently, this is the importance of the subject to the law, explicating their juridical contour, which is the reason that imposes the study of the judicial control of the policies and conflicts that supervene what is called judicial activism.[6]

[6] Judicial activism means that certain issues of great political or social repercussion are being judged by organisms of the Judiciary branch, and not by the traditional s instances: the National Congress and the Executive branch – in which scope are the President of the Republic, his ministries and public administration in general. As intuitive, the judicial activism includes a transfer of power to judges and courts, with a significant alteration in the language, argumentation and in the manner of participating in society. The phenomenon has multiple causes. Some of them express a worldwide tendency; others are directly related to the Brazilian institutional model (BARROSO, 2009, p.02, free translation).

2 The conflict among the branches in the judicial activism of public policies

In the fundamental principles of the 1988´ Federal Constitution is established that the Powers of the Union are made up of, independents and harmonic amongst themselves, the Legislative, the Executive and the Judiciary.

In the same manner, in III incise, 4th paragraph, the 60th article of the Constitution, it says the proposal of amendment to the Constitution will not be object of deliberation to abolish the separation of the powers.

The independence and harmony, therefore, are evidenced as the main elements in the separation of the powers that constitute the fundaments of the republic.

Nevertheless, the Constitution itself predicts actuation possibilities that demonstrate there are activities that would, in thesis, private of a power, but are also carried out d by other Republic Powers.

An example is the possibility to edit the Provisional Measure by the Executive branch, according to what is established in article 62 of the Constitution, an activity that is typically Legislative, but is also accomplished by other branches.

Consequently, the separation of the powers can be interpreted mainly as independence and balance among the branches. About the theme, Hely Lopes Meireles comments that Montesquieu never made use in his production of the expression "separation of powers", referring uniquely to the need of the "balance among the powers", which resulted between the English and North-Americans in the system of checks and balances, that we know as "*freios e contrapesos*", where one Power limits the other (MEIRELLES, 1996, p; 57, our translation).

The reality, however, supplants the juridical norm. The juridical fiction of norm is not always the true order of facts. Despite the Constitutional dispositions of independence among the branches, politically, the Executive branch is still as seen as a central Power in relation to the others, in reason of which the principal political events in the country take place in it.

The Legislative, for example, be it in a municipal, state or federal scope, suffers strong interferences of the Executive, which acts in the political and parliamentarian parties "aggregating" to form an ample majority that assures it tranquility and governability.

The exchange of political support in the Legislative sphere for a position in the Executive is something extremely common and practiced in the national political scene that negotiations are carried

out explicitly,, entailing the political support in exchange for positions. The executive, as the keeper of the "vault", ends up having great "negotiation" power with the Legislative.

Upon commenting how the negotiation occurs in the elaboration of the budget by the Executive branch, Edilberto Lima and Rogergio Miranda affirm that there are many political groups that support the Government and because of it receive Ministries. Each minister is appointed by a political party, the greater the budget of their ministry, the bigger will be their influence and the more political dividends they and their political party will have (LIMA; MIRANDA; 2006, p. 326).

The dispute over ministries mainly occurs among the larger political parties, because they have parliamentarians in sufficient number to politically fortify the Executive representative, or, in an inverse logic, enfeeble it.

Equally clarifying is Joffre Neto's comment about the relation between the Executive and Legislative in a municipal scope, when mentioning that the population asks the councilmen for employment, repairs, medicine, among many other things that are not in their competence:

> The population claims to the councilman what he cannot give, and the councilman promises what he cannot fulfil, or there is another avenue: negotiate with the one that has the key of the "vault of goodwill": the Mayor. On the other hand, the Executive is obligated to appeal to the Legislative specific attributions, because to govern implies the approval of all orders of laws: administrative, authorizing and especially budgetary. Consequently, a game of favors is rapidly established: the Mayor needs votes and wants to be free of inspections; the councilman needs direct actions for his own electorate. Therefore, the municipal parliamentarian easily changes votes and a friendly treatment with the Mayor or the administrative resources that he needs. From the genuflection to genuflection, of the equipotential power to the Executive the legislative transforms itself in a supervening power (NETO, 2003, p. 428, our translation).

The subservience of the municipal Legislative, as previously mentioned, in relation to the Executive is not usually different in a state or federal level. On the contrary, it is observed that political parties and parliamentarians of the National Congress oscillate among opposition and government according to their interest at the moment, or, still, according to the chief of the Executive branch.

The independence due in the constitutional text, as seen, despite formally existing and being of the extreme relevance in

the democratic stability of the country, many times ends up supplanted by the way the game of the political power happens among the branches.

The Judiciary, in its turn, having the relations established among the other Republic Powers and before social rights and public policies ruled in the Constitution, cannot avoid judging and analyzing the nature of political issues[7] in light of the Constitution.

In the same sense, as Claudia Maria Barbosa explains, the jurisdictional service is an activity that surrounds the three branches, since the starting point in a law, voted by the Legislative and executed by the Executive. This relationship becomes more complex when the judiciary attributes to itself the function of judging the inconstitutionability of the laws edited by those branches. The judiciary, in these cases, will be judging the two other branches (BARBOSA, 2006, p. 12).

It is in the basis of the Democratic State of Rights´ the attribution of the Judiciary branch of judging acts practiced in the exercise of Legislative and Executive activities.

In this sense, Lenio Luiz Streck comments that the Democratic State of Rights, in face of the obliged character of the constitutional text and the notion of normative force in the Constitution, shows a sensible displacement of the center of decisions of the Legislative and Executive to the constitutional jurisdiction plan. Thus, the inertia and the lack of action of one of the branches could be supplied by the Judiciary branch , using the juridical mechanisms ruled by the Constitution (STRECK, 2004, p. 19 e 20).

The polemic about the judicialization of policies occurs precisely when one Power of the Republic understands that it can or must act in substitution to another, in reason of its omission. Also, the Legislative cannot execute the public policies for understanding that the Executive is omissive, just as the Judiciary cannot legislate through *summula* in reason of the Legislative's inertia[8]. The utilization of mechanisms in the Constitution, however, as previously

---

[7] For the record, this phenomenon is not a peculiarity of ours. In different parts of the world, at different times, constitutional courts or supreme courts stood out in certain historical momentsas protagonists of decisions involving questions of a large political reach, public policies implementation or moral choices in controversial themes in society (Barroso, 2009, p.01).

[8] "It is on style a 'judicial activism' that, despite the law, creates shortcuts to avoid the jurisdictional service that is essential, such as the decision not to invigorate, electronically, the doubled deadline for an appeal. The lawyer that appeals – this reason explains why he is not known –, takes the risk of compensating his client due to the loss of a chance, despite observing the law to its full extent, which it hasn´t changed!

pointed out, constitutes a prerogative of the Judiciary that must be exercised to its full extent.

The comment about the judicial activism of the public policies as a new species of judgment of constitutionality in our country, Fabio Comparato claims that such Judiciary attribution will face all sorts of resistance[9]. However, it is necessary to remove the classic objection that the Judiciary does not have competence, according to the principle of the separate of the powers, to judge political issues (COMPARATO, 1998, p. 46).

It appropriate to point out, also, Canotilho´s opinion, to whom the principle of the judicial self-limitation does not have to exclude the judiciary´s appreciation of political issues:

> The principle of the judicial self-limitation is another principle imported from the North American jurisprudence and fundamentally reconductable to what follows: the judges must limit themselves to the decision of jurisdictional issues and deny the capacity to judge political issues. The principle was defined by judge Marshall as signifying there are certain political issues in the President's competence, in regards to which there cannot be constitutional control. However, as the American doctrine itself accentuates, the doctrine of the political issues cannot mean the existence of constitutional questions exempt of control. First, we must not admit the rejection of justice or declination of the Constitutional Court competence simply because the political issue must be decided by political instances. Second, as already said, the problem does not reside in, through constitutional control, making politics, but in appreciating, according to the legal and material parameters of the constitution, the constitucionability of politics (CANOTLILHO, p. 1293, our translation).

In the same sense – and with the same disastrous consequence –, it is the understanding not to assure the party of the right of complementation in the preparation of the lawsuit in the Special Courts, though the Civil Procedure Code is subsidiary, which, after so many absurdities have been committed, this right remains consecrated, through the legislative. The bad example comes from above, as demonstrates the STJ summula 115, that consider inapplicable in the extraordinariness instances, the rule that assure the party the right to make amends for flaw in representation" (GONÇALVES NETO, 2014, P. 25, our translation).

9 According to the author, one of the manifest tendencies in the Brazilian political regime, in the recrudescence phase of the oligarchic power in reaction to democratizing pressure, consists of reducing the scope of the judicial exams of government acts, or, what is worse, to transform the Judiciary in a government organism (COMPARATO, 1998, p. 48).

We observe that the Separation of powers, as well the independence and harmony among them does not constitute a reason for the Judiciary to stop judging public policies according to constitutional precepts. The principle of the judicial self-limitation, therefore, does not prevent the appreciation of politicalthemes by the Judiciary branch. According to Eduardo Appio, it is in the Constitution and the theories around the juridical effectiveness of its rules that the judges will find motivation to exercise an essentially political activity, denominated judicial activism, where the judges take on the function of control and execution of the social policies when reputed with an unjustified estate omission (APPIO, 2008, p. 110).

Judicial activism, in this context, represents a new role the judiciary takes on the relation with the three Republic Powers, no longer restricted to the strict limits of the law, but amplifying its action to other activities, different from the traditional ones, ballasted in the effectiveness of social rights and public policies in the Federal Constitution.

According to Luiz Roberto Barroso, with the advance of constitutional law, the ideological premises on which the traditional interpretation system was built are no longer integrally satisfactory. Therefore, it was verified that the solution to juridical problems is not always in the abstract report of the normative text. In regards to the judge´s work, he will not have only a technical knowledge function. The interpreter becomes a co-participant of the process of the creation of the law, completing the legislator´s work, when making valuations of meaning to the open clauses and when choosing among the possible solutions (BARROSO, 2006, p.08).

Gradually, this new comprehension of the judges about function of the Judiciary branch when performing a reinterpretation of the rules that ensure more effectiveness to the social rights becomes more noticeable.

Eduardo Cambi sees the expansion of the Judiciary´s branch activities as a relevant consequence of neoconstitucionalism[10], a

[10] The neoconstitutionalism or the new constitutional right in the conception here developed, identifies a ample group of transformations that occurred in the State and in constitutional rights, among which we may cite, (i) as a milestone, the formation of the constitutional State of law, whose consolidation took place during the final decades of the XX century; (ii) as a milestone, the post-positivism, with the centrality of the fundamental rights and the re-approximation law and ethics; and (iii) as a milestone, the set of changes that include the normative force of the Constitution, the expansion of the constitutional jurisdiction and the development of a new dogmatic of a constitutional interpretation. These phenomena result in an extended and deep process of constitutionalization of the law (BARROSO, 2006, p.10).

phenomenon which, when facing the jurisdictional protection of social rights, requires the revision of the separation of the powers principle (CAMBI, 2008, p. 90).

In this context, we highlight the normative power of the Constitution that ceases being a letter of political intentions to give place to an imperative rule, endowed with a binding character that allows to the judiciary action with practically no limits, finding obstacles merely in the constitutional text itself.

In the same manner, those possibilities are a challenge for the judges. Eduardo Appio the judges, used to deciding based on an academic and professional training that confers primacy to the law, started to be called upon to decide about public management resources, based on the interpretation of more open constitutional principles (APPIO, 2008, p. 12).

The possibilities of judicial activism of the public policies, considerably amplified in the neoconstitutionalist view, implies, also, in the obligation of judges to dialogue with different sciences and find in other areas of the knowledge the complementation necessary to the traditional juridical formation.

The limits of judicial activism of public policies must be delimited by the constitutional text itself, avoiding the break of the principles of independence and harmonic action among the branches, but ensuring the effectiveness of the precepts due in the Constitution.

Conclusion

Thus, public policies constitute an important instrument of ensuring social rights´ due in the constitution, its execution being the competence of the Executive branch.

The Judiciary branch is not part of its formulation, but it can, however, perform the constitutional control and legality of its elaboration, execution and implementation, which means, just the same, that the Judiciary branch is competent to assert social rights are carried out through the judicial activism of public policies.

The limits of jurisdiction need to be restricted to the possibilities that the constitutional text imposes, so that there is no suppression of the activities of a branch by another.

On the other hand, the growth of the judicial activism shows there are gaps being left by the others branches, at the example of the Legislative branch, whose political agenda and the list of activities are constantly being defined by the Executive branch, through the political force it exercises in the relationship between the two branches.

This fact, however, does not authorize to the Judiciary to legislate, replacing the function of another power of the Republic, whose the representatives are elected legitimately to exercise this attribution in spite of all the distortions that exist in the elections, some examples are: to buy votes, corruption, abuse of the power, etc. These problems, by the way, exist just as much in the Executive as in the Judiciary, which drove society to demand the external control of the Judiciary branch[11].

Just the same judges cannot substitute the representatives of the Executive branch, usurping their discretionary and decisive power in the execution of public policies.

The judicialization of public policies is a consequence that was certainly not predicted by the 1988 constituent legislator, at least not in its current proportion, and which has imposed on the Judiciary branch a more active and participative posture in the accomplishment of the Welfare State, forcing judges to leave their traditional political isolation.

The robe, therefore, finds more and more new juridical possibilities to open or close the door of the vault, as well, makes the pen of the legislative at times instigated to write, at times demanded to scratch its own writing.

The Juridical phenomenon of the contemporaneous constitutional law is salutary for the accomplishment and enforcement of social rights, as well as for the democratic consolidation of the country.

The result of possible conflicts in the relation among the Republic powers deriving of this judicial activism, however, will only be known over time, once every time one of the branches prevails upon the others in evident excess of power and unbalance of the relationships; it puts ta risk the Democratic State of the Law.

[11] About the subject, see: (ALVES; BARBOSA; 2008, p.09): conformable exposed, in a long time the society clamoured for an intern organism of the Judiciary branch, but with a legitimate autonomy and freedom, that could exercise the control and inspect that branch, as well, conduct his political and strategically planning. Abundant and notorious are the examples of the crisis faced by the Judiciary branch, waiting for a good opportunity to reform, such as "sell of decisions", deviation of budget, advisement service from the magistrates to particulars in lawsuits that were under his authority, nepotism, lack of commitment to the course and efficiency in the lawsuit (mainly the celerity), Judiciary lack of interest in the execution of its own decisions (especially when the defendant is the public power), etc.

References

ALVES, Carolina Fátima de Souza; BARBOSA, Claudia Maria. Conselho Nacional de Justiça e o exercício da função fiscalizadora do Poder Judiciário - breves considerações. **EOS** - Revista Jurídica da Faculdade de Direito, v. 2, p. 8-15, 2008.

APPIO, Eduardo. **Controle Judicial das Políticas Públicas no Brasil**. Curitiba: Juruá Editora, 2009.

APPIO, Eduardo. **Discricionariedade Política do Poder Judiciário**. Curitiba: Juruá Editora, 2008.

BARBOSA, Claudia Maria. O Processo de Legitimação do Poder Judiciário Brasileiro. In: **XIV Congresso Nacional do CONPEDI** - Conselho Nacional de Pesquisa e Pós-Graduação em Direito, 2006, Fortaleza. Anais do XIV Congresso Nacional do CONPEDI. Florianópolis: Fundação Boiteux, 2006. v. 1.

BARBOSA, Claudia Maria. A necessidade da formulação de indicadores próprios para avaliar a atividade jurisdicional. In: Letícia Borges da SILVA; Paulo Celso de OLIVEIRA. (Org.). **Socioambientalismo**: uma realidade. 1. ed. Curitiba: Juruá, 2006, p. 79-89.

BARROSO, Luís Roberto. Judicialização, ativismo judicial e legitimidade democrática. In: **Revista Eletrônica da OAB**. Edição Número 4 - Janeiro/Fevereiro de 2009, p. 1-29.

BARROSO, Luís Roberto. **Neoconstitucionalismo: O triunfo tardio do Direito Constitucional no Brasil.** Disponível em: <http://conjur.estadao.com.br//static/text/43852,12>. Acesso em: 04 out. 2006.

BUCCI, Maria Paula Dallari. O conceito de política pública em direito. In: BUCCI, Maria Paula Dallari (org.). **Políticas Públicas: reflexões sobre o conceito jurídico**. São Paulo: Saraiva, 2006.

CAMBI, Eduardo. Revisando o princípio da separação dos poderes para tutelar os direitos fundamentais sociais. In: **Direitos Fundamentais Revisitados**. CAMBI, Eduardo; KLOCK, Andrea Bulgakov; ALVES, Fernando de Brito; (orgs.). Curitiba: Editora Juruá, 2008, p. 89-101.

CANOTLILHO, José Joaquim Gomes. **Direito Constitucional e Teoria da Constituição**. 6. ed. Coimbra, Portugal: Editora Almedina, 2002.

COMPARATO, Fábio Konder. Ensaio sobre o juízo de constitucionalidade de políticas públicas. **Revista de Informação Legislativa.** Brasília a. 35, n. 138, abr./jun, 1998.

DERANI, Cristiane. Privatização e serviços públicos. As ações do Estado na produção econômica. São Paulo: Editora Max Limonad. 2006.

DRAIBE, Sonia Miriam. Avaliação de Implementação: esboço de uma metodologia de trabalho em políticas públicas. In: Maria Cecília R. Barreira; Maria do Carmo B de Carvalho. (Org.). **Tendências e perspectivas na avaliação de políticas e programas sociais**. 1ª ed. São Paulo: IEI/PUCSP, 2001, p. 13-41.

GONÇALVES NETO, Alfredo de Assis. Discurso de Agradecimento pela Medalha Vieira Neto. *In*: **Anais da V Conferência Estadual dos Advogados.** Ordem dos Advogados do Brasil. Seção do Paraná. Curitiba: OABPR, 2014, p. 25. <http://www.oabpr.org.br>. Acesso em: 01 fev. 2015.

LIMA, Edilberto C.P.; MIRANDA, Rogério B. O processo orçamentário federal brasileiro. In: MENDES, Marcos (Org.). **Gasto público eficiente**. Rio: Topbooks Editora, 2006, p. 319-369.

MACIEL, Débora Alvez. KOERNER, Andrei. Sentidos da judicialização da política: duas análises. In: **Lua Nova: Revista de Cultura e Política**, n. 57, 2002, p. 113-133.

MEIRELLES, Hely Lopes. **Direitos Administrativos brasileiros**. São Paulo: Malheiros Editores, 1996.

MELO, Marcus André. Estado, governo e políticas públicas. In: MICELI, Sergio (org.). **O que ler na ciência social brasileira** (1970-1995) - Ciência Política. São Paulo/Brasília: Editora Sumaré/ANPOCS/CAPES, 1999.

NETO, Jofre. O legislativo e o poder local. In: Benevides, Maria Vitória; KERCHEM, Fábio. VANNUCHI, Paulo. (Orgs.) **Reforma política e cidadania**. São Paulo: Fundação Perseu Abramo, 2003, p. 423-446.

STRECK, Lenio Luiz. **Jurisdição Constitucional e Hermenêutica**. Uma Nova Crítica do Direito. 2. ed. Rio de Janeiro: Editora Forense, 2004.

TATE, C. Neal. VALLINDER, Torbjorn. ***The Global Expansion of Judicial Power***. New York University Press, 1995.

YOSHIDA, Consuelo Yatsuda Moromizato. A efetividade da proteção do meio ambiente e a participação do judiciário. In: **Desafios do direito ambiental no século XXI**. Estudos em homenagem a Paulo Affonso Leme Machado. KISHI, Sandra Ademi Shimada. SILVA, Solange Teles da. SOARES, Inês Virgínia Prado. São Paulo: Editora Malheiros, 2005.

SUPREMO TRIBUNAL FEDERAL. STF. Brasília, D.F. <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=98954> Acesso em: 01 mar. 2015.

SUPREMO TRIBUNAL FEDERAL. STF. Brasília, D.F. <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=274982&caixaBusca=N>. Acesso em: 01 mar. 215.