



Judicial control of public policies in the jurisprudence of the Supreme Federal Court: limits and possibilities

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SUMMARY

This article analyzes the complex and evolving jurisprudence of the Federal Supreme Court (STF) regarding judicial oversight of public policies. It examines the transition from an initial stance of judicial self-restraint to a more interventionist approach, especially in the implementation of social rights. The objective is to provide an overview of how the Brazilian Supreme Court has navigated the delicate task of protecting the Constitution without becoming a positive legislator or public administrator.

Keywords: Judicial Control. Public Policies. Supreme Federal Court. Separation of Powers. Existential Minimum.

ABSTRACT

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1 INTRODUCTION

The institutional arrangement of contemporary democracies is based on the pillar of separation of powers, a dogma designed to prevent the concentration of power and ensure the freedom. In this model, the Legislative Branch is responsible for innovating the legal order, while the Executive Branch, administer public affairs and execute laws, and the Judiciary, resolve conflicts based on current legislation. However, the Constitution of the Federative Republic of Brazil of 1988, establish a vast list of fundamental rights and guarantees, notably those of a social, imposed on the Judiciary an additional and extremely important function: that of guardian of constitutional promise. This mission raises one of the most sensitive debates in law Brazilian Constitution: what are the limits of judicial action in controlling public policies? intended to realize these rights?

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The central question that emerges from this tension is to what extent the Judiciary may, without usurping the powers of others, intervene in the discretionary choices made by elected political agents. The implementation of a public policy involves the allocation of budgetary resources, definition of priorities and technical choices, decisions that, in principle, make up the core of administrative merit and political discretion. An intervention Undue judicial action could not only violate the separation of powers, but also compromise the democratic legitimacy of decisions and generate unpredictable systemic consequences for the budget and public administration.

On the other hand, the inertia or deficient performance of political powers in implementation of fundamental rights, such as health, education and housing, can transform constitutional precepts into mere declarations of intent, emptying their normative force of the Constitution. In the face of omissions or acts of commission that violate essential guarantees, the The Judiciary is called upon to act to ensure a minimum level of dignity for the human person, foundation of the Democratic Rule of Law.

In this scenario, the Supreme Federal Court has played a central role in construction of a jurisprudence that seeks to balance deference and intervention. The objective The purpose of this article is, therefore, to analyze the trajectory of the Supreme Court's understanding on the subject. To this end, the theoretical basis that underpins the conflict will be addressed, as well as the evolution of jurisprudence. from a stance of self-restraint to one of greater protagonism, the control criteria consolidated, such as the existential minimum and proportionality, and, finally, the current challenges that this complex institutional relationship imposes.

2 THE TENSION BETWEEN THE SEPARATION OF POWERS AND THE EFFECTIVENESS OF FUNDAMENTAL RIGHTS

The theory of separation of powers, in its classical conception, advocated a watertight division of functions between the Legislative, Executive and Judiciary, aiming to contain the state power. From this perspective, the Judiciary would have an eminently declaratory function, "mouth of the law", being forbidden to enter into the merits of political and administrative decisions, under penalty of subverting the democratic order and the popular will expressed through its elected representatives. This view is reflected in the traditional notion of administrative merit as a space of discretion immune to judicial review, where the public administrator, within



the limits of the law, has the freedom to choose the most convenient and timely solution for the public interest.

However, contemporary constitutionalism, especially after the enactment of constitutions with a strong axiological and normative load, such as the Brazilian one of 1988, resized the role of the Judiciary. The Constitution has ceased to be a mere political document and has become the supreme legal norm, endowed with direct and immediate applicability, whose precepts bind all powers. The enshrinement of an extensive catalog of fundamental rights, including social rights that require positive benefits from the State, such as those provided for in Article 6, imposed a new dynamic on the system of checks and balances.

The realization of these social rights depends intrinsically on the formulation and implementation of public policies. The legislator's failure to regulate a right or the failure of the administrator in implementing an essential service creates a vacuum that can be interpreted as an unconstitutionality by omission. It is at this point that the tension arises manifests itself with greater intensity. State inaction can perpetuate human rights violations fundamental, but judicial intervention to fill this gap can be seen as a invasion of the sphere of competence of the other powers.

The dilemma, therefore, is not merely theoretical. It translates into practical issues and appellants in court: can a judge order the construction of a daycare center, the supply of a high-cost medicine not included in the lists of the Unified Health System (SUS) or carrying out basic sanitation works in a community? By doing so, wouldn't the magistrate redefining budgetary priorities democratically established by Legislative and Executive branches? The answer to these questions is not unequivocal and has been the subject of deep reflection and maturation in the jurisprudence of the Supreme Federal Court, which seeks ways to ensure the normative force of the Constitution without annihilating discretion of political agents.

3 THE JURISPRUDENTIAL EVOLUTION OF THE FEDERAL SUPREME COURT

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The Supreme Federal Court's stance on judicial control of policies public policies has not been static. Over the last few decades, there has been a clear evolution of a markedly deferential and self-restrained positioning for a more jurisprudence assertive in the protection of fundamental rights, especially social rights.

3.1 The Initial Position of Self-Restraint

Initially, the prevailing understanding in the STF was that decisions relating to implementation of public policies fell within the domain of discretion administrative, and are therefore immune to judicial review, except in cases of manifest illegality. The Judiciary should refrain from analyzing the convenience and opportunity of choices made by the administrator, at the risk of replacing his political judgment with a judgment the judge's technician. It was argued that judges do not have the same legitimacy democratic nor the technical expertise and systemic vision of the public budget that they have elected officials. This position reflected a concern to preserve the separation of powers in its most traditional sense, avoiding what is conventionally called "government of judges".

3.2 The Jurisprudential Turn and the Existential Minimum

The jurisprudential shift began to consolidate from the perception that the state failure to implement essential social rights represented a direct violation to the Constitution, especially the principle of human dignity. The Supreme Federal Court (STF) began to develop the thesis that, although public managers have a margin of discretion to formulate policies, this freedom is not absolute. It has a limit insurmountable in the duty to ensure a set of basic goods and services, without which the human existence is not endowed with dignity. Thus, the doctrine of the "minimum" is born existential".

This concept represents the essential core of social rights, a level minimum civilized standard that the State has the duty to guarantee to everyone, regardless of budgetary considerations or political expediency. Failure to provide this essential core is not considered a legitimate political choice, but rather an omission unconstitutional and subject to correction by the Judiciary. The Claim of Non-Compliance with Fundamental Precept (ADPF) No. 45, which dealt with the omission of the Executive Branch in regulating the right to strike for public servants is a milestone in this regard, although the concept has been further explored in numerous other judgments, especially in the health area and education. Judicial action, in this context, does not aim to replace the administrator, but rather ensure that the Constitution is not a dead letter.

4 CRITERIA AND LIMITS OF JUDICIAL CONTROL

The consolidation of a more interventionist stance on the part of the STF required the development of criteria to guide and legitimize judicial control over the public policies, preventing actions from becoming arbitrary. The main parameters that stand out in the Court's jurisprudence are the binomial existential minimum versus reserve of possible and the principles of reasonableness and proportionality.

4.1 The Existential Minimum and the Possible Reserve

The main line of defense of the Public Power against judicial determinations for the implementation of social rights is the claim of "reserve of the possible". According to this argument, the state's ability to provide goods and services is limited by the scarcity of budgetary resources. Thus, the realization of a right would depend on the existence of financial availability, a decision that would be up to the political powers.

The Supreme Federal Court, however, established a restrictive interpretation for the reserve of the possible. The Court understands that such an allegation cannot be used as a shield generic to justify state inertia and failure to comply with constitutional duties. To be accepted, the thesis of the reserve of the possible must be objectively proven and concrete action by the Government. A simple allegation of lack of funds is not enough; it is necessary demonstrate that the resources are, in fact, insufficient and that there was no choice arbitrary or unreasonable administrative action in the allocation of available funds.

Furthermore, the STF's jurisprudence is firm in the sense that the reservation of the possible does not is opposable to the existential minimum. That is, when the essential core of a right is at stake fundamental, such as the right to life and health, the State cannot exempt itself from its obligation under the pretext of lack of resources. Guaranteeing the minimum existence is a priority expense, and failure to guarantee it constitutes an unconstitutional failure that legitimizes the intervention of the Judiciary to determine the adoption of necessary measures.

4.2 Reasonableness and Proportionality as Control Vectors

In addition to situations involving the existential minimum, the STF also exercises the control of public policies based on the principles of reasonableness and proportionality. Even when the manager acts within his margin of discretion and the minimum



existential is assured, your choices cannot be arbitrary, illogical or disproportionate.

The principle of reasonableness requires compatibility between the means employed in public policy and the ends it aims to achieve. A measure that has no connection logical with its stated purpose may be invalidated as unreasonable. The principle of proportionality, analyzed in its triple dimension, offers a more detailed roadmap for control. The measure must be *adequate* (capable of achieving the intended purpose), *necessary* (must not there is another less onerous means to achieve the same result) and *proportional in the sense strict* (the benefits of the measure must outweigh the burdens and sacrifices to rights that it imposes).

Through these principles, the Judiciary does not say *what* the administrator must do, but evaluates *how* he did it. The control does not focus on the merit of the political choice, but on its compatibility with the constitutional parameters that govern all state activity. It is a control of legality in a broad sense, which monitors the coherence and justification of administrative decisions, curbing excesses and omissions that, although they do not directly violate the existential minimum, result in violations of other constitutional rights or principles.

5 CONTEMPORARY CHALLENGES AND INSTITUTIONAL DIALOGUE

The expansion of judicial control over public policies, although fundamental to the guarantee of rights, is not without criticism and challenges. The main objection lies in the so-called "judicial activism" and the risk of the Judiciary, a power without direct democratic legitimacy, override the decisions of elected representatives, creating a democratic deficit. Critics argue that court decisions that impose high public spending can disrupt budget planning and create "judicialization of politics", transferring it to the courts debates that should take place in the political arena.

Aware of these risks, the Supreme Federal Court has sought to develop mechanisms to mitigate the effects of their decisions and promote greater balance institutional. One of the most relevant instruments in this sense has been the implementation of public hearings. By convening experts, managers, civil society representatives and stakeholders to discuss complex issues such as the provision of high-cost medicines or the prison system, the Court expands its information base,

gives greater legitimacy to its decisions and encourages dialogue between the different actors social and state.

Another important development is the adoption of "structural decisions." In cases of massive and complex violations of rights, such as those that occur in the prison system (analyzed in ADPF 347), a simple order to "solve the problem" is ineffective. The structural decisions, instead of imposing a single and immediate solution, establish a plan of goals and a monitoring process, in which the Judiciary acts as a catalyst for changes, coordinating and supervising the actions of the other powers in the gradual construction of a solution. This approach recognizes the complexity of policy implementation public and replaces the logic of command and control with a logic of cooperation and dialogue institutional.

6 CONCLUSION

The trajectory of the Supreme Federal Court's jurisprudence on judicial control of public policies reflects the maturation of the role of the Judiciary in the Democratic State of Brazilian law. The Court moved from a stance of almost total deference to the choices policies to a position in which it assertively assumes its duty as guardian of Constitution, especially in protecting the essential core of fundamental rights.

It was established that the separation of powers cannot serve as a pretext for state inaction in the face of violations of human dignity. The development of guidelines such as theory of the existential minimum, the restrictive interpretation of the reserve of the possible and the application of principles of reasonableness and proportionality provided the Judiciary with tools to intervene in a legitimate and well-founded manner, correcting omissions and arbitrary acts without, however, annihilate the discretion of public managers.

Challenges, however, persist. The balance between the realization of rights and respect for democratic bodies is tenuous and requires constant improvement. The search for dialogic solutions, such as public hearings and structural sentences, points to a promising path, in which the Judiciary acts not as a substitute for political powers, but as an inducer of public policies and a guarantor of qualified democratic debate and constitutional supremacy. The debate on the limits and possibilities of judicial review

remains open, being one of the most vital and dynamic themes of constitutional law contemporary.

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