The Brazilian Supreme Court and its 'judicial activism': a serious concern

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Introduction

As a Latin country, Brazil inherited from Portugal a legal system based on Roman-Germanic law, which demands the existence of formal laws to impose obligations on the one hand and rights on the other, and limits the role of the jurisprudence. However, when courts apply legal rules to a specific situation, judges must often interpret the law, even where it is clear, using certain criteria (eg, by considering the meaning of words and verbs, as well as sociological, historical or evolutionary and systematic factors).

Such action by judges is necessitated by the fact that when a law is conceived, it is done so at a certain point in time and location, and in line with a certain set of societal values. However, over time that society's values and customs may change. As a result, enforcement of the terms of a law written many decades ago may lead to an unfair result if it is evaluated in the present day - the words and verbs must be reinterpreted based on the same principles that nourish the system, changing the jurisprudence and the reach of certain bills.

Although the Anglo-Saxon system contains laws in the same way as the Roman-Germanic system, the former also includes the so-called *stare decisis* principle, by which lower courts are bound by the decision of a higher court, thereby enhancing the importance and the power of the jurisprudence. Furthermore, the understanding of the law given by a prior decision has the power to bind future judgments involving similar situations.

In certain ways, this is reminiscent of the old Roman *ordo iudiciorum privatorum et publicorum* system (ie, that of public and private courts), in which Roman citizens presented themselves to the magistrate to whom the emperor had delegated power, asking him for a solution to solve a conflict. The magistrate would then declare which law should be applied to the case at hand (*ius dicere*), by literally setting it in stone. The parties would then present themselves to the judge, who would decide the case by applying the law declared by the magistrate. This appears to be the origin of the expression "judge-made law".

In any system, when a court interprets the law created by the legislature, it should clearly not be allowed to surpass its limits; ultimately, the

court cannot write new rules. The same applies to public state policies - the court, by deciding cases, cannot take the place of the executive power and government agencies. If this were the case, it would lead to the undermining of Montesquieu's classic tripartite system for the division of power (ie, legislature, executive and judiciary), which has been adopted in the constitutions of many democratic countries. This would effectively result in the creation of a superpower and run the risk of a judicial dictatorship being formed.

Supreme Court activism

Even though these arguments are irrefutable, the Supreme Court has faced a number of situations in which their logic has been brought into question. Some cases resulted from inefficiencies in legislative power and unnecessary delays in the creation of laws demanded by the 1988 Constitution. In other cases, the court encroached on the public state policies arena. In all circumstances, the court based its decisions on ensuring constitutional rights are upheld.

The Supreme Court is not only a constitutional court; as well as defence of the Constitution and its effectiveness via constitutional actions and exceptional appeals, the court's remit also includes judgment in concrete cases involving a writ of *habeas corpus* or an injunction order against the immediate lower tribunal, the Superior Court of Justice. It also judges criminal cases where the defendants are public servants (eg, congressmen or ministers).

The way in which the Supreme Court has taken the law into its own hands in such matters can be demonstrated by four recent cases.

a) *Petition 3.388-4 - Indians territories*

On March 19 2009 the Supreme Court confirmed ex-President Lula's decision to grant 19,000 Indians of five ethnicities the right to live in 1.7 million hectares of land in Amazonia, expelling thousands of farmers that had occupied this land for decades, albeit illegally (under the Constitution belongs to the federal union). This huge piece of land was once a boundary of the Brazilian territory between Venezuela and French Guiana. In an attempt to avoid creating an "independent new Indian State", the Supreme Court (through Justice Menezes Direito) imposed 19 conditions regarding how the land should be divided among the Indians, thereby involving itself directly in a public policy matter.

b) ***ADI 4277 and ADPF 132 - Homosexual marriage***

Although Article 1.723 of the 2002 Civil Code is explicit and clear that "it is recognized as a family entity the stable union between man and woman", on May 5 2011 the Supreme Court granted homosexual couples the right also to constitute a legal family entity.

Arguing that the congressmen had failed to attend to claims from representatives of such couples during the creation of the 2002 Civil Code, and following their recent demands to have the law changed, nine years later the Supreme Court "altered the civil law".

c) ***ADPF 186 - Quotes for afro-descendants in public Universities***

On April 25 2012 the Supreme Court ruled unanimously that a resolution introduced by the University of Brasília which granted that 20% of newly enrolled students must be African descendants was in accordance with the Constitution. A political party had contested the resolution, stating that such "affirmative public policy" was unfair to other Brazilians (eg, Indians and poor white people) who, while not of African descent, faced a similar situation - they also had not been granted the means to study and compete with other students in order to get a place in the public university.

However, the court ruled that the resolution did not offend the principle that everyone is equal before the law and that the merit of each depends on individual effort. Despite the justices recognising that such an affirmative policy of social inclusiveness was not ideal and should be temporary, and that governments should grant the means for a good basic education for all, the court understood that such a policy, where adopted by different states, was valid in order to correct social unfairness. However, one Indian at the court during the decision protested (with reason): Why only African descendants?

d) ***ADPF 54 - Anencephaly and abortion***

On April 12 2012 the Supreme Court decided a controversial constitutional action promoted by the National Confederation of

Health Workers, claiming that women should be granted the right to terminate pregnancy when anencephaly of the foetus has been confirmed. The justices ruled, by tiny majority, that in such cases termination of the pregnancy should not be considered abortion, as a newborn baby without a brain has zero chance of long-term survival and is likely to die immediately.

Another justice argued that such cases did constitute abortion, but that termination should be permitted in order to preserve the psychological health of the mother, who would suffer deeply day after day in the knowledge that the baby growing in her womb could never survive.

Stressing that this type of abortion has been authorised by more than the half of the United Nations countries for some years, the decision was taken to restrict the incidence of the Article 128 of the Penal Code. The court agreed with the National Confederation of Health Workers' assertion that the legislature had failed to change the Penal Code for some decades. Furthermore, when the code was created, there was no technology available to confirm that a foetus was suffering from anencephaly, which is an exceptional situation.

In Brazil, abortion is considered a crime against life and is permitted in two specific situations only: rape or danger to the woman's life. For decades the legislature has adopted a pro-life policy, understanding that human life must be protected once pregnancy has been confirmed, since the Constitution protects human life, and the Civil Code grants rights to the foetus (Article 2) in several circumstances. For example, if the baby's father dies before the birth, he or she will be considered an heir under Article 1798. The foetus can also receive donations (Article 542), which will be received by a legal guarantor.

On the other hand, pro-choice activists have advocated that women should own the right to their own bodies, until at least the 12th week of pregnancy, even though this may result in the extermination of a human being. They also claim that the prohibition causes the death of thousands of poor women who, once excluded from the public health system, practice hidden abortions, whereas rich women can have the procedure carried out safely in private clinics or travel to countries in which it is permitted.

In the United States, a bill was recently passed in Texas that sets out strict demands before abortion can be granted, including making the mother hear the foetal heartbeat before deciding, giving rise to much debate.

e) *"Súmula vinculante 24" - Tax fraud crime*

Regarding tax fraud, another decision was recently issued in which the Supreme Court arguably went too far in its constitutional task of applying the law to a concrete case, literally undermining an express article of the Penal Code and acting beyond its constitutional limits.

It is a basic penal concept that a material crime is considered perpetrated at the moment at which the result wished for by the criminal becomes concrete. If his or her action is interrupted by any external circumstance, or the desired result is not achieved due to a situation outwith his or her control, it will be considered an attempted crime (Article 14(II) of the Penal Code) and the penalty will be reduced accordingly.

However, for crimes of tax fraud, Articles 1º(I) to (IV) of Law 8.137/90 detail a different situation. It cannot be proven that a tax crime has been committed unless the tax authorities effectively agree so. In other words, if the tax assessment is undergoing administrative questioning, no criminal action can be enforced before a definitive conclusion has been issued by the fiscal authorities.

Therefore, where a person is fraudulent and fails to pay taxes due in January 2010, the criminal prosecutor can bring charges only after the tax assessment has been defined by the administration. If such administrative questioning takes eight or ten years to be decided, the public prosecutor would not be able to bring charges until 2018 or 2020, despite the tax fraud being perpetrated in January 2010. However, when attempting to bring charges in 2018 or 2020, the public prosecutor may face another obstacle: the statute of limitation rule.

In an attempt to solve this problem, the Supreme Court recently issued a mandatory decision that must be observed by inferior courts (*Súmula Vinculante 24*). However, this decision is contrary to Article 14 of the Penal Code and creates a nonsensical situation. The court stated that a material crime, as defined under Articles 1º(I) to (IV) of Law 8.137/90, "is not perpetrated .... before the definitive tax assessment [by the authorities]".

In other words, the Supreme Court illegally postponed the moment at which a crime is committed. Furthermore, the court conditioned the calculation of this moment on the diligence and rapidness of a third party. If the tax authority is quick to conclude its questioning of the contributor in relation to the tax assessment for taxes due in January 2010, the crime will be deemed to have been committed on one date; however, if the tax authority takes 10 years to decide, the crime will be deemed to have been committed a decade later, in January 2020. This would be the case even if the contributor has already died.

Through the *Sumula Vinculante 24* decision, the justices of the Supreme Court appear to have acted illegally by taking on the role of the legislature.

Conclusion

These five examples provide a picture of the Brazilian Supreme Court proactiveness. From one perspective, such actions can be seen as a legitimate answer by the judiciary power, which must always answer any conflict submitted to it and fulfil its constitutional duty to grant a definitive solution. Therefore, when no specific law applies to a case (and it is impossible for the legislature to foresee every circumstance), the courts must ultimately consider the most important value - human dignity - which demands that equality, mutual respect of each person's rights, a safe and healthy environment, consistency in human relations and continuous enhancing of freedoms and individuality be maintained. A balance must be found that grants everyone the same possibilities to conquer achievements through their own effort and merit.

This complex task is not easy and can be achieved only with a free press, the free flow of information, transparency and, above all, access to a judicial system that committed to all these values.

However, from another angle, such actions can be seen as setting a dangerous precedent that may endanger the delicate balance of federal powers - since the adoption of public policies relates to the executive and the creation of law, imposing duties on the one hand and granting rights on the other, is a task for the legislature. The proactiveness of the Brazilian Supreme Court raises great concerns specially in the criminal area in which freedom is in question. We know how does it start and we do not know where it could end.