THE CASE ADPF 132: IS DEFENDING THE CONSTITUTIONAL TEXT A POSITIVIST (OR ORIGINALIST) ATTITUDE?

// O CASO DA ADPF 132: DEFENDER O TEXTO DA CONSTITUIÇÃO É UMA ATITUDE POSITIVISTA (OU "ORIGINALISTA")?

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>> ABSTRACT // RESUMO

In the last years, the Brazilian Constitution has been taken by a theoretical line that admits and defends the need for judicial activisms to solve political and social problems presented by everyday life. The last attempt was a constitutional lawsuit – known in Brazil as "Arguição de Descumprimento de Preceito Fundamental" ADPF n. 182 (Claim of Fundamental Principle Violation) – which purposes the judicial regulation marriage of same-sex persons. In this article it is problematized by demonstrating how such intent would express a serious democratic risk because it has become the judicial review in an everlasting constitutional power, although it is founded on good intentions. // Nos últimos anos, o Supremo Tribunal Federal tem adotado posturas interpretativas que extrapolam os limites constitucionais postos para a sua atividade. Os fundamentos adotados pela Corte para justificar tais posturas ainda se mantêm atrelados à superação do "positivismo", à superação da razão (do legislador, considerado inerte) pela vontade (do julgador), onde o texto constitucional passa a depender dos juízos subjetivos dos Ministros e tem sua normatividade enfraquecida. O presente artigo pretende, então, demonstrar o que significa, realmente, o positivismo e porque tal viravolta realizada pela Corte não o supera, além de apresentar os efeitos colaterais do ativismo judicial do Supremo.

>> KEYWORDS // PALAVRAS-CHAVE

ativismo judicial; hermenêutica; Supremo Tribunal Federal; positivismo; uniões homoafetivas. // **judicial activism; hermeneutics; Brazilian Federal Supreme Court (STF); legal positivism; same-sex marriage.**

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1. INTRODUCTION

Before moving into the core discussion which titles this paper, we should briefly take a look back at the constitutional actions that have settled the current position of the Brazilian Federal Supreme Court (STF) on the legal status of same-sex couples.

The STF jointly analyzed[1] the Direct Action on Unconstitutionality (ADI) 4277[2] and the Claim of Fundamental Principle Violation (ADPF) 132[3], respectively filed by the General Attorney of the Republic and Rio de Janeiro state governor Sérgio Cabral. The purpose of both actions was the recognition of same-sex couples as family entities.

Reporting Justice Ayres Britto voted in the sense of construing the issue according to the Federal Constitution under article 1.723[4] of the Brazilian Civil Code, excluding any possible understanding disallowing the recognition of same-sex couples as a family. Below is a brief description of the main grounds for the STF decision studied herein.

The Reporting Justice argued that article 3, item IV of the Brazilian Constitution (CF), bars any discrimination based on gender, race, and color; therefore, no one should be shamed or discriminated as a result of their sexual orientation. He ruled that "*people's gender, except for an express or implied constitutional provision stating otherwise, does not lend itself for inequality before the law*" (p. 612). Thus, he concluded that any depreciation of live-in same-sex couples goes against the aforementioned article of the Constitution and against one of its main purposes of the, which is to foster everyone's welfare.

Furthermore, he maintained that the Constitution's regulatory silence as to the ways of using sexual organs should not lead to a restrictive understanding. Citing Hans Kelsen and his general negative norm, Minister Ayres Britto stated that that which *is not legally barred or required, is legally allowed* (*idem*)[5]. Therefore, he believes that sexual freedom should be seen as a fundamental right, considering the autonomy of will, privacy, the right to pursue happiness, the right to have a family, and others. All that immersed in the paradigm of compassionate constitutionalism[6] and in accordance with the social-political-cultural pluralism protected by the Brazilian Constitution.

Regarding the notion of family[7], the Reporting Justice argued that, far from being an orthodox, closed-in content that is univocal or marked off by the law, it is a social-cultural category and a spiritual principle. Hence, given its express constitutional protection, the family should be safeguarded in its various formations and possibilities found in everyday life. From that standpoint, the law must treat all families in an equal manner, be they opposite or same-sex couples, thereby advancing into the realm of customs and helping eliminate prejudice.

With respect to the words man/woman[8] found in the constitutional norms pertaining to the topic, the Justice stated that the main role of said words is to assert the horizontality of these relationships. In other words, to equate the man and the woman in the family, thereby moving away from the hierarchy of the patriarchy imbued in Brazilian culture. He also

argued there is no terminological difference between "family" and "family entity", and that those terms are perfect synonyms.

Overall, all of the Justices agreed with the Reporting Justice's opinion. Justices Ricardo Lewandowski, Gilmar Mendes and Cesar Peluso disagreed on the grounds of the judgment, as they believed same-sex couples did not fit into the constitutionally established types of families. Nevertheless, the two actions were granted and the Justices have settled that article 1.723 of the Civil Code is to be "construed according to the Constitution," allowing ongoing, long-lasting, public same-sex relationships to be considered common-law marriage, while families.

It is important to clarify that the following approach disputes the way the STF found to deem same-sex couples equal to opposite-sex couples under the law, given that: a) it goes against an express constitutional provision; b) weakens the Brazilian democracy and the separation of powers; and c) reinforces a judicial pragmati(cis)m in which the Constitution, as a *tabula rasa*, merely constitutes the meanings its interpreters impose on it in a discretionary manner. I would like to point out that this analysis is based on the Hermeneutic Critique of Law and Dworkin's position that "what the interpreter thinks about a given subject does not matter." I mean, personally, I am in favor that same-sex couples have all the rights. At times, the Constitution does not say everything we want it to... Moreover, when it does not say something, twisting it is not the proper thing to do.

2. CRITICISM OF THE DECISION BY THE BRAZILIAN FEDERAL SUPREME COURT – THE "ACTIVIST" MINDSET

In Brazil, the term judicial activism has been used in a *blank slate* manner.[9] It should be noted that in the United States the discussion about the government of judges and judicial activism has spanned over two hundred years of history. On the other hand, we cannot forget that judicial activism in the United States was carried out upside down at first (so that we cannot consider the activism to be something always positive). The typical case of upside down activism was the US Supreme Court's stance relative to the New Deal as the Court, hanging tight to the principles of some *laissez faire*-type economic liberalism, barred the interventionist measures laid out by the Roosevelt government for being unconstitutional.[10] Interventionist attitudes in favor of basic human rights took place in a context that depended much more on the individual action by an established majority than on the results of an activist mindset *per se*. For instance the Warren Court case was the product of the personal notions held by a certain number of justices and not the result of some *constitutional feeling* about the issue.

In turn, this topic puts on dramatic airs in Brazil. It should suffice to mention that, in that regard, *judicial activism* shows up as a *principle* in the draft of the Brazilian Code of Class Action Lawsuits (art. 2, letter i). Although such bill is yet to be discussed by the Legislative Branch, the

mere mention to *judicial activism* as a "guiding principle" (*sic*) of brazilian class action suits depicts the state of deep theoretical impasse prevalent among jurists.

It is in such context that a good example of simple/everyday-type judicial activism permeating the mindset of bbrazilian jurists can be exactly taken from the judgment of the Claim of Fundamental Principle Violation (ADPF) 132, already outlined at the beginning of this text. Let's see: the claim was filed in 2009 by the Federal Public Attorney's Office aimed at recognizing the common-law marriage between same-sex people and ensuring them the same rights given to opposite-sex couples.

At first, the action meant for the Legislative Branch's alleged omission in regulating the rights of same-sex couples to be recognized and remedied, although the very Constitution, in its art. 226, §3, points towards another direction. Denied at first, the claim was filed again, this time seeking *verfassungskonformeAuslegung* (an interpretation according to the Constitution) of art. 1.723 of the Brazilian Civil Code[11], in the sense of providing full protection to same-sex couples.

The perplexity that ensues is owed to the following question: how could there have been the aforementioned omission if the very Constitution establishes it is the Government's duty *to protect the union between a man and a woman*? Does the Constitution's normative power imply obedience to semantic limits or not?

Where would the omission be, *considering it is a constitutional order* that establishes the Government's action should be towards protecting the union between a man and a woman? It should be noted we cannot speak of hierarchy among constitutional norms. Otherwise, we would be accepting Otto Bachof's thesis about the possible existence of unconstitutional constitutional norms. What is still more astounding is that said ADPF also intended to annul the several decisions that had literally followed the aforementioned constitutional order. It is, therefore, some hyper-activism.

The following issue is immediately blatantly clear: rendering a measure of this sort effective means turning the Court into an agency with permanent powers to alter the Constitution by affirming an obsolete species of *Verfassungswandlung* which in fact would operate as a veritable process of *Verfassungsänderung*, reserved to the amending Constituent Power through the constitutional amendment process.

The risk emerging from such type of action is that an intervention of this caliber by the Judicial Branch into society generates *serious side effects*. I mean, there are problems which simply cannot be solved by way of a misguided idea of judicial activism. The Judicial Branch cannot replace the lawmaker (here, let us not forget the difference between activism and judicialization: the former, weakens the autonomy of law; the latter, at the same time, inexorable and contingent).[12] It is unnecessary to mention the countless court decisions forcing governments to fund experimental medical treatments (even outside Brazil), the supply of erectile dysfunction drugs, and baldness treatments...!

3. GAPS IN THE CONSTITUTION?

First off, it should be unnecessary to say it is not up to the Judicial Branch to "fill in gaps" (*sic*) left by constituent lawmakers (neither originary nor amending ones). By allowing decisions of that sort, we would be encouraging the Judicial Branch to "create" a "parallel" Constitution by establishing, based on its members' subjecting subjectivity, that which was "unduly" – at the interpreter's discretion – left out of the Constitution.

There are hermeneutical limits to the Courts turning into lawmakers. It should be noted that one of the arguments used – at least rhetorically to justify said decisions – is that the Courts must ensure the common-law marriage (therefore, equating it to marriage) of same-sex couples because lawmakers did not intend to do that in the short term as they lacked the "political conditions" to Legislate on the matter. However – if I may say so – it is exactly this argument that is contrary to the very thesis: *in a representative democracy, it is up to the Legislative Power to make laws* (or constitutional amendments).

The facts that Courts – via constitutional justice – make "corrections" to the legislation (hermeneutical-constitutional filtering and *strictosensu* control of constitutionality) does not mean they can, in cases where the very Constitution points towards another direction, issue "lawmaking" decisions (I recall here Recl 4335-4/AC[13] in which the STF, in a decision yet to become final, under the pretext of making a "constitutional change" – *sic*, "eliminated" item X of art. 52 from the constitutional text).

The Constitution recognizes the common-law marriage between a man and a woman. That does not mean that, for failing to forbid such common-law marriage from being contracted between people of the same sex, the very Constitution can be "filled in", under a Kelsen-type argument that "that which is not forbidden is allowed" (as if Kelsen could be read in such a simplistic manner). Were that to be so and countless non-prohibitions could be turned into permissions. Let's consider: the 1988 Constitution also does not bar direct actions for the unconstitutionality of city laws under the Federal Constitution (art. 102, I, "a", only provides for the possibility of arguments addressing federal and state laws). That does not make it possible to speak of an ADI against a city law at the STF. City folk could claim the original Constitution violated the principle of isonomy and that the lack of a mechanism of that sort violates basic rights etc. However, none of that can be "filled in" by an act of will by the Courts (it should be noted that the ADPF ended up solving the problem by admitting the examination of city laws under the Constitution whenever there is no other way to solve the dispute; nevertheless, it must be repeated: that change to the state of the art was made via a legislative provision). Also as an example: the civil legislation only addresses changes to one's first name. However, that does not mean, based on the axiom "that which is not forbidden is allowed", that Courts can rule for the change to one's family name, in the event someone feels humiliated by their last name and claims, *v.g.*, the principle of the dignity of the human person. In short: there is no "B side" of the Constitution to be "discovered" in an

axiological manner. The correct answer for the (same-sex) common-law marriage case depended on a legal-constitutional change and not on an activist attitude by the STF. For instance, we should look at the Spanish case, in which the problem was solved via the Legislative Branch.[14]

4. GOOD ACTIVISMS?

ADPF 132, granted by the STF, has serious side effects. For two reasons, to say the least:

a) explicitly, because there is an attempt to establish a veritable Jurisprudence of Values (*Wertungsjurisprudenz*) as the intent is to "make legal room" to create something that depends on regulation by lawmakers;

b) implicitly, because the argument of the Federal Attorney General's Office leads to the reinstatement of the outdated idea that there could be unconstitutional constitutional norms, given that the very §3º in article 226 of the Brazilian Constitution would be unconstitutional (*sic*!) as it states the Government's protection is meant for the union between a man and a woman, thereby going against sensitive principles in the Constitution, as is the case of legal certainty and the human person's dignity.

The concern-raising element in this type of legal protection request is that it brings along – in an underlying manner – an idea that has been gaining ground in and acceptance by the brazilian legal dogmatics: the need to resort to "*good judicial activisms*" to solve issues that an ever-changing society raises and with which the political decision-making media (especially the Legislative) cannot keep up. Now, the historic experiences we have been legated and which allow us to develop a notion of *judicial activism* do not point towards the "good" or "evil" of the activities carried out under this sign.

Certainly, the experiences coming from the United States and Germany provide the substantial *corpus* we have on the topic. In the US, as Christopher Wolfe reminds us in his *The rise of modern Judicial Review*, judicial activism managed to name from the conservative stances that perpetuated racial segregation and prevented the economic changes Roosevelt's New Deal was attempting to perform in the first half of the 20th century, all the way to the Warren Court's stances deemed progressive or liberal in the 1960s. In Germany, as previously stated, the Federal Constitutional Court's activity has also been rated by some authors as judicial activism, giving rise to the school of the so-called *Jurisprudence of Values* (it should be noted that it is exactly the Jurisprudence of Values that will be harshly criticized by Habermas, who will deem it a stance by the courts which settles the public sphere and prevents decisions from being democratically made).

In all those cases, the most correct thing to say is that there is no way to establish a given judicial activism's "goodness" or "evil". The most correct thing to say is that issues such as this one we are analyzing should not be left to be solved by the Courts' "will to power" (*WillezurMacht*). Delegating such issues to the Courts means running a serious risk: that of weakening the democratic production of law, the cornerstone of democracy. Or

are we about to admit that the – democratically produced – law may come to be corrected by teleological-factual-and/or-moral arguments?

What type of democracy do we want? It is not a matter of being pro or con protecting homosexuals' personal and property rights. The risk emerging from such type of action – and now, from the STF's decision - is that an intervention of this caliber by the Judicial Branch into society generates serious side effects. I mean, there are problems which simply cannot be solved by way of a misguided idea of judicial activism. The Courts cannot replace lawmakers.

Let me explain. In a democratic regime, as well stated by Ronald Dworkin in his *Sovereign Virtue*[15], we need to make a distinction between personal preferences and issues of principle. The courts may intervene, as they should, whenever an issue of principle is at stake. However, it is not up to this branch to issue decisions embodying personal preferences held by its members or a portion of society. For a very simple reason: democracy is a thing too important to be at the mercy of the Judicial Branch's representatives' personal taste. Were that the case, the homosexuals' very interests would be in jeopardy, given the regulation of relationships between same-sex people would depend on the "opinion" and "will" of the one ruling on the case. In other words, what if the STF had decided otherwise? Would those engaged in the cause agree with that? What would be left for them to do in that case? Only political pressure, via a social movement, which is exactly what should be (have been) done as a mechanism to solve this legal problem!

If the issue is analyzed by a Justice favorable to the minorities' movements and regulating such relationships, his/her decision tends to grant it; on the other hand, a conservative Justice opposing such "change to customs" may deny the request.

That is exactly what should not happen in a case such as this. The decision to be made in such cases must be reached in the political sphere instead of the courts, precisely to prevent its solution from being at the mercy of the Constitutional Court's Justices' personal opinions.

In other words, the decision must be arrived at in the context of a dialoguing society where the courts have their role, which does not comprise legislating. In short, an issue like this, exactly for the importance it carried, cannot be solved by a court's ruling. It is necessary to have a more comprehensive discussion that involves all sections of society, whose proper locus is marked off within the democratic decision-making media.

In any case, there is a dangerous trend inside the legal community of turning to the courts to remedy occasional omissions by lawmakers, struggling for a veritable exercise of a belated Jurisprudence of Values by the Brazilian Federal Supreme Court (or by the other courts in the Republic). It suffices to note the subordinated assignment of ADI 4277 (initially ADPF 178) to ADPF 132, which had already been filed by the Governor of the State of Rio de Janeiro. Both their reasons are grounded on an alleged violation of constitutional principles (injury and right) and the frequent denial of rights to homosexuals. All that because the union of same-sex people is an "indisputable factual reality", the product of the

"liberalization of customs", already recognized in other countries, and failing to treat same-sex couples "with the same respect and consideration" afforded opposite-sex couples means "looking down on the identity and dignity" of homosexuals. It means the assumption of a sociologism clad in legal attire, more than arguments dealing with ethical values and their legal regulation. The claim also mentions the violation of the following constitutional rights: 1) the dignity of the human person, 2) equality, 3) prohibition of odious discriminations, 4) freedom, and 5) protection of legal certainty.

We cannot but be intrigued by the fact the principle of legal certainty was mentioned as an argument authorizing the action filed by the Federal Attorney General's Office. It seems there was no concern about the validity of the claim, which in the future may lead to interpretative instability with respect to the constitutional text's normative power due to the fissure caused in the Constitution's text through a protagonism of the Constitutional Court. Or is that reason for concern only when the "activism is bad"? Are "good activisms" allowed?

In other words, legal certainty is wronged not by failing to legally regulate the cohabitation of same-sex people but instead at the time the Court changes, under the pretense of some "omission by constituent lawmakers" (*sic*) or an "evaluative discovery" (*sic*), or yet of the (improper) remedy of "the very Constitution's unconstitutionality" (*sic*), the text of the Constitution as though they were a constituent Power, thereby creating a sort of *extremely seriousinstitutional uneasiness*.

It is important to further highlight that the very use of the ADPF as a mechanism capable of remedying the "legislator's omission" is misguided. That is because, in cases of omission, the proper handling of constitutional jurisdiction mechanisms points towards filing for a Writ of Injunction (article 5º LXXI of the Federal Constitution). Now, a Writ of Injunction is an action delivering concrete effects and which would have maintained the institutional balance between the Republic's powers, while the ADPF, given the system of the decision's effects, makes the Courts act as though they were lawmakers by actually creating a general, abstract rule. Not to mention that, in this case, the action by the courts would not impact merely the action of ordinary lawmakers but would cause a tear in the very constitutional order by formally amending the text in §3º of article 226. In any way, even the *writ* of injunction would have no constitutional room for the simple fact that the constitutional text points to the opposite of the claim. In other words, we cannot overstep the boundaries of the text: let us take the (constitutional) text seriously.

Additionally, it should be noted that the recognition of common-law marriage between same-sex couples was already being discussed legally, and decision by trial and appellate courts had been rendered. In those cases, too, there was a clear trespass by the courts in terms of breaking away from the Constitution's text. That is a symptom of what we are here calling "reinstatement of the Jurisprudence of Values". Now, although the Constitution's text provides too "closed-in" a normative fabric, some law operators believe we need to "open up" this sense of constitutional

rulemaking by randomly and casually using the constitutional principles. Such principles are invoked based on a sort of "meaning anemia", in which the great revolution brought about by the neo-constitutionalism — the principles represent the practical world's insertion into law — ends up obscured by something we can call pan-principles[16].

5. DISCRETION VERSUS INTERPRETIVISM (ORIGINALISM)?

In my book *Verdade e Consenso* e *HermenêuticaJurídicae(m) crise*[17], based on the Hermeneutic Critique of Law, I make several criticisms of the judges' discretionary power. I fundamentally attack legal positivism and understand it based on its crucial aspect: discretion. I will not dwell on this point in this limited space. I would just like to underscore that positivism is not only the exegetic one; there are several other "post-exegetic" positivisms which rely on axiologisms and voluntarisms. In other words, I believe the "mouth-of-the-law judge" is a legal positivist as much as the "law meaning-owner judge". Putting one in the place of the other represents no progress in legal theory. Incidentally, that seems to be the major problem of the several neo-constitutionalist stances.

It seems some critics of my work have failed to understand the way I fight discretion. Such is the case of Eduardo Appio who, in a recent book, criticizes specific points in my work and labels it – in a specific topic in his book – "*Lenio Streck's hermeneutic interpretivism*"[18]. Appio uses that argument to criticize my position relative to the STF's decision in the case of ADPF 132, the subject-matter of this ponderings. A problem immediately arises. It seems clear to me there is a misguided articulation of the notion of *interpretivism*.

As generally known, *interpretivists* are the theoretical stances advocating an *originalist* interpretation of the Constitution. Given such theories emerge in the United States, it is an originalism related to the US Constitution. To further clarify, there has been a historic dispute between North American theorists – at least since the classic article by Thomas Grey, who was the first to thus establish and classify the methodological difference regarding the interpretation of the Constitution[19] – about how the interpretation of the Constitution should be methodically handled. According to Grey, there are two opposing positions: *interpretivism* and *non-interpretivism*. *Interpretivism* is related to the originalist stance, in which the limits of lawmakers' freedom of interpretation must be bound to the limits of the written text; that is, the constitutional writing suffices for the political process limits to be established and implemented. On the other hand, *non-interpretivist* stances defend a sort of constitutional policy and are closer to the ideas advanced by legal realism. Now, it is certain that, by defending the possibility and the need for correct answers in law (or, according to the formula I propose: constitutionally suitable answers), it is not possible to consider me an *interpretivist* (originalist). For a simple reason: when I affirm such thesis, I assume the *interpretivism/non-interpretivism* dichotomy has been obsolete for a long time,

and that the problems deriving from it have been solved. That is because when, in *Law's Empire*, Dworkin tackles the semantic sting and the pragmatism problem, the classical theses about the Interpretation of the US Constitution are inevitably overcome.

In other words, the correct answer problem is not reduced to the court ruling's identification with the text of the law or the Constitution. Were we to think like that, we would still be tied to the dilemmas of semantic stances. When we speak of correct answers, there is a host of events that cross through the law, which go beyond the mere problem of the "literality of the text".

Hence the confusion made by Appio: when I assert that the semantic limits of the text must be complied with, as in the case of the problem involving same-sex marriage, he takes from my approach an inexplicable slant of judicial restraint in benefit of strict exegesis, according to the literality of the norm[20]. Still in the realm of the series of mistakes and confusions made by the author in the course of his text, let's look at the statement saying that philosophical hermeneutics "does not point a way to be followed, as it simply recommends that the interpreter should let the interpretation flow naturally"[21], as though I were suggesting some sort of hermeneutic *laissezfaire*.

I must insist: the hermeneutics I work on is anti-relativist and anti-discretionary, which is to say that *the meaning is not at the interpreter's disposal* (which is different from saying there is some "strictly literal exegesis"). Finally, it should be noted that, since the first edition of my *Súmulas no Direito Brasileiro*[22], prior to the release of *Hermenêutica Jurídica e(m) Crise*, I have already been defending an explicit doctrine in a sense that is vastly unlike the one stated in this odd typological synopsis, which makes me consider there is an indisputable misinterpretation about the corresponding contents in my texts, which not even the hermeneutic "let-it-flow" would allow in such notorious mistakes.

That is why we need to avoid the following confusion: when I assert the semantic limits of the text must be (minimally) complied with, as in the case of the problem involving same-sex marriage, one cannot take from my approach an inexplicable slant of judicial restraint in benefit of some strict exegesis, according to the literality of the norm. Far from it! I must insist: saying the meaning is not at the interpreter's disposal is different from saying there is some "strictly literal exegesis".

In one word: we have a Constitution that is the Alfa and Omega of democratic judicial order. A steering, commitment-based Constitution. Living in a democracy has its costs. In this case, a basic cost: the constitutional pre-commitments can only be cleared by those appointed by the very Constitution (the amending constituent power).

Assuming everything that is not provided for in the Constitution can be "performed" by the Judicial Branch, we would not even have had to write the Constitution: the courts would do it better (or the Public Attorney's Office!). Incidentally: after the aforementioned ADPF thesis success, there is a host of claims that should immediately be filed with the courts (and which are widely supported by the population...!). Do I need to list them?

Always defending the preservation of the autonomy degree reached by law and in democracy, I believe it would actually be better to rely on the Constitution and the way it itself has laid out for it to be amended and laws to be created. After all, 200 years of constitutionalism should have taught us the price of the countermajoritarian rule. At the helm of his boat, Odysseus was aware of the danger posed by the sirens' song...! Oh, social facts...; the good old factual positivism. Oh, the majorities... However, how can we tell what they want other than by way of the Legislature? Either that or let us leave everything to lawsuits! But then we had better not complain about "excess judicialization" or "activisms"...!

6. HERMENEUTICS, JUDICIAL PROTAGONISM AND LEGAL POSITIVISM: THE PROBLEM DERIVING FROM REPLACING THE MOUTH-OF-THE-LAW JUDGE WITH THE PRINCIPLE-BASED JUDGE (OR THE PROBLEMS DERIVING FROM LEAPING FROM REASON TO THE WILL)

Talking about "hermeneutics" is complex business. In the (jurists' theoretical)[23] common sense, this word is plagued by some veritable "meaning anemia." People say "anything about anything" about it (to reclaim here jargon I once minted to face the relativisms typical of would-be critical and post-positivist theories).

Saying that hermeneutics is the "art of interpreting" or that "hermeneutics" is the science of interpretation" solves nothing. Likewise, saying the Constitution requires mechanisms (*sic*) or specific methods for its interpretation is absolutely reckless, besides failing to withstand a 30-second philosophical discussion.

In fact, interpretation studies have gained momentum in the past years with the advent of post-WWII Constitutions. A wide variety of notions have emerged from that. On the one hand, it is widely said "we are in the age of principles", "principles are the positivation of values", the "general principles of law have now been turned into constitutional principles", principles are the way for morals to correct the law, principles are *writs* of optimization, "the balancing method" (*sic*) is the best suited to face the complexity of constitutional texts, and subsumption has been "replaced with balancing" (although it, i.e. subsumption, remains crucial for "easy cases" etc). That is "the word on the streets". Therefore, countless are the mistakes colonizing the theory of law at this point in history.[24]

This issue is so serious that the weighing rule proposed by Alexy has been gradually turned into a "principle" (*sic*). To make matters worse, the so-called "balancing" is directly applied by the "interpreters", who place one "principle (or value)" on each plate of the scale (*sic*) for the result to finally emerge: the value (*sic*) that will prevail. Many also speak of some "weighing of interests" (as though they were reinstating Philipp Heck's *Interessenjurisprudenz*). One principle supersedes the other... As a result of what? The answer is simple: as a result of the "balancing" interpreter's discretion (to say the least). What was the ADPF 132 judgment other than the exercise of some wide discretionary (or arbitrary) power?

Another problem emerges from the misunderstanding about the "interpretation methods." In fact, the writer-jurist clings to Savigny and brings the traditional grammar, axiological, teleological, logical-systematic, and historic-evolution methods. That is done without any critical judgment of the role historically played by those methods and without any comments about what actually took place in Germany in the 19th century, as the country struggled between historicism and pandectism. As though it were under a veil of ignorance, the theoretical common sense disregards that aspect. Were jurists aware of that, they would probably not cite Savigny. Or at least they would be honest and put the master's work in context.

Other authors have "found out" (quite belatedly) that the judge is no longer the mouth of the law (they are those who make the "positivism-natural law" dichotomy, or something similar, as will be shown below). Quite often I hear in lectures - and read in some books – that for this "discoverer" authors there would be two types of judges: the mouth-of-the-law judge and the principle-based judge. The "world" would fit in here, so to speak, given that in place of this exegetic (primitive positivist) judge, the "post-positivism" vulgate has put the "judge who owns the meanings", a solipsist judge (*Selbstsüchtiger*). Why does/did that happen? Because the field of law (in Bourdieu's sense) has yet to duly solve the problem called "what is this, the legal positivism?"

To most people, speaking of positivism means recalling the old exegetics, in which text and rule are (were) the same thing, just like term in effect and validity. Hence, my warning: when we speak of positivisms and post-positivisms, from the start it is necessary to make clear the "place of speaking", that is, about "what" we are talking.

In fact, it has been a long time since my criticisms have been aimed chiefly to the post-Kelsen normative positivism, that is, the positivism that admits discretion[25] (or judicial decisionisms and protagonisms – in short, we must keep it clearly in mind that the positivism of that sort is called "normative" because the "judges produce norms" and, as they have the power to produce norms, whatever they decide, goes – therein lies the core of Chapter 8 of the Pure Theory of Law[26]). Actually, discretion is a characteristic of any and all positivism.

In other words, it is not necessary (anymore) to say the "judge is the mouth of the law" etc.; in short, we can all be spared, at this point in history, from such "discoveries of black powder." That is because such "discovery" should not lead to an empire of solipsist decisions, examples of which are the stances which follow the Jurisprudence of Values (which has been "imported" from Germany in a misguided fashion), as well as the various axiologisms, legal realism (which is no more than some "factual positivism"), the weighing of values (through which, at least in *terrae brasilis*, the judge literally chooses one of the principles he himself elects *prima facie*) etc.

Even here in the final considerations, this issue needs to be better explained: positivism is a scientific stance that cements itself in a decisive manner in the 19th century. The "positive" to which the tern positivism

refers is understood here as being the facts (we should remember that the logical neopositivism was also called "logical empiricism"). Evidently, facts, here, correspond to a given interpretation of reality that encompasses only that which we can count, measure or weigh, or, at the limit, something we can define by means of an experiment.

In this conceptual jumble, some manuals even present Kelsen's thesis regarding the separation between law and morals in the science of law as the detachment of morals from law, which makes "applying the letter of the law" a positivist attitude. Therefore, according to a misguided interpretation, Kelsen would have been a positivist who used to advocate a pure interpretation of law. Hence, it is said he believed the law should be applied in a literal manner (*sic*). In fact, that type of mix-up is seen quite often. We also frequently see self-described critic (and post-positivist or non-positivist) jurists pushing Kelsen's maxim that the "interpretation of the law is an act of will." In such case, such jurists unwittingly assume Kelsen's "other side", that is, the side on which Kelsen says that interpretation is an act of will, although he says that because he believes judges do not make science but legal politics.

Based on that, the confusion is endless, even reaching the debates at the Brazilian Federal Supreme Court. A sort of "state of nature in the understanding of law" is created, in which each one defends their own thesis. The result: to "escape" the exegetic formalism (because in jurists' mind positivism equals exegetism), a considerable amount of said jurists ends up going for (philosophical) relativism, that is, by mistaking truth for an apodictic notion, they say "the truth is always relative". It is the pragmati(ci)sm taking over the last trenches of law. The ADPF 132 decision seems to fit perfectly into that context. It should suffice to see some of the opinions issued by the Justices during the proceedings:

> **J. Gilmar Mendes:** *"The Court's elimination or establishment of certain normative meanings of the text almost always have the ability to change, albeit minimally, the original normative meaning set by the lawmaker. That is why oftentimes the interpretation given by the Court may turn into a decision that alters the original meanings of the text"*[27]

> **J. Luiz Fux**: *So much so that at this time, which is also one of judicial daring – but life is daring, otherwise it is nothing -, is the time for a crossing. The crossing that perhaps the legislator has not wanted to make but which the Supreme Court, by means of Justice Carlos Ayres' splendid vote, has signaled it is willing to.*

Finally, the interpretation carries a decisive meaning for the normative consolidation and preservation of the Constitution. The constitutional interpretation is subject to the principle of the optimal actualization of the norm (*Gebot optimaler Verwirklichung der Norm*). Evidently, that principle cannot be applied based on the means provided by logical subsumption and conceptual construction. If law and above all the Constitution

have their efficacy conditioned by the concrete facts of life, it does not seem possible that the interpretation should make them a blank slate[28].

Therefore, it is urgent to renew that same emancipator mindset and, at this point in history, extend the institutional guarantee of the family also to same-sex couples.[29]

> **J. Ricardo Lewandowski**: *It is certain that the Courts no longer are, as the 18th century liberal thinkers would have them be, a mere non-critical, mechanical* bouche de la loi*, and certain creativity by the judges is admitted in the law interpretation process, especially when they come across gaps in the legislation. However, we must not forget that the judges' exegetic work ceases upon reaching the objective limits of the statutory law. In other words, although judges may and should resort to a wide variety of hermeneutic techniques to extract from the law the meaning that is closest to the legislator's original intent, combining it with the Zeitgeist in effect at the time of its subsumption to the facts, the judicial interpretation cannot flow over the boundaries objectively outlined in normative parameters, given that, as our forerunners used to teach,* in claris cessat interpretatio[30]

> **J. Joaquim Barbosa:** *For believing that that was not the constituent legislator's intent, I understand it is up to this Court to search the rich axiological palette informing the entire constitutional framework created in 1988 and check whether the legal disregard some intend to lay on these relationships is compatible with the Constitution. It is then that this Court will be undertaking one of its noblest missions: the one of preventing the smothering, the despise, the plain and hard discrimination of a minority group by the majorities that be.*[31]

Let us examine how symptomatic that is. In Brazil, there are several authors who maintain so-called "progressive" positions and say judges are the channel through which social values invade law. It is intriguing that many such positions – and Brazil is bountiful in that sort of production – speak of post-positivism and even cite Dworkin as the author who has "elevated principles to the status of norm, thereby freeing judges from the constraints of strict legality."

Now, it is generally known that Dworkin devised his thesis exactly to fight the afflictions of Herbert Hart's positivism (who, by the way, can also be considered a normative positivist). The core point in Dworkin's argument is related to the discretionary power Hart bestows upon judges to solve that which he used to call difficult cases. It should be noted that the author, unanimously held as one of the so-called post-positivism leaders, is a stalwart discretion opponent (and, as a necessary corollary, and anti-relativist), despite certain sections in the legal community saying Dworkin is a natural law theorist and his "Judge Hercules" is a subjectivist.[32] As we are going to see, nothing could be more mistaken and unfair.

Therefore, it seems obvious to say that, if someone grounds their theory on Dworkin, they will carry the burden of being discretion opponents,

unless they lower their position to some naive methodological syncretism that remains blind to the existing differences. Incidentally, such syncretism is not hard to find among brazilian jurists, *v.g.* those who advocate weighing in stages and cite, to support their thesis, as astounding as it may seem, no less than Gadamer's hermeneutic circle. I think that is unacceptable. It would be something like placing modern subject in the midst of Aristotle's work. Or yet, "bundling up" Alexy's and Dworkin's positions; or attempting to bridge the gaps in Habermas' theory using Alexy's balancing.

What is, after all the core issue of the discussion? I will try to explain that more thoroughly. In the field of law, at the age of the great Constitutions, no one wants to be a positivist (any longer) (except, of course, for Ferrajoli, Peces-Barba and PrietoSanchis, to name the most important). Everyone sees themselves as post-positivists or non-positivists. In the classroom, conferences and seminars, I often hear criticisms against legal positivism. When someone defends the application of a given legal text, they are soon branded a positivist. Defending the application of some law's "literality", for instance, has become a mortal sin. However, would defending the "law's literality" be a positivist attitude?

Now, positivism is a *scientific* stance that cements itself in a decisive manner in the 19th century. The "positive" to which the tern positivism refers is understood here as being the facts (we should remember that the logical neopositivism was also called "logical empiricism"). Evidently, facts, here, correspond to a given interpretation of reality that encompasses only that which we can count, measure or weigh, or, at the limit, something we can define by means of an experiment.

In the realm of law, such positivist measurability will be found first in the product of the Legislature, that is, in the legislation, more specifically in a certain type of legislation: the Codes. Positivism was an ideological stance built to sustain that which had been made positive by the new historic subject: the revolutionary legislator. Then, positivism means: a theory to ensure the product that, in a discretionary manner, the legislator has set as a way to maintain the power.

That first phase was "legalism." It should be noted that such legalism presents different overtones as we look at that phenomenon from the standpoint of a given legal tradition (for instance, we can refer to: the english positivism, of a utilitarian nature; to french positivism, where a legislation exegesis prevails; and to the german positivism, within which we can see the rise of the so-called conceptual formalism that is at the root of the so-called jurisprudence of concepts).

With respect to the french and german experiences, that can be ascribed to the heavy influence Roman Law had on the formation of their respective private law. Not because of what is usually believed – that the romans "created the written laws" – but instead because of how Roman Law was studied and taught. That which is called exegesis has its origins there: there was a specific text on which the most sophisticated studies about law focused. That text was – in the pre-codification period – the *Corpus Juris Civilis*.

The codification moves along the following path: before the codes, there was a sort of ancillary role attributed to Roman Law. That which could not be solved by Common Law would be solved according to criteria deriving from the authority of studies on Roman Law – by the commentators or glossarists. The codification movement somehow incorporates all the Romanist discussions and ends up "creating" a new element: the Civil Codes (France, 1804, and Germany, 1900).

From then on, the ancillary role of Roman Law disappears completely. All legal arguments are supposed to attribute their merits to the codes, which are given the stature of veritable "sacred texts". That is because they are the positive element with which the Science of Law is supposed to deal. Of course that, even back then, there emerged problems related to the interpretation of such "sacred text".

Somehow we would come to realize that that which is written in the Codes does not cover the reality. But then, how do we control the exercise of interpreting the law so that such work is not "destroyed"? And, at the same time, how do we exclude from the interpretation of law the metaphysical elements that were not well-liked by the positivist way of interpreting reality? At first, the answer will be given based on an analysis of the very codification: the School of Exegesis, in France, and the Jurisprudence of Concepts, in Germany.

I call that first panorama primitive positivism or exegetic (or legalist) positivism. The main feature of that "first moment" of legal positivism, with respect to the problem of interpreting law, will be to perform an analysis which, under the terms proposed by Rudolf Carnap[33], we could call syntactic. In that case, the mere strict determination of the logical connection of the signs that make up the "sacred book" (Code) would be sufficient to solve the problem of interpreting law. Therefore, concepts such as those of analogy and general principles of law must be also seen from that standpoint of building a strict conceptual framework that would represent the – extremely exceptional – hypotheses of case inadequacy to the legislative hypotheses.

Then, there emerge proposals to improve that logical "rigor" of scientific work as proposed by the positivism. That second moment is what we can call *normative positivism*. Here there is a significant change regarding the manner of work and the starting points of the "positive", the "fact". First off, the first decades in the 20th century witnessed the overwhelming growth of the Government's regulatory power – which will intensify in the 1930s and 1940s of the 20th century – and the demise of the syntactical-semantic models of interpreting the codes, which models seemed to be completely unhinged and worn out. Then, the problem of the undetermined meaning of Law emerges front and center.

It is in such environment that, in the first decades of the 20th century, Hans Kelsen enters the scene (and whose major work, the second edition of the Pure Theory of Law, is published in 1960). Surely Kelsen does not mean to destroy the legal positivist tradition that had been built by the *Begriffjurisprudenz* (Jurisprudence of Concepts). On the contrary, we can say that his main goal was to strengthen the analytical method proposed

by the conceptualists so as to respond to the increasing breakdown of the legal rigor that was being disseminated by the growing Jurisprudence of Interests and the School of Free Law – which significantly nourished the use of psychological, political, and ideological arguments in the interpretation of law. That is done by Kelsen based on a radical finding: to him, the problem of interpreting law is much more semantic than syntactic. Therefore, we have here an emphasis on semantics[34].

Nevertheless, at a specific point Kelsen "gives in" to his adversaries: the interpretation of law is riddled with subjectivisms deriving from a solipsist practical reasoning (it should be noted that later on Habermas would devise his theory of communicative action as a way to replace that practical reason). To the Austrian author, such "deviation" is impossible to be corrected. In the famed chapter VIII of his *The Pure Theory of Law*, Kelsen even states that legal norms – understanding norm in the sense of the PTL, which is not equivalent, *stricto sensu*, to the legislation – are applied in the scope of their "semantic frame". It is a procedural view of the application of law.

To Kelsen, the only way to correct that inevitable indetermination of the meaning of law would be to resort to a logical therapy – of the *a priori* kind – that made sure Law moved about on strict logical grounds. That field would be the place of the Legal Theory, or in Kelsenian terms, the Legal Science. And that is directly related to the results of research conducted by the Vienna Circle (the birthplace of logical neopositivism). Without it, it is impossible to understand the complexity of Kelsen's work.

That point is essential for us to be able to understand the positivism which developed in the 20th century and how I conduct my criticisms in this field of the theory of law. More clearly: I am talking about that normative positivism and not about an exegesis that had been giving off signs of exhaustion in the beginning of the last century.

In one word: Kelsen was already done with the exegetical positivism but he abandoned the main problem of Law - the material interpretation at the "application" level. And therein lies the "curse" of his thesis. He was not completely understood, as to this day some mistakenly believe that, to him, judges should carry out a "pure" interpretation of the law...! Definitely: one cannot begin a study of the theory of law believing that exegetic positivism finds in Kelsen an advocate or leader.

Let me be clearer. Since the early 20th century, the philosophy of language and the logical neopositivism of the Vienna had already pointed out to the problem posed by the multiple meanings of words. That leads us to another question:

a) is the so-called "literality of the law" something that is available to the interpreter?

b) given that words are polysemous, given there is no possibility of completely covering the meaning of statements contained in a text, then when is it that we can say we are before a "literal interpretation"?

Therefore, literality is much more an issue of the interpreter's understanding and insertion in the world than a "natural" characteristic, so to speak, of legal texts. In other words, we cannot admit that, still at this

point in history, we should be taken by arguments which remove the contents from a – democratically legitimized – law based on the alleged "outdated" literality of the legal text.

7. CONCLUSION.

When I affirm my position in defense of the "constitutional legality" (or of a right democratically produced by the Legislature, in short, of an "integrity of the legislation", ultimately), I see the idea of exegesis (or exegetism) as outdated, as previously shown. In fact, I mean that in Contemporary Constitutionalism the Legislature's work should be understood no longer in terms of the prevalence of some bourgeois legality but instead as a constitutional legality, to quote ElíasDíaz[35]. In other words, I am referring to the fact that we have leapt from a *lowly legalism* that reduced the core element of Law either to a strict concept of legislation (as in the case of 19th century codes, the basis for primitive positivism) or to an abstract, universalizing concept of norm (which is embedded in the idea of law found in normative positivism), *to a concept of legality that only constitutes itself under the cloak of constitutionality*. After all, we would not be able to, at this point in history, admit an unconstitutional legality. Strictly speaking, legality should be understood as the set of operations by the State that is determined not only by the law but also by the Constitution – once it would be nonsense to affirm a legality that did not express the commendation of a constitutionality – and by the effectiveness of court decisions under the framework of democratic legitimacy. [36]

Hence, I insist: literality and ambiguity are interchangeable concepts which are not clarified in a simply abstract dimension of analyzing the signs that make up a statement. Such issues always take us to a level of depth that carries with it the context from which the statement originated.

That is why when I sometimes affirm the "literality of the law" I am siding with neither an originalist nor an exegetic stance. Well, literality, with or without quotation marks, is much more an issue of the interpreter's understanding and insertion in the world than a "natural" characteristic, so to speak, of legal texts. Besides, there are no texts without contexts. The text does not exist in its "textitude." It merely "is" in its norm. Such norm has limits, though. Many. Why? For the simple reason we cannot attribute any norm to a text or, as something I came up with some time ago which has become a catch phrase, "*we cannot just say anything about anything.*" It is Gadamer who says: if you want to say something about a text, let the text tell you something first[37].

That is the hermeneutical problem we must tackle! Which problem misleading arguments like that only conceal and, more seriously, at the risk of tainting the democratic pact. Regardless of how fair and popular the cause may be. The issue is to know the limits of activist stances. And whether there is in fact the "good activism." And, more than that, the problem is to establish who is going to say what it is – "this good activism?"

>> ENDNOTES

[1] Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628635. Access: February, 12th, 2013.

[2] ADI 4277 was initially filed with the Court as ADPF 178. The action sought a statement recognizing the union of same-sex people as a family entity. It was also requested that the same rights and duties of common-law marriage partners be extended to same-sex partners (BRAZIL. Federal SupremeCourt.AçãoDireta de Inconstitucionalidade No. 4277. Petitioner: General Attorney of the Republic. Requested: the President of the Republic and the National Congress. Rapporteur: Minister Carlos Ayres Britto. Date of Judgment: 05/05/2011. Judgement's Date of Publication: 14/10/2011).

[3] In ADPF no. 132, the state government of Rio de Janeiro (RJ) claimed the failure to recognize same-sex couples violates basic principles such as equality, freedom (from which the autonomy of will derives) and the principle of the human person's dignity, all of them contained in the Federal Constitution. Under that argument, the government asked the STF to apply the legal regime of common-law marriage provided for in article 1723 of the Civil Code to the same-sex relationships of Rio de Janeiro civil servants (BRAZIL. Federal SupremeCourt. Arguição de Descumprimento de Preceito Fundamental No. 132. Petitioner: Governor of the State of Rio de Janeiro. Requested: Courts of Justice and the Legislative Assembly of the State of Rio de Janeiro. Rapporteur: Minister Carlos Ayres Britto. Date of Judgment: 05/05/2011. Judgement's Date of Publication: 14/10/2011).

[4] The common-law marriage between a man and a woman is recognized as a family entity, comprising their public, ongoing, and lasting cohabitation established in order to raise a family.

[5] *Verbis*, from the vote: The Constitution does not bar same-sex people from forming a family. The opinion is settled in that no one is forbidden anything except given someone else's or the entire society's right or legitimate interest protected, which is not the case under judgment (p. 614). Actually, regarding the concrete use of sex in the three aforementioned functions of erotic stimulation, sexual intercourse and biological reproduction, the Brazilian Constitution is intentionally silent. Which is in itself a way of operating by drawing from Kelsen's general negative norm, according to which 'everything that is not legally barred or required, is legally allowed' (p. 634) (...). Plainly speaking: the Federal Constitution does not expressly provide about the three classical forms to concretely use the human sexual apparatus. It does not explicitly refer to people's subjectivity to choose to purely and simply not use their genitals (sexual abstinence or vow of chastity), to use them by oneself (masturbation), or finally, to use them along with a partner. Therefore, the Constitution hands over the empiric performance of such sexual functions to each person's free will, as the normative silence in this case operates as absolute respect for something that, in animals at large and human beings in particular, is defined as instinctive or deriving from the very nature of things. Every natural person's "preference" or "orientation" is embedded in such instinctive way of being (BRAZIL. Federal SupremeCourt. Arguição de Descumprimento de Preceito Fundamental No. 132. Applicant: Governor of the State of Rio de Janeiro. Requested: Courts of Justice and the Legislative Assembly of the State of Rio de Janeiro. Rapporteur: Minister Carlos Ayres Britto. Date of Judgment: 05/05/2011. Judgement's Date of Publication: 14/10/2011: p.634-635).

[6] *Verbis*, from the vote: This type of constitutionalism, i.e. compassionate, is oriented towards people's community integration (not exactly towards "social inclusion"), to be made viable by urgently adopting affirmative public policies for the basic civil-moral equality (more than simply economic-social) of historically underprivileged and even vilified social strata. Social

strata or segments such as, for instance, the blacks, the Indians, women, people with a physical and/or mental disability, and more recently, those who stopped being referred to as "homosexuals" to be identified by the name of "homoaffectionate." That, along with public laws and policies fiercely fighting prejudice, ultimately means fully accepting and subsequently experiencing social-political-cultural pluralism (BRAZIL. Federal SupremeCourt. Arguição de Descumprimento de Preceito Fundamental No. 132. Applicant: Governor of the State of Rio de Janeiro. Requested: Courts of Justice and the Legislative Assembly of the State of Rio de Janeiro. Rapporteur: Minister Carlos Ayres Britto. Date of Judgment: 05/05/2011. Judgement's Date of Publication: 14/10/2011: p. 632).

[7] *Verbis*, from the vote: The caption in art. 226 grants the family, the basis of society, special protection from the State. Constitutional emphasis on raising a family. Family in its colloquial or proverbial meaning as a domestic group, regardless of it having been formally or informally set up, or whether it comprises opposite-sex or same-sex couples. When using the word "family", the 1988 Constitution does not limit its formation to opposite-sex couples or to city hall formalities, civil ceremony, or religious rite. Family as a private institution which, voluntarily constituted between adult persons, maintains a necessary trichotomous relationship with the State and civil society (BRAZIL. Federal SupremeCourt. Arguição de Descumprimento de Preceito Fundamental No. 132. Applicant: Governor of the State of Rio de Janeiro. Requested: Courts of Justice and the Legislative Assembly of the State of Rio de Janeiro. Rapporteur: Minister Carlos Ayres Britto. Date of Judgment: 05/05/2011. Judgement's Date of Publication: 14/10/2011:p. 612-613).

[8] *Verbis*, from the vote: The Constitution's reference to the basic man/woman duality in paragraph 3 of its art. 226 is due to the focused effort to not miss the slightest opportunity to benefit horizontal legal relationships or hierarchy-free ones in the scope of domestic partnerships. Normative reinforcement for more efficiently fighting the Brazilian customs' patriarchal obstinacy (BRAZIL. Federal SupremeCourt. Arguição de Descumprimento de Preceito Fundamental No. 132. Applicant: Governor of the State of Rio de Janeiro. Requested: Courts of Justice and the Legislative Assembly of the State of Rio de Janeiro. Rapporteur: Minister Carlos Ayres Britto. Date of Judgment: 05/05/2011. Judgement's Date of Publication: 14/10/2011: p. 614).

[9] I suggest Tassinari, 2013 as a mandatory reading to learn more about judicial activism, study its origins, the misguided import of the activist model, the limits of jurisdiction, and the necessary distinction between judicialization and activism; also Streck, 2013, especially chapters 5 and 6.

[10] Acc. Wolfe, 1994.

[11] CC, art.1.723: "The common-law marriage between a man and a woman is recognized as a family entity, comprising their public, ongoing, and lasting cohabitation established in order to raise a family."

[12] It should be noted there is a considerable number of Brazilian authors concerned about the problems deriving from that misguided reception of the judicial activism idea in Brazil. In that respect, it is worth mentioning Valle/Vieira, 2009.

[13] BRAZIL. Federal SupremeCourt. Reclamação nº 4335 (AC). Petitioner: Federal Public Defender's Office. Requested: Criminal Execution Judge of Rio Branco's District. Rapporteur: Ministro Gilmar Mendes. Still pending judgement.

[14] Also in that respect and to learn more about the topic, Acc. Streck/Tomaz de Oliveira/Barretto, 2010

[15] Dworkin, 2005.

[16] Acc. Streck, 2011a.

[17] Streck, 2011b.

[18] Acc.Appio, 2009.

[19] Acc. Grey, 1975.

[20] Appio, 2009.

[21] Appio, 2009:299.

[22] Streck, 1995.

[23] The expression *theoretical common sense* comes from Luis Alberto Warat, eminent argentinean professor who unveiled the masks of the "obvious" by showing/denouncing, in the scope of the theory of law, that the "obvious elements, certainties and truths" transmitted by legal dogmatics are no more than rhetoric-ideological constructs. That is not to say that every dogmatic-legal discourse is ideological; but a considerable number is, to the extent in which it is a symbolic venue for de "discursive retaliation", "*ad hoc* justifications" and "neo-sophisms", given that when it is convenient for them, jurists ignores any possibilities for words tp have DNA. One of the subject-matters of his criticism was the production of digests aimed at making things universal. Fundamentally, even today – or more and more still – jurists' production related to that which we can call legal dogmatics keeps following court decisions, in which entire fields of knowledge are eliminated to dispatch people to a highly standardized symbolic sphere instituted and capitalized in favor of the prevailing mode of semiotization. In other words, the doctrine keeps indoctrinating very little. It was against this sort of "hermeneutic runaround" that Warat devised this concept, which is the way through which legal dogmatics equips such issues.

[24] For a proper reading of the principles, see the book by Tomaz de Oliveira, 2008. In this book, the author discusses the issue of principles from the standpoints of hermeneutic philosophy and philosophical hermeneutics, affirming their normative nature and deontological character. About my criticism against pan-principles, see my debate with Luigi Ferrajoli in Ferrajoli, 2012).

[25] I understand discretion according to what we can infer from *lato sensu* positivism, therefore referring to the idea of the power to *choose* the interpreter has when judging a case. I consider discretion the main characteristic of post-exegetic positivism (especially the proposals by Kelsen and Hart). It is obvious that discretion was also present in the legalist (primitive) positivism, to the extent that the legislator had full discretion to prepare the law. In that regard, I make use of the *strong discretion* notion worked on by Dworkin in his *Taking Rights Seriously*, to criticize Herbert Hart's positivism. In *terrae brasilis*, there is boundless expanses where the judges' discretionary power is applied, chiefly from the standpoint of securing greater powers for judges in order to overcome the model of formal-exegetic law; or as a bet on judicial protagonism, in which the judge judges based not on non-legal criteria but on an act of will (I recall Kelsen maintains the judge's act is an act of will), and discretion is therefore understood as a power inherent to the judicial task, in view of the vagueness and ambiguity of normative texts. It is important to say that, based on a theory of decision – grounded on the demand for correct answers in law – I wholly refute the judges' discretionary power.

[26] Kelsen, 2011.

[27] BRAZIL. Federal SupremeCourt. Arguição de Descumprimento de Preceito Fundamental No. 132. Applicant: Governor of the State of Rio de Janeiro. Required: Courts of Justice and the Legislative Assembly of the State of Rio de Janeiro. Rapporteur: Minister Carlos Ayres Britto. Date of Judgment: 05/05/2011. Judgement's Date of Publication: 14/10/2011: p. 755

[28] BRAZIL. Federal SupremeCourt. Arguição de Descumprimento de Preceito Fundamental No. 132. Applicant: Governor of the State of Rio de Janeiro. Required: Courts of Justice and the Legislative Assembly of the State of Rio de Janeiro. Rapporteur: Minister Carlos Ayres Britto. Date of Judgment: 05/05/2011. Judgement'sDate of Publication: 14/10/2011: p. 680

[29] BRAZIL. Federal SupremeCourt. Arguição de Descumprimento de Preceito Fundamental No.

132. Applicant: Governor of the State of Rio de Janeiro. Required: Courts of Justice and the Legislative Assembly of the State of Rio de Janeiro. Rapporteur: Minister Carlos Ayres Britto. Date of Judgment: 05/05/2011. Judgement'sDate of Publication: 14/10/2011: p. 681

[30] BRAZIL. Federal SupremeCourt. Arguição de Descumprimento de Preceito Fundamental No. 132. Applicant: Governor of the State of Rio de Janeiro. Required: Courts of Justice and the Legislative Assembly of the State of Rio de Janeiro. Rapporteur: Minister Carlos Ayres Britto. Date of Judgment: 05/05/2011. Judgement's Date of Publication: 14/10/2011: p.712

[31] BRAZIL. Federal SupremeCourt. Arguição de Descumprimento de Preceito Fundamental No. 132. Applicant: Governor of the State of Rio de Janeiro. Required: Courts of Justice and the Legislative Assembly of the State of Rio de Janeiro. Rapporteur: Minister Carlos Ayres Britto. Date of Judgment: 05/05/2011. Judgement'sDate of Publication: 14/10/2011: p. 724

[32] Upon reviewing the literature dealing with authors like Dworkin in Brazil, I believe the best books have been authored by Motta, 2012 and Meyer, 2008. Meyer – who was advised by Marcelo Cattoni, another legal philosopher specializing in Dworkin and Habermas –, like Motta, puts "things" in their rightful places. Additionally, they both demystify the misguided readings about Dworkin and deliver sharp criticism against Alexy.See Cattoni de Oliveira, 2007.

[33] Carnap, 1971.

[34] For us to fully understand this issue, I must insist on a point: there is a split in Kelsen between law and the science of law, which will crucially determine his concept of interpretation.

[35] Díaz, 1995.

[36] Acc. Díaz, Elías (1995). "Estado de Derecho y Derechos Humanos". *Novos Estudos Jurídicos*, Itajaí, Year1, no. 1, Jun, p. 16.

[37] Gadamer, 1998.

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