THE BACKLASH EFFECT OF LEGISLATIVE POWER AS A RESPONSE TO JUDICIAL ACTIVISM: PARADIGM SITUATIONS IN BRAZILIAN LAW

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Abstract: The objective of this paper is to analyze the reaction of the political system to the positions of the Judiciary, notably those of a guarantor nature, with regard to fundamental rights and guarantees (backlash effect). Based on the conceptualization of the backlash effect, one wonders, primarily, whether this type of legislative reaction occurs in Brazil. From this, through the contextualization of the institute and examination of concrete situations, the legality and legitimacy of such reactive behaviors is investigated. The work is constructed by the narrative-descriptive methodology, developed through doctrinal works, articles, legislation, and, mainly, the mentioned jurisprudential cases.

Keywords: *Backlash* effect; Checks and balances; Vaquejada; Constitutional Amendment n. 96/2017; Fundamental clauses.

1 Introduction

The rise of post-positivism and neo-constitutionalism brought consequences inherent in the contemporary domestic legal system. After re-reading the legal principles and the search for justice beyond strict legality, there is a greater incidence of understandings, such as the recognition of the normative force of the Constitution and the cogent force of the principles, as well as phenomena such as the expansion of constitutional jurisdiction and judicial activism. In this senses, the backlash effect, specifically concerning the reaction of the legislative branch to the decisions of the judiciary, is not a recent phenomenon, having been verified a relevant incidence in the United States of America.

It is known that, by the system of checks and balances, it is natural and even salutary that the branches (or functions), in what is necessary and compatible, act towards the cessation of possible excesses of others, avoiding abuses and ensuring harmony between these spheres. However, the aim is to verify whether this type of reaction summarizes the legitimate use of this system of reciprocal limitation between branches or whether there is improper entry into other attributions, with possible unconstitutionality of this resulting action. Thus, this article aims to answer the following questions: does the backlash effect, in its political nature (reaction of the Legislative Branch) exists in Brazil? If so, has it proved legitimate?

The study is divided into three parts. The first is dedicated to the conceptualization of the institute, with its analysis and temporal evolution; the second will analyze the (i) legitimacy of this form of action, in light of the separation of branches, in diverse situations and by equally

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different forms of the legislative process. To this end paradigmatic judgments are analyzed in domestic law (with the corresponding legislative reaction): Argument of Non-Compliance with Fundamental Precept nº 54 (non-criminalization of therapeutic anticipation of childbirth, in case of fetus anencephaly), direct action of unconstitutionality nº 4277 and ADPF nº 132 (recognition of the constitutionality of homoaffective unions) and, notably, the ADI nº 4983 (*vaquejada* case). Finally, the third part analyzes paradigm situations of the backlash effect in Brazilian law, especially the so-called "vaquejada case", as well as the constitutionality of said reaction.

2 Milestones of contemporary constitutional law: the rise of judicial activism

For Barroso (2005, p. 02), contemporary constitutional law, in its trajectory traveled in Europe and Brazil, has considered three fundamental milestones (historical, theoretical, and philosophical). These milestones implied paradigm shifts and created “a new perception of the Constitution and its role in legal interpretation in general”.

The historical milestone, in what is relevant for the present study, considers its origin in the - post-war - world and in Brazil – Constitution of the Republic of 1988 and redemocratization process. The lack of immediate applicability of constitutional norms brought especially serious consequences in the period before the 2nd World War, and the current constitutional texts were unable to prevent the rise of dictatorial regimes, such as the fascist and nazi.

By way of example: although commendable[2], the Weimar Constitution was read as a norm of little effectiveness. Its articles were not considered to be of immediate application "and the lack of direct judicial protection of these rights led to the erosion of the democratic substrate of the Weimar Constitution, giving way to the establishment of the totalitarian regime of 1933". The 1949 Bonn Fundamental Law reacted against these flaws, seeking to effect its immediate effectiveness and normative force (MENDES; BRANCO, 2018, p. 225).[3]

In the Magisterium of Barroso (2005, p.04-05), as a philosophical framework of the new constitutional law, post-positivism is situated in the convergence between jusnaturalism and legal positivism. The aim is to replace pure models with a "diffuse and comprehensive set of ideas".

This milestone seeks to overcome the pure and simple positive law, without, however, disregarding the principle of legality. He also argues that the application of the law is carried out

[2] It was considered one of the most advanced in the world, being one of the first to expressly provide rights of **economic and social order** and on **family, education, and culture** (SILVA, 2014, p. 84, our translation).

[3] On the subject, Vieira also teaches (2018, p. 95, our translation): “There is, however, a set of clauses of our Constitution that, although they accept to be amended by this reasonably flexible course, cannot have their content abolished. [...] This idea of entrenching certain constitutional devices, although old, gained new dimension after the realization that Hitler was eroding the 1919 Weimar Constitution, using his own amendment procedures, which did not limit even changing its fundamental clauses.

on the basis of a theory of justice, without giving basis to casuisms, especially by the Judiciary Branch.

Post-positivism involves not only law but also sociology and politics, beginning to reconsider the importance of morality for the legal system; it is a multidisciplinary movement of the reunion of law with morality[4], without resorting to metaphysical categories (BARROSO, 2005, p. 05). Also according to the author, a rapprochement between law and philosophy is promoted.

Emerging in the post-war period on European soil, neo-constitutionalism seeks to bring the Constitution – and its normative force – to the center of society, prevailing over its effective supremacy.[5] The author also outlines that, as a theoretical framework, it is based on three pillars: the recognition of the normative force of the Constitution, the expansion of constitutional jurisdiction, and the development of a new dogmatic of its interpretation.

Mendes and Branco (2018, p. 80, our translation) thus conceptualize this theoretical movement:

> Currently it is possible to consider a time of constitutionalism characterized by overcoming the supremacy of Parliament. The current moment is framed by the superiority of the Constitution, to which all the powers constituted by it are subordinated, guaranteed by jurisdictional mechanisms of control of constitutionality. The Constitution, moreover, is characterized by the absorption of moral and political values (a phenomenon sometimes referred to as the materialization of the Constitution) above all in a system of self-enforcing fundamental rights. All this without prejudice to continuing to affirm the idea that power derives from the people, which is ordinarily manifested by its representatives. To this set of factors, several authors, especially in Spain and Latin America, give the name of neo-constitutionalism.[6]

The expansion of constitutional jurisdiction, mentioned above also implied the rise of judicial activism, a phenomenon initiated in the US Supreme Court (BARROSO, 2005, p. 39) and increasingly seen in judicial decisions of Brazilian courts.

It is known that the matter is the subject of several controversies. How to reconcile judicial activism with the checks and balances system? Would not excess in the exercise of jurisdiction actually violate the logic of the separation of "branches" (functions) of the State?

It will be analyzed in conjunction with judicial activism over which the backlash effect

[4] "Post-positivism aims to be a general theory of law applicable to all legal systems, whose distinctive aspect consists in the defense of a necessary connection between law and morality" (FERNANDES, 2017, p. 59, our translation).

[5] Constitutions, as theorized in their early days (notably the United States and France), were, in fact, seen as an expression of the will of the people. However, this thought was replaced by the concept of the Constitution as a pact between a sovereign monarch and the other classes, albeit with some limitations to the former. Thus, through this document, the branches were distributed among social classes but under the control of the King. With the advance of capitalism and class conflict in the beginning of the twentieth century, ideals such as Constitution and justice were losing their original meaning, serving only as an instrument of formalization of what was established by the sovereign. In other words, the Constitution came to be seen – and effectively was – a formal document, without great capacities of interference in reality (VIEIRA, 2018, p. 85-86, our translation).

[6] Fernandes (p. 54, our translation), however, notes that neo-constitutionalist perspectives would not be unison, and that there would be "neo-constitutionalisms" and not just "a neo-constitutionalism".

hovers.

3 Backlash effect: Concept and evolution

The dictionary of *Cambridge* defines *backlash* as follows: *a strong feeling among a group of people in reaction to a change or recent events in society or politics* (BACKLASH, 2020).[7] The backlash effect, as explained by Marmelstein (2016, p. 07), under analysis from a legal perspective, relates to the social or political reaction to a certain ideological line of judicial activism.

Thus, as a reaction to judicial decisions, the backlash effect is thus explained by the author (2015, our translation):

> (1) In a matter that divides public opinion, the Judiciary makes a liberal decision, assuming a leading position in the defence of fundamental rights. (2) Since social consciousness is not yet well consolidated, the judicial decision is bombarded with inflammatory conservative speeches, full of fallacies with strong emotional appeal. (3) The massive and politically orchestrated criticism of the judicial decision brings about a change in public opinion, capable of influencing the electoral choices of a large portion of the population. (4) Thus, candidates who adhere to conservative discourse tend to gain greater political space, often being champions of votes. (5) By winning elections and taking control of political power, the conservative group can pass laws and other measures that correspond to his/her worldview. (6) As political power also influences the composition of the Judiciary since the members of the governing bodies are politically appointed, a space opens for the change of understanding within the judiciary itself. (7) In the end, there may be a legal setback capable of creating a regulatory situation even worse than that which existed before the judicial decision, damaging the groups that would supposedly benefit from that decision.

Historically, the word has been used to designate a reaction of public opinion to controversial political situations. It was also understood as a - contrary - response to the fight for civil rights. Therefore, any claim that could go against the *status quo* would normally be amenable to conservative reaction – in this respect, the backlash effect. In this sense, Fonteles (2019, p. 25, our translation) explains:

> Over time, around the middle of the twentieth century, the word approached its meaning used in the fields of Constitutional Law, being understood as a reaction of public opinion to political controversies. In this context closer to the current, the term *backlash* was historically perceived as a reaction to civil rights struggles, such as the fundamental rights of black Americans (‘*white backlash’*) and women (*backlash* as a reaction to feminism).

However, the author points out (p. 27) that this expression has been the subject of evolution, and that, at present, it is not limited to conservative reactions of judicial decisions:

> Backlash is not limited to conservative reactions because, contrary to the

[7] "A strong feeling among a group of people in reaction to a change or recent events in society or politics", in free translation.

> definition provided above by Post and Siegel, it will not always arise against a decision that threatens the status quo. In theory, although this is relatively unusual, it is possible to form a non-conservative backlash, an opinion shared by authors such as Kleilein and Petkova13, for whom the 'progressive' backlash would be hope for those who resist against the Donald Trump Administration (USA) or against extreme right-wing political parties in Europe.

It is possible that the reaction is of a progressive nature, as a response to the so-called "conservative" decision. The history of American constitutionalism has demonstrated this[8]. However, Brazilian law has indicated that, in practice, the backlash effect has emerged as a response of a conservative portion of society and the Legislative Branch to so-called "progressive" decisions by the Courts.

It is known that neo-constitutionalism has been the protagonist of the so-called *process of constitutionalization of the law*.[9] As already highlighted, the rise of this post-war phenomenon has implied the increase of judicial activism and, in this context, it is also known that the Judiciary Branch has increasingly exercised a counter-majority role, notably in the control of constitutionality (SOUZA NETO; SARMENTO, 2012, p. 21-22). Thus, controversial decisions, subject to public criticism, are also subject to reactions from Parliament in the opposite sense – often serving as an electoral platform for conservative candidates who stand contrary on such matters subject to trial in the national courts.

4 Legitimate performance as a checks and balances system?

It could also be considered that the legislative action under consideration would be nothing more than a legitimate form of limiting state functions (in this case, the Judiciary Branch) by the state itself (to be done by the Legislative Branch), through the checks and balances system).

Theorized by Baron de Montesquieu, Charles-Louis de Secondat (1996, p. 167), the checks and balances system has an intrinsic relationship with the current separation of functions

[8] "The history of American constitutionalism also provides a great illustration of 'progressive' backlash, like the reactions to the *Bowers v. Hardwick* case (1986), when the U.S. Supreme Court refrained from pronouncing the unconstitutionality of a law criminalizing sodomy, igniting an avalanche of protests. [...] Invoking the constitutional right to privacy since it was surprised in the intimacy of his home, the accused postulated the invalidation of the state law that criminalized homosexual practices. However, the Supreme Court refused to do so, positioning the symbolic understanding of *apartheid* between heterosexuals and homosexuals. The North American LGBT faction reacted to the trial with anger, demonstrating that the backlash is not always an attempt to conserve the *status quo*, that attacks a transformative or subversive decision. The narrated case demonstrates that the backlash can also represent an attempt to change the *status quo*, reacting against a decision aimed at its maintenance" (FONTELES, 2019, p. 28, our translation).

[9] "In summary: neo-constitutionalism or new constitutional law, in the sense developed here, identifies a broad set of transformations that occurred in the State and constitutional law, among which can be noted, (i) as a historical landmark, the formation of the Constitutional State of Law, whose consolidation took place over the final decades of the twentieth century; (ii) as a philosophical landmark, post-positivism, with the centrality of the fundamental rights and the rapprochment between law and ethics; and (iii) as a theoretical landmark, the set of changes that include the normative force of the Constitution, the expansion of constitutional jurisdiction, and the development of a new dogmatic of constitutional interpretation. From this set of phenomena resulted an extensive and profound process of constitutionalization of Law" (BARROSO, 2005, p. 11-12, our translation).

("branches") of the State. When addressing the political freedom of the citizen, in its relationship with the Constitution, this is how the thinker disposes on the subject (1996, p. 168, our translation):

> Political freedom, in a citizen, is this peace of mind that comes from the opinion that each one has regarding their security. To obtain this freedom, it is necessary that the government be such that a citizen cannot fear another citizen.
> There is no freedom when the Legislative Branch is reunited with the Executive in the same person or body of magistracy because it can be feared that the same monarch or even the Senate will make tyrannical laws to execute them tyrannically.
> Nor is there freedom if the power to judge is not separate from the legislative and executive. If it were the responsibility of the legislative branch, the power over the life and freedom of citizens would be arbitrary, for the judge would be the legislator. If it were united with the Executive Branch, the judge could have the strength of an oppressor.
> All would be lost if the same man, or the same body of principals, or of nobles, or of the people exercised the three branches: that of making the laws, that of executing the public resolutions, and that of judging the crimes or the demands of individuals.

As already raised in topic 2 of this essay, it is necessary to reconcile this checks and balances system and separation of functions of the State with judicial activism, avoiding excesses of action and improper entry into the sphere of competence of the Legislative and Executive Branches.

For Moraes (2016, p. 1,196-1,197, our translation), it is necessary to have common sense and balance between the issues so that the Judiciary Branch does not omit itself but avoids the excess of subjectivism and develops "self-restraint techniques":

> The common sense between 'judicial passivity' and 'judicial pragmatism', between the 'respect to the traditional formulation of the rules of the checks and balances in the Separation of Branches' and 'the need to ensure that the constitutional requirements for maximum effectiveness' must guide the Judicial Branch, and, in particular, the Federal Supreme Court regarding the application of judicial activism, with the presentation of a clear and substantiated interpretative methodology, so as to provide a framework for the excessive subjectivism, allowing for a critical analysis of the choice made, with the development of judicial self-restraint techniques, removing its application to strictly political issues, and basically, with the minimalist use of this decision-making method, that is, interfering solely in an activist way in face of the severity of cases placed and in the defense of the supremacy of Fundamental Rights.

Thus, being the checks and balances a form of surveillance and reciprocal limitation between state functions, it is reiterated that: would this *side effect of judicial decisions* merely not be the (legitimate) fruit of that system? Wouldn't it be just a constitutionally appropriate means of avoiding these excesses in judicial activism?

The reasoning to answer the question can be divided into four distinct situations:

a) decision declaring the unconstitutionality of a normative act, with the consequent

edition of the norm identical to the previous one;

b) decision declaring the unconstitutionality of normative act and subsequent edition of constitutional amendment in matter not protected by fundamental clauses;

c) decision declaring the unconstitutionality of normative act followed by edition of constitutional amendment in a matter protected by fundamental clauses;

d) decision on sensitive matters, subject to the backlash effect, taken on the grounds of absence of legal provision, with subsequent edition of a standard on the matter.

First, the constitutionality of the new legislation must be examined. Thus, if the decision subject to the backlash effect considered the unconstitutionality of a particular law or interpretation, one cannot understand that the contrary reaction of the Legislative Branch, in the edition of a norm equivalent to the previous one, will not lack legitimacy.

It is known that even decisions issued by the Federal Supreme Court in concentrated control of constitutionality do not bind the Legislative Branch in its typical (legislating) functions. Thus, it is technically possible to draw up a law in the same sense as that already considered by the STF as violating the Constitution. On the other hand, from the perspective of legitimacy, this procedure is quite questionable, since, in the end, the manifestation of the Judiciary Branch also carried out in its typical function is being ignored.

However, a different situation occurs in the case of the so-called constitutional amendment overcoming interpretation. In this situation, in response to the declaration of unconstitutionality of a norm, the Legislative Branch amends the Constitution.

On the subject, Barroso observes that (2012, p. 25, our translation):

> Except in relation to matters protected by fundamental clauses, the last word concerning what the positive constitutional right should be at any given time is of the National Congress, in the exercise of its derived constituent power. If the Legislative Branch disagrees wih the intelligence given by the Federal Supreme Court to a constitutional norm, it can always amend it, provided it can fill the quorum of three-fifths of the members of each house, observing the other requirements of the legislative process (CF, article 60 and paragraphs). There are precedents, both in comparative law and in the Brazilian experience, in which amendments were approved to alter interpretations established by the Supreme Court.

There are no impediments that a norm that violates the Constitution becomes, by itself, authorized, in a subsequent amendment[10]. However, even in these cases, as the author notes, it is necessary to observe the materials protected by the fundamental clause[11]. In this sense, Mendes and Branco teach (2018, p. 595, our translation):

> [...] It is, therefore, clear that legislative intervention is not only inevitable but also necessary. However, any legislative intervention that may affect effective judicial protection should be prohibited. It is the essential core of

[10] observing, of course, the absence of supervenient constitutionality. Thus, only a law sanctioned after the creation of said amendment could be considered constitutional.

[11] It is known that the Brazilian constitutional system accepts the control of constitutionality of constitutional amendments. In this sense, the STF, in ADI nº 2,362, decided that, "norms produced by the reform power have their validity and effectiveness conditioned on the legitimacy they receive from the constitutional order. Hence the necessary obedience of the constitutional amendments to the so-called fundamental clauses".

> the fundamental right to judicial protection that must be respected by supervenient legislative production, under penalty of unconstitutionality of the subsequent rule.

If there is no violation of these matters, the amendment of the constitutional text is part of the democratic game, and there is no need to consider, at least in theory, illegitimacy of the legislative action.

It is currently peaceful to understand that the judiciary does not have a monopoly on constitutional interpretation. Their decisions, although they enjoy the character of the definitiveness for the concrete case, do not imply fixing the normative interpretation – not even for the Judiciary – nor for the Legislative, of course. On the subject, Carvalho and Murad highlight that (2017, p. 32, our translation):

> The idea of institutional dialogues emphasizes that the judiciary will not have a monopoly on constitutional interpretation. Therefore, there are constitutional decisions that must be produced by a process of elaboration shared between the judiciary and other constitutional actors. The theories of dialogue offer an alternative form to fill the democratic legitimacy gap, overcoming the counter-majority difficulty of the judiciary. For this reason, this theory has been gaining space, especially concerning the discussion of democratic legitimacy associated with the judicial review.
> Thus, constitutionalist democracy proposes a overcoming of the extreme attributions between what would be the role of the Judiciary and the role of the Legislative Branches, insularly considered, to, finally, and considering the popular expression of interpretations on the Constitution, bring benefits for richer and more effective dialogues.
> The issue of counter-majority difficulty, as well as the last word by the Judiciary Branch produces an institutional myopia, blurring the true point of interest. It would not be the tension between the branches, nor the answer of what would be reserve of justice or power dispute, but that any 'last word' is always provisional (MENDES, 2011).
> The theories of dialogue present a new form of viewing judicial review and the legislative process, producing important impact by arguing that the Court's decision is not, and does not have to be, the end of the line.

Finally, in cases where a controversial decision, subject to the backlash effect, is taken by the grounds of lack of legal provision, the reasoning is similar to the previous one: the issuance of a regulatory norm, at least in an initial analysis, would be part of the democratic game; it would, however, be necessary to analyze the norm in the light of the Constitution, considering it to be an infraconstitutional norm, unlike the situation of the constitutional amendment exceeding interpretation. Reservations must be made, however, about this procedure, which is usually a limitation of rights – because it is responsive to a progressive decision of the Judiciary Branch – in a way that is rarely reasonable, as will be discussed in the following topic.

5 Paradigmatic cases in Brazilian law

As a result of the controversy, the decisions regarding the non-criminalization of therapeutic anticipation of childbirth in case of fetus anencephaly (Argument of Non-Compliance with Fundamental Precept - ADPF - nº 54), as well as the recognition of the constitutionality of homoaffective unions (Direct Action of Unconstitutionality – ADI – nº 4277 and ADPF nº 132) have been the object of the backlash. On the subject, Marmelstein (2016, p. 11, our translation) well elucidated that:

> In Brazil, the presence of the backlash effect is also notorious, fruit of the political reaction to the increase of judicial protagonism in recent decades. The political rise of conservative groups is noticeable, and there is a risk of backsliding on certain issues. Attempts are made in each controversial case faced by the Federal Supreme Court, in the political way, to approve legislative measures contrary to the judicial position.
> Thus, the recognition of the legal validity of homoaffective unions by the Supreme Court, for example, has generated, in the political way, the growth of voices favorable to the so-called Family Statute, which seeks to exclude homoaffective relations from state protection.
> Likewise, the decision of the Supreme Federal Court not to criminalize the therapeutic anticipation of childbirth in case of fetus anencephaly, as well as the favorable decision to conduct scientific research with embryonic stem cells, provoked the political strengthening of more conservative groups, favorable to the so-called Statute of the Unborn Child, whose main objective is to absolutely prohibit abortion and research with stem cells.

As it turns out, decisions of progressive nature made by the Federal Supreme Court have constantly had reactions from the conservative wing of the Legislative Branch. Proposals diametrically opposed to the grounds raised in the above decisions are raised by parliamentarians through the so-called Family Statute and the Statute of the Unborn Child. Regarding the latest legislative proposal, under pressure from the religious bench, it also opposes the decision on the constitutionality of the use, for scientific research purposes, of embryonic stem cells; another example of the backlash effect in Brazilian law.

The clearest case of direct legislative reaction to a court decision (certainly, the most commented in recent years), possibly occurred in the so-called 'vaquejada' case.

A common practice in northeastern Brazilian states, the "vaquejada" was constantly criticized by Animal Protection Associations because it would entail excessive suffering to animals, which would often have sequelae arising from the activity.

However, despite the aforementioned criticisms, the state of Ceará sanctioned Law nº 15,299/2013, regulating the *vaquejada* in its federative sphere *as a sports and cultural activity*:

> Art. 1. Vaquejada is regulated as a sporting and cultural activity in the state of Ceará.
>
> Art. 2. For the purposes of this Law, any event of a competitive nature, in which a pair of cowboys on horseback pursues bovine animal, aiming to dominate it, is considered 'vaquejada'.

> Paragraph 1. The competitors, called cowboys or vaquejada cowboys, are judged in the competition by dexterity and skill in animal domination.
>
> Paragraph 2. The competition must be held in an appropriate physical space, with dimensions and format that provide safety for the cowboys, animals, and the general public.
>
> Paragraph 3. The track where the competition takes place must, compulsorily, remain isolated by enclosures, not barbed, containing warning signs and signs informing the appropriate places for accommodation of the public.
>
> Art. 3. The 'vaquejada' can be organized in amateur and professional modalities, upon registration of the cowboys in a tournament sponsored by a public or private entity.
>
> Art. 4. The organizers of the 'vaquejada' are obliged to adopt measures to protect the health and physical integrity of the public, cowboys, and animals.
>
> Paragraph 1. The transport, treatment, handling, and assembly of the animals used in the 'vaquejada' must be done in an appropriate way so as not to harm their health.
>
> Paragraph 2. In the professional 'vaquejada', the presence of a team of paramedics on duty is mandatory during the performance of the exhibits.
>
> Paragraph 3. The cowboy who, for an unjustified reason, exceeds in the treatment with the animal, injuring it or ill-treating it intentionally, must be excluded from the exhibit.
>
> Art. 5. This law comes into force on the date of its publication.
>
> Art. 6. The provisions to the contrary shall be repealed.

In this context, ADI nº 4,983 was filed by the Attorney General, aiming at the declaration of unconstitutionality of said rule. According to the exordial of the action of abstract control, the contested norm does not find support in the Constitution of the Republic, violating the provisions of its article 225, paragraph 1, item VII. In this context, it is argued that, while the right to culture is also supported by the Constitution, it cannot prevail in cases where it implies inappropriate treatment of animals.

The Federal Supreme Court, in the wake of what has already decided earlier (*e.g.*, in situations involving laws regulating practices such as cockfighting and bullfighting[12]), understood by the unconstitutionality of Law nº 15,299/2013. The judgment thus stood:

> VAQUEJADA - CULTURAL MANIFESTATION - ANIMALS - MANIFEST CRUELTY – PRESERVATION OF FAUNA AND FLORA - UNCONSTITUTIONALITY. The obligation of the State to guarantee to all the full exercise of cultural rights, encouraging the valorization and dissemination of manifestations, does not preclude the observance of the provisions of item VII of article 225 of the Constitution, which prohibits

[12] Direct Actions of Unconstitutionality nº 1,856/RJ and 2,514/SC and Extraordinary Appeal nº 153,531/SC, respectively.

> practice that ends up subjecting animals to cruelty. The so-called 'vaquejada' contradicts the constitutional norm.

According to the STF, there is, "a conflict of constitutional norms on fundamental rights – on the one hand, article 225, paragraph 1, item VII, and, on the other, article 215". In these cases, one must weigh between principles, by means of the "dimension of weight or importance" (DWORKIN, 2007, p. 42-43), to verify which should prevail in the specific hypothesis.

This was how the Court decided, considering for good to establish a higher weight to the principle of the ecologically balanced environment:

> [...] the weighting of rights, norms, and facts should be interpreted more favorably for the protection of the environment, demonstrating greater concern for maintaining, ecologically balanced conditions for a healthier and safer life for the benefit of citizens today and tomorrow.

However, in just a little more than a month after the trial, Law nº 13,364/2016 was approved, which began to "raise" the "Rodeo, 'Vaquejada', and the respective artistic-cultural expressions, to the condition of manifestations of national culture and intangible cultural heritage". Additionally, the National Congress approved the Constitutional Amendment nº 96/2017, which, in the included paragraph 7 of its article 225, establishes that "sports practices that use animals are not considered cruel, provided they are cultural manifestations":

> Paragraph 7. For the purposes of the provisions in the final part of item VII of paragraph 1 of this article, sports practices that use animals are not considered cruel, provided they are cultural manifestations, according to paragraph 1 of article 215 of this Constitution, registered as an immaterial asset integral to the Brazilian cultural heritage, and must be regulated by specific law that ensures the welfare of the animals involved.

Two observations are appropriate regarding the aforementioned reaction of the Legislative Branch to the decision of the STF.

First, Law nº 13,364/2016 is flagrantly unconstitutional. It is known that our domestic legal system adopted the theory of nullity in the control of constitutionality (BARROSO, 2012, p. 16). Thus, since the legislation was approved without constitutional support at the time, a subsequent amendment to the Constitution does not imply receipt of a null norm *ab initio*. As already mentioned, despite the decision in ADI not binding the legislator in its legislating activity, a norm of a similar use, has rightly already been considered incompatible with the Constitution; the same, of course, will be done with the latter.[13]

[13] In this sense, Fernandes (2017, p. 127, our translation) highlights (although referring to the transition of constitutional texts at the time, the same logic is fully applicable when one has the same Constitution as a parameter, in view of the need for compatibility of the law, since its birth, with its text): "[...] Here we have the thesis of the 'principle of contemporaneity' and, based on this thesis, 'it is maintained that the law that was born flawed, that is, that has a congenital, insoluble flaw, is impossible to be corrected by the phenomenon of reception', that is,' the addiction *ab* origin nullifies the law, making it ineffective. In these terms, 'a previous law that was born unconstitutional could

Secondly, although a constitutional amendment may, in theory, overcome the declared unconstitutionality penalty, it is necessary to analyze whether it does not violate the fundamental clauses of the Constitution. In the case, there is no form to argue that there is no violation of such rules.

The so-called fundamental clauses said *explicit* find provision in article 60, paragraph 4, of the Constitution:

> Art. 60. The Constitution may be amended by proposal:
> (...)
> Paragraph 4. The amendment proposal aiming to abolish the following shall not be the object of deliberation:
> I - the federative form of State;
> II - the direct, secret, universal, and periodic vote;
> III - the separation of branches;
> IV - the individual rights and guarantees.

In this sense, it is certain that the violation of the ecologically balanced environment violates, in the same respect, item IV above ("IV - individual rights and guarantees"). As decided by the STF in the precautionary measure of ADI nº 3,540-1, the right to an ecologically balanced environment constitutes a third dimension right, enshrined in the postulate of solidarity, considered as diffuse and of undetermined ownership. This "indeterminate ownership", however, does not imply that it is not owned by anyone: on the contrary, it means that it is the right of all individuals; therefore, a norm tending to affect its essential core, even if approved by the constituent power derived reformer, will be null, for violation of the fundamental clause mentioned (theory of the "limits of limits"[14]).

It is not ignored that the understanding of the ecologically balanced environment, as a fundamental clause, is not peaceful (SARLET, 2017). However, as seen, the understanding must prevail that this right, because it is essential to the minimally healthy quality of life of the individual, is not subject to exclusion by the derived Constituent legislator.

There is an intent to create a "normative concept" about what is, or is not, cruelty to animals. If a particular practice is, of course, cruel, a normative prediction in the opposite direction will not transform reality. On the topic, Sarlet (2017, our translation) well notes that:

> With this, all indicated that the power of constitutional reform creates an eminently normative concept of cruelty, establishing, albeit in other words, that what even represents a de facto cruelty (by the nature of the concrete practice and its consequences in terms of unnecessary suffering) ceases to be by normative decree. Furthermore, the legal regulation defers from the infra-constitutional by the relatively wide freedom of conformation given to the

not be fixed by the new Constitution', in terms of the impossibility of a 'supervenient constitutionality' (thesis of the '*impossibility of supervenient constitutionality*')".

[14] "[...] there would be a space susceptible to limitation by the legislator and another would be insurmountable to limitation. In this case, in addition to the requirement of justification, essential in any case, there would be a "limit of the limit" for the legislative action itself, consisting in the identification of an insurmountable area of regulation." (MENDES, 2018, p. 315).

> legislator in even broadening such a spectrum, although the legislation must, under the new constitutional arrangement, ensure the welfare of animals.

In this context, and on this same grounds, ADI nº 5,728 was filed[15], aiming at the declaration of unconstitutionality of the Constitutional Amendment nº 96/2017, in a possible "*backlash effect of the backlash effect*". Said action is still pending trial. However, it has already the opinion of the Attorney General for the unconstitutionality of the contested device:

> There is no doubt that cruel practices such as 'vaquejadas', cockfights, bullfighting, and similar activities collide with the Constitution, especially with article 225, paragraph 1, VII.
> The jurisprudence of the Federal Supreme Court is peaceful in the sense that the preservation of the environment must prevail over practices and sports that subjugate animals in unworthy, violent, and cruel situations. These manifestations, despite their importance in the past, must yield to the new social reality that the 1988 Constitution seeks to model.

For now, it remains to be believed that the Supreme Court, for the sake of consistency – and even in obedience to the principle of legal certainty – will have to maintain its consolidated jurisprudence, emphasizing environmental protection.

6 Conclusion

This article sought to analyze public opinion reactions and, notably, those of the legislative branch, in the face of judicial activism in the current domestic legal system. The *backlash* effect was conceptualized, and, subsequently, its occurrence in the domestic legal system was verified. The question of the legal legitimacy of Parliament's reactions to the so-called "progressive" decisions handed down by the courts was then discussed.

It was verified that the *backlash* effect of the judicial decisions in Brazil, is relatively recent and, as it could also be verified, despite the absence of illegality, it is usually of rather questionable juridicity. Jurisdictional activity, of course, is not exempt from public disapproval or legislative unionability (CARVALHO; MURAD, 2017, p. 19). However, analyzing this legislative reaction phenomenon, as exercised in the country, it was possible to conclude that the norms elaborated as a response to the decisions of the judiciary tend to be limiting to the right of individuals, which goes against even the representativeness of those responsible for editing said rules.

As seen in the first case analyzed (ADPF nº 54), the decision of the STF tending against the *status quo* (possibility of therapeutic anticipation of childbirth, in case of fetus anencephaly), was the object of reaction of the legislative branch in the opposite, conservative direction. Likewise, as for the case of the "vaquejada", after a so-called progressive decision by the STF

[15] In addition to the violation of *individual rights and warranties*, it was argued that the violation of the principle of prohibition on retrocession and prohibition of subsumption of animals to cruelty is reason for unconstitutionality of the amendment, as an essential core of environmental protection.

(defense of the safety of animals), the reaction that followed was even greater: the edition of constitutional amendment in the absolutely opposite sense to the conclusion of that Court. Again, a vanguard decision had as a reactionary act as a response. From this, it is concluded that, at least as a rule, although there are, from the formal perspective, vices of illegality in reactive acts, the aforementioned legal legitimacy does not exist. Although the system of checks and balances and the mutual supervision between the three branches (functions) of the State is intrinsic – and essential – to the Democratic Rule of Law, the reactions of the legislative branch to judicial decisions of a progressive nature have not been for the fight against possible excesses but purely to maintain the *status quo*.

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