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Ativismo judicial e diálogos transjudiciais: parâmetros para a interação entre decisões nacionais e estrangeiras [1]

Judicial activism and transjudicial dialogues: parameters for the interaction between national and foreign decisions

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Resumo

Este artigo promove uma articulação entre a categoria do Ativismo Judicial e a dos diálogos mantidos entre juízes e Cortes, estudados em doutrinas como o Transconstitucionalismo e o Transjudicialismo, e reunidos sob a fórmula mais ampla dos Diálogos Transjudiciais. O objetivo é o de contribuir para a construção

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de alguns parâmetros que conciliem os elementos articulados, visando que as interações transjudiciais revistam-se de cientificidade e harmonizem-se com a legitimidade democrática. Como resultado, a título conclusivo, a mencionada articulação entre as categorias permitiu a criação de certos parâmetros não-taxativos sujeitos a um contínuo desenvolvimento.

Palavras-chave: Ativismo Judicial; Transconstitucionalismo; Transjudicialismo.

Abstract

This article promotes an articulation between the category of Judicial Activism and that of dialogues held between judges and Courts, studied in doctrines such as Transconstitutionalism and Transjudicialism, and brought together under the broader formula of Transjudicial Dialogues. The objective is to contribute to the construction of some parameters that reconcile the articulated elements, aiming for transjudicial interactions to be scientific and harmonized with democratic legitimacy. As a conclusive result, the aforementioned articulation between the categories allowed the creation of certain non-taxing parameters subject to continuous development.

Keywords: Judicial Activism; Transconstitutionalism; Transjudicial Dialogues.

Introduction

The subject of Judicial Activism is widely debated in legal science. There are controversies in the search for a concept and about the virtues and vicissitudes of the practice. Similarly, the conversations[4] between judges and courts around the world receive a variety of perspectives. This is a growing reality, whether in dialogues between judges and courts in different countries, or between national judges and transnational or international courts. These complex thematic axes come together at a one point: to what extent do interactions with foreign law, for application in the domestic sphere, represent or not represent concretizations of Judicial Activism?

This article[5] seeks to promote an articulation between the category of Activism and the aforementioned colloquies between judges and Courts, studied

[4] When we talk about conversations or dialogues, we are not dealing with communication in the literal sense, and some abstraction is required to visualize dialogical practices in dynamics that refer to inter-institutional interactions. The idea is not that of synchronous, real-time conversations, but asynchronous ones over time.

[5] This article, exclusively on Judicial Activism, contains excerpts from the book: SALLES, Bruno Makowiecky. **Acesso à justiça e equilíbrio democrático:** intercâmbios entre *civil law* e *common law*. v. 1. Belo Horizonte: Dialética, 2021.

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in doctrines such as Transconstitutionalism and Transjudicialism and gathered here under the broader formula of Transjudicial Dialogues. The aim is to contribute to the construction, without being exhaustive, of some parameters that reconcile the elements articulated, with the intention that transjudicial interactions should be scientific and compatible with democratic legitimacy in the contemporary scenario.

To this end, we first develop the idea of Judicial Activism, presenting theoretical elements that allow us to propose a concept and identify some of its practical dimensions. Next, we move on to the subject of Transjudicial Dialogues, looking at important notions for understanding them, such as Transnationality, Transnational Law, Transconstitutionalism and Transjudicialism. Finally, the contents are articulated in order to make them compatible and to provide, with scientific humility, guidelines for Transjudicial Dialogues to avoid the problems of democratic legitimacy typical of activist judicial practices.

With regard to methodology, the text was written using inductive-deductive logic. The various phases of the research were aided by the techniques of referent, category, operational concept and bibliographical research[6].

1. Judicial activism: introductory notions and concept

Discussions about Judicial Activism go back a long way, notably in American literature and legal experience, which can be considered the cradle of the subject [7].

These discussions have become more prominent since the advent of *judicial review*[8]. In fact, the basic issue was the subject of controversy even before the term "judicial activism" was coined, the authorship of which was attributed to

[6] PASOLD, Cesar Luiz. **Metodologia da pesquisa jurídica**: teoria e prática. 13ª ed. rev. atual. ampl. Florianópolis: Conceito Editoral, 2015.
[7] CAMPOS, Carlos Alexandre de Azevedo. **Dimensões do ativismo judicial do Supremo Tribunal Federal**. Rio de Janeiro: Forense, 2014.
[8] RAUPP, Mauricio Santos. **Ativismo judicial**: características e singularidades. Do voluntarismo à concretização de direitos. 1. ed. Rio de Janeiro: Lumen Juris, 2016.

the historian Arthur Schlesinger Jr. in an article published in January 1947 in the popular Fortune[9], magazine, curiously not as the result of a judicial decision or a scholarly essay[10].

Analyzing the positions of the Supreme Court and its members is part of American legal culture. In his well-known work, Christopher Wolfe establishes a historical trajectory and divides the judicial review exercised by the Court into three cycles: the traditional era, the transitional era, and the modern era. These eras are characterized by different types of activist decisions, either with the recognition and expansion of judicial review in the absence of an explicit constitutional provision, or with the invalidation of political decisions based on open-ended clauses, or with the creative interpretation of constitutional principles to grant rights and liberties to citizens, all conditioned by the historical context and the composition of the Court.[11].

Although American practice and doctrinal production are pioneers in the field, Judicial Activism and the questions it raises are present in different democratic regimes, both in the common law and civil law legal families. In Germany, for example, there are questions about how the Constitutional Court interprets the system of fundamental rights[12], by adopting value jurisprudence as a methodological concept [13]. In Italy, discussions on activism appear in topics such as the control of the legality of political action in criminal operations, in expressions such as *supplenza giudiziaria*[14] and constitutional interpretation techniques like additive sentences [15]. In Brazil, the doctrine shows a large number

[9] SCHLESINGER JR., Arthur M. The Supreme Court: 1947. **Fortune**. v. XXXV, n. 1, p. 73-80 e 201-212, Jan. 1947.
[10] KMIEC, Keenan D. The origin and current meanings of judicial activism. **California Law Review**. v. 92, n. 5, p. 1.441-1.478, October 2004.
[11] WOLFE, Christopher. **The rise of modern judicial review**: from constitutional interpretation to judge-made law. Maryland: Rowman & Littlefield Publishers Inc., 1994.
[12] HABERMAS, Jurgen. **Direito e democracia:** entre faticidade e validade. v. I. Tradução de Flávio Beno Siebeneichler. Rio de Janeiro: Tempo Brasileiro, 1997.
[13] LARENZ, Karl. **Metodologia da ciência do direito**. Tradução de José Lamego. 3 ed. Lisboa: Fundação Calouste Gulbenkian, 1997, p. 163-172.
[14] RODOTÀ, Stefano. Magistratura e política in Italia. *In*: LIBERATI, Edmondo Bruti; CERETTI, Adolfo; GIASANTI, Alberto. **Governo dei giudici:** la magistratura tra diritto e politica. Milano: Giangiacomo Feltrinelli editore, 1996. p. 17-30.
[15] Sentenças aditivas são espécies de sentenças manipulativas, assim entendidas as que alteram o significado de uma lei sem alterar o texto normativo. No caso das sentenças aditivas, elas reconhecem a inconstitucionalidade da lei, por não conter alguma previsão que deveria nela

of cases of activism by the Supreme Court[16], usually innovating in the legal system or tackling controversies that the legislature fails to address. Colombia's Constitutional Court has already issued emblematic activist decisions on issues such as reviewing the President's decree of a state of exception and imposing structural duties on the Executive and Legislative branches in the promotion of public policies[17].

The dilemmas of activism have also been addressed in the decisions of Human Rights Courts, in situations where they order countries to implement vague norms. And they have also reached the Court of Justice of the European Union, when it establishes general legal principles for the functioning of the system.[18], establishes dialogues between legal systems or cites decisions of the European Court[19]. Many other national and international examples could be cited, but it is beyond the scope of this article to list them all.

Judges tend to act only when provoked and handle disputes according to due process[20] and have no preferences or sympathies for parties or positions, acting as impartial third parties who, supported by technical legal knowledge, apply the law or case law to resolve intersubjective or normative conflicts. In such a scenario, the acts of planning results and initiating the necessary measures to achieve them are, in principle, the responsibility of the Legislative and Executive Branches, which are in charge of creating policies and actively implementing them[21]. Similarly, the initiative to bring claims in search of legal goods lies with

constar, e suprem a lacuna, inserindo no conteúdo da lei uma situação por ela não contemplada. A respeito: CAMPOS, 2014, p. 118.

[16] RAMOS, Elival da Silva. **Ativismo judicial:** parâmetros dogmáticos. São Paulo: Saraiva, 2010.

[17] CAMPOS, Carlos Alexandre de Azevedo. **Dimensões do ativismo judicial do Supremo Tribunal Federal**. Rio de Janeiro: Forense, 2014.

[18] FREITAS, Lourenço Vilhena de. The judicial activism of the european court of justice. *In*: COUTINHO, Luís Pereira; LA TORRE, Massimo; e SMITH, Steven D. **Judicial activism**: an interdisciplinary approach to the american and european experiences. Ius Gentium, V. 44. Switzerland: Springer International Publishing, 2015. p. 173-180.

[19] ALLARD, Julie; GARAPON, Antoine. **Os juízes na mundialização**: a nova revolução do direito. Lisboa: Instituto Piaget, 2005, p. 19-20.

[20] LA TORRE, Massino. Between nightmare and noble dream: judicial activism and legal theory. *In*: COUTINHO, Luís Pereira; LA TORRE, Massimo; e SMITH, Steven D. **Judicial activism**: an interdisciplinary approach to the american and European experiences. Ius Gentium, Vol. 44. Switzerland: Springer International Publishing, 2015, p. 03.

[21] LA TORRE, Massino. **Between nightmare and noble dream: judicial activism and legal theory**, p. 03.

the litigants. Judges award solutions to such initiatives based on a pre-existing right[22], rationally justify them based on developed laws and norms.

However, this conception of judges, and even this division of roles in the democratic regime and in the judicial process, is challenged by a number of factors. The human condition in the interpretation of the law, the various types of demands that are directed to judges on a daily basis, the difficulties in defining the limits and the role of the judicial function[23] and also the gaps, ambiguities and vagueness of the legal system each contribute to some extent to the judicial creation of law [24] and for a more active attitude on the part of judges. Today, it is considered outdated and even childish by some[25], the belief that there is no such thing as innovation or proactivity, recognizing that there is room for such situations, especially in disputes over constitutional issues and the relationship between the branches of government, as well as in so-called hard cases.

In a more general approach, Activism is seen as a doctrine or argument that favors the practice of effectively transforming reality over purely speculative activities[26]. This idea comes from its etymology. The term combines the prefix "active," which conveys a sense of more action and less contemplation, with the suffix "ism," which adds a meaning usually associated with the formation of doctrines, principles, modes, and theories, which can be philosophical, religious, artistic, literary, scientific, economic, political[27].

This general connotation of active behavior, although insufficient, provides a useful notion for the field of law, in which "activism begins when, among several possible solutions, the judge's choice depends on the desire to

[22] SHAPIRO, Martin. The success of judicial review and democracy. *In*: SHAPIRO, Martin; SWEET, Alec Stone. **On laws, politics & judicialization.** New York: Oxford University Press, 2002. p. 162.
[23] RAUPP, Mauricio Santos. **Ativismo judicial**: características e singularidades. Do voluntarismo à concretização de direitos. 1. ed. Rio de Janeiro: Lumen Juris, 2016, p. 2.
[24] FRIEDMAN, Lawrence M. Access to justice: social and historical context. In: CAPPELLETTI, Mauro; WEISNER, John. **Access to justice**. v II. book I: promising institutions. Milano: Giuffrè; Alphen aan den Rijn: Sijthoff & Noordhoff. 1978-1979. p. 21
[25] BARAK, Aharon. **The judge in a democracy**. New Jersey: Princeton University Press, 2006, p. 9.
[26] MICHAELIS. **Dicionário brasileiro da língua portuguesa** (on line). Editora Melhoramentos Ltda, 2018. Available at: https://michaelis.uol.com.br/moderno-portugues/busca/portugues-brasileiro/ativismo/ . Acesso em 21 de agosto de 2023.
[27] MICHAELIS. **Dicionário brasileiro da língua portuguesa**, 2018.

accelerate social change or, on the contrary, to halt it"[28]. However, specifying the meaning of Judicial Activism requires other contributions.

In the legal field, due to the conceptual imprecision and the sometimes open and uncritical way in which the expression is used, parameters must be sought to give Judicial Activism its meaning[29], Also, to make the category scientific and prevent it from being combined: “rhetorically charged shorthand for decisions the speaker disagrees with”[30,31]. Some care is also needed to filter out possible situations of ideological and manipulative use of the expression, which occurs when those who seek to limit the powers of judges or to retain control over legality use it, without adequate justification, as a discourse to limit the judiciary.[32], To adjectivalize as Activism something that reflects the mere fulfillment of legal functions.

In an attempt to define a concept, the doctrine points to two prevailing meanings of activism[33]. These meanings, in turn, may share some commonalities in terms of judicial lawmaking and more or less general interference with the legislative function, as well as appearing feasible in certain contexts, and both may also manifest themselves in numerous ways.

In one sense, activism is seen as the willful attitude of judges in interpreting and applying the law, replacing laws and precedents with their personal beliefs, preferences in outcomes, worldviews, morality, humanism, justice, or politics, whether progressive or conservative.[34]. Activism occurs when magistrates, without authority, invent rules and enforce them as if they were state law, following not the laws but their own creation[35] and thus exercises an ad hoc

[28] GARAPON, Antoine. **O guardador de promessas**: justiça e democracia. Tradução de Francisco Aragão. Lisboa: Instituto Piaget, 1998, p. 54.
[29] CAMPOS, Carlos Alexandre de Azevedo. **Dimensões do ativismo judicial do Supremo Tribunal Federal**. Rio de Janeiro: Forense, 2014, p. 151.
[30] ROOSEVELT III, Kermit. **The myth of judicial activism**: making sense of Supreme Court decisions. New Haven: Yale University Press, 2006, p. 3.
[31] Tradução livre: “abreviação retórica carregada para decisões com as quais o orador discorda”.
[32] ACCATTATIS, Vincenzo**. Governo dei giudici e giudici del governo**. 7a ed. Franco Angeli: Milano, 2008, p. 88.
[33] RAUPP, 2016, pp. 65-66.
[34] BARAK, Aharon. **The judge in a democracy**. New Jersey: Princeton University Press, 2006, p. 265.
[35] LAWRENCE A., Alexander. Judicial activism: clearing the air and the head. *In*: COUTINHO, Luís Pereira; LA TORRE, Massimo; e SMITH, Steven D. **Judicial activism**: an interdisciplinary

and retroactive legislative function, which implies the incidence of the rule created for the purpose of regulating a past fact. In this sense, the practice is usually seen as something negative that undermines the rule of law with its broad judicial discretion[36].

Strictly speaking, the criterion for classifying a decision as activist for this purpose is the degree to which the judge (un)binds himself to the law in the conduct of the case and in the decision, which can be measured in both public and private legal relations. This is activism in the applied or operative field.

In another sense, activism is also seen as the behavior of judges aimed at vigorously and rigorously scrutinizing or influencing the actions and omissions of the other branches of government, reducing deference to political decisions and intervening more directly in the spheres classically reserved to the legislative and executive branches, with the aim of making constitutional rules and certain fundamental rights a reality.[37]. It is thus, "(...) *della tendenza del potere giudiziario ad assumere le vesti del potere legislativo e del potere esecutivo in situazione specifiche* (...)"[38,39].

Here, the key to classifying a decision as activist or not is fundamentally linked to the tripartite nature of the powers and the degree to which judges usurp the duties of legislators and administrators, whether by invalidating rules in judicial review or review of legality, by remedying parliamentary or executive omissions, or by imposing behavior or policies, individually or collectively. Activism is thus viewed from a relational perspective. Perceptions of the positive or negative nature of this attitude are more divided than in the first sense.[40]

approach to the american and european experiences. Ius Gentium, V. 44. Switzerland: Springer International Publishing, 2015. p. 15-21.

[36] WOLFE, Christopher. **The rise of modern judicial review**: from constitutional interpretation to judge-made law. Maryland: Rowman & Littlefield Publishers Inc., 1994.

[37] RAUPP, Mauricio Santos. **Ativismo judicial**: características e singularidades. Do voluntarismo à concretização de direitos. 1. ed. Rio de Janeiro: Lumen Juris, 2016, p. 61.

[38] OLIVIERO, Maurizio. Costituzionalismi, crisi della democrazia e populismi. *In*: ROSA, Alexandre Morais da; CRUZ, Alice Francisco da; QUINTERO, Jaqueline Moretti; e BONISSONI, Natammy. **Para além do estado nacional**: dialogando com o pensamento de Paulo Márcio Cruz. Florianópolis: Emais, 2018. p. 281.

[39] Tradução livre: "(...) da tendência do poder judiciário de assumir o papel do poder legislativo e do poder executivo em situações específicas".

[40] SALLES, Bruno Makowiecky. **Acesso à justiça e equilíbrio democrático:** intercâmbios entre *civil law* e *common law*. v. 1. Belo Horizonte: Dialética, 2021, p. 190.

Of course, everything is a question of degree or intensity. However, in both cases of activism, together or in isolation, there is a common denominator: judges are more assertively in the position of creators of law, legislators or administrators, beyond the classic function of resolving disputes on the basis of the law and moderating the excesses of the other branches.[41] There is more personal or political decision-making and less adjudication of rights.

Under these guidelines, it is proposed that judicial activism be conceptualized (*lato sensu*) as a judicial attitude of transformative rather than contemplative tendencies, which manifest themselves (*stricto sensu*), jointly or separately, in the (i) interpretive, applicative or operative spheres, through a marked voluntarism in the creation of law, to the detriment of legislation, precedents or legal norms in general, and (ii) institutional or relational spheres, through a more direct intervention in the attributions of the other powers, so as to give judges in both situations a role that goes beyond the classical vision of applying the law to subjective or normative disputes and moderating the excesses of the other branches, and this can be seen in constitutional and ordinary jurisdiction, both collective and individual, as well as in various practical dimensions of the operation of the law.[42]

Judicial activism has a number of practical dimensions, such as constitutional and statutory interpretation, assertion of rights, quasi-legislative creation of law, determination of public policy, self-expansion of jurisdiction, conduct of litigation, overruling of precedent, maximalist reasoning, result-driven rather than law-driven decisions, judicial partisanship, claims of judicial sovereignty.[43], Activities to control political legality in the criminal field [44], the use of transnational law[45] and the expansive application of rights by international

[41] KURLAND, Philip. B. Government by judiciary. **University of Arkansas at Little Rock Journal.** v. 2. n. 307. p. 320, 1979.
[42] SALLES, Bruno Makowiecky. **Acesso à justiça e equilíbrio democrático:** intercâmbios entre *civil law* e *common law*. v. 1. Belo Horizonte: Dialética, 2021, p. 195.
[43] CAMPOS, Carlos Alexandre de Azevedo. **Dimensões do ativismo judicial do Supremo Tribunal Federal**. Rio de Janeiro: Forense, 2014, p. 165-174.
[44] GHEZZI, di Morris L. Il panorama e le rovine: Alla ricerca di uno stato democratico di diritto in Italia. In: LIBERATI, Edmondo Bruti; CERETTI, Adolfo; GIASANTI, Alberto. **Governo dei giudici:** la magistratura tra diritto e política. Milano: Giangiacomo Feltrinelli editore, 1996. p. 61.
[45] FREITAS, Lourenço Vilhena de. The judicial activism of the european court of justice. *In*: COUTINHO, Luís Pereira; LA TORRE, Massimo; e SMITH, Steven D. **Judicial activism**: an

courts and tribunals[46]. This is not to say that the above examples are necessarily synonymous with activism, but activist practices can take place in the above settings.

At the opposite end of the same continuum from Activism, there is the philosophy of judicial self-restraint and it is possible to speak of various degrees of it[47]. In essence, self-contained judges economize on their personal preferences, avoid contradicting the conduct of other branches of government, at least in the absence of clear error, and invoke prudence in interpreting the Constitution, creating law, and enforcing public policy. In addition, they typically "confine themselves to deciding questions of law and deny the justiciability of political questions"[48].

The keynote of Self-Containment lies in the attitudes of deference and prudence. The former is a sign of respect for the democratic-representative decision-making system. The second has as its main objective the institutional preservation of the Judiciary, avoiding damage to its image and political reactions[49], or even fears of weakening the courts due to difficulties in enforcing judgments.

Thus, the category of judicial self-containment (*lato sensu*) can be conceptualized, in short, as the judicial tendency opposed to activism, on the (*stricto sensu*) (i) interpretive or applicative and (ii) institutional or relational levels, characterized by judicial attitudes of caution and greater deference to the political choices of the other branches, manifested in judicial review and ordinary,

interdisciplinary approach to the american and european experiences. Ius Gentium, V. 44. Switzerland: Springer International Publishing, 2015. pp. 173-180.

[46] ALLAN, James. Judicial activism: vanity of vanities. *In*: COUTINHO, Luís Pereira; LA TORRE, Massimo; e SMITH, Steven D. **Judicial activism**: an interdisciplinary approach to the american and european experiences. Ius Gentium, Vol. 44. Switzerland: Springer International Publishing, 2015. p. 71.

[47] BARAK, Aharon. **The judge in a democracy**. New Jersey: Princeton University Press, 2006, p. 266.

[48] CANOTILHO, José Joaquim Gomes. **Direito constitucional e teoria da constituição**. 7. ed. Coimbra: Edições Almedina, 2000, p. 1309.

[49] CAMPOS, Carlos Alexandre de Azevedo. **Dimensões do ativismo judicial do Supremo Tribunal Federal**. Rio de Janeiro: Forense, 2014, p. 178.

collective or individual adjudication, including the myriad dimensions of legal practice[50].

In conclusion, it is important to note that the more or less activist attitude of the judiciary is not exclusively the result of voluntarism, nor can it be reduced to the individual ideology of the judges. As much as it is claimed that the judiciary is not one of the most heterogeneous classes, it is undeniable that judges have different world views, education and personalities. This diversity reflects the plurality of ideas in society.[51]. But this is not the only result of an expansive or regressive judiciary. The way judges act is conditioned by institutional factors related to the degree of independence and guarantees of the judiciary, which in turn are related to issues such as the more or less politicized form of investiture, the remuneration policy of the class, the control and formatting of the career, the training during the professional life.[52] and possibly others.

2. Transjudicial Dialogue Notes

Transnationality is a phenomenon whereby social, political, economic, cultural and other relations transcend the boundaries of nation-states in a globalized and interconnected world[53], makes notions of territory, nationality and sovereignty somewhat obsolete in the face of common problems. Transnational law is something to be forged and contextualized in this new reality[54], not to be confused with Public International Law or Private International Law. The very prefixes 'trans' and 'inter' already indicate differences, in that the

[50] SALLES, Bruno Makowiecky. **Acesso à justiça e equilíbrio democrático:** intercâmbios entre *civil law* e *common law*. v. 1. Belo Horizonte: Dialética, 2021, p. 209.
[51] BARAK, Aharon. **The judge in a democracy**. New Jersey: Princeton University Press, 2006, p. XV.
[52] MASTITZ, Anna; PEDERZOLI, Patricia. Training the legal professions in Italy, France and Germany. In: *In*: TATE, C. Neal; VALLINDER, Torbjörn (org). **The global expansion of judicial power.** New York: New York University Press, 1995. p. 155-180.
[53] CRUZ, Paulo Márcio; PIFFER, Carla. Transnacionalidade, migrações transnacionais e os direitos dos trabalhadores migrantes. **Revista do Direito**. Santa Cruz do Sul. v. 3, n. 53, 2017, p. 54. Available at: https://online.unisc.br/seer/index.php/direito/article/view/11371/6969 Accessed in 10 Feb. 2023.
[54] CRUZ, Paulo Márcio; BODNAR, Zenildo. A transnacionalidade e a emergência do Estado e do direito transnacionais. **Revista Eletrônica do CEJUR**. v. 1, n. 4, p. 1-24, 2009. Available at: https://revistas.ufpr.br/cejur/article/view/15054/11488 Accessed in: 10 Feb. 2023.

former denotes something that "goes beyond" or "beyond", while the latter expresses the idea of "difference or appropriation of related meanings"[55].

Public international law is the set of rules, whether conventional, such as international treaties, or customary, or even principle-based, that govern relations between states, international organizations and individuals, insofar as these relations transcend the physical boundaries of states. The objectives of this branch of law are essentially to maintain peace, promote the security of international relations and coordinate the various interests so that states achieve their mutual goals and interests[56]. It is a right that, from a classical point of view, is linked to the notion of the State as a subject of international rights and obligations[57].

On the other hand, private international law is the body of rules that deals with the conflict of laws in space. It seeks to define, based on the analysis of connecting factors, which forum and/or law, whether national or foreign, is applicable to a conflict with an accusation of internationalization[58]. In this sense, it is responsible for defining the competence and/or the rule of a sovereign state to deal with conflicts that combine exogenous elements.

Transnational law comes from a different angle. It also deals with a variety of situations that dissolve borders. In a sense, it encompasses public and private international law as well as national law[59]. However, it does so in different keys, with the aim of promoting democratization, cooperation and solidarity, mitigating the vision of sovereignty, conflict, dispute, exclusivity, protection or power of one state in its relations with another[60].

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[55] CRUZ, Paulo Márcio; BODNAR, Zenildo. A transnacionalidade e a emergência do Estado e do direito transnacionais, p. 5.
[56] MAZZUOLI, Valerio de Oliveira. **Curso de direito internacional público**. 5 ed, rev., atual. e amp. São Paulo: Editora Revista dos Tribunais, 2011, p. 44 e 63.
[57] FRANCIONI, Francesco. Il diritto di acesso alla giustizia nel diritto Internazionale generale. In: FRANCIONI, Francesco; In: FRANCIONI, Francesco; GESTRI, Marco; RONZITTI, Natalino; e SCOVAZZI, Tullio. **Acesso alla giustizia dell'individuo nel diritto Internazionale e dell'unione europea**. Milano: Giuffré, 2009, p. 06-07.
[58] DEL'OLMO, Florisbal de Souza; JUNIOR, Augusto Jaeger. **Curso de direito internacional privado**. 12ªed. rev., atual. e amp. Rio de Janeiro: Forense, 2017, p. 02.
[59] JESSUP, Philip C. **Direito transnacional**. Tradução de Carlos Ramires Pinheiro da Silva. Editora Fundo de Cultura, 1965, p. 87.
[60] JESSUP, Philip C. **Direito transnacional**, p. 62.

The common nature of the world's problems is seen in transnational law, which seeks an interconnected community rather than compartmentalized sovereignties. A higher level of integration is proposed based on a similar axiological agenda, common interests, and consensus. Transnational norms encompass a broader concept and other forms of legality, with transnational law including not only what is formally enacted, but also the deliberations of private organizations, contracts, solutions in mediation and arbitration, and so on. And the way in which public and private actors, such as states, international organizations, multinational corporations, organizations and others, work together to interpret and apply it is determined by the transnational process[61].

It can be said that this concept of Transnational Law encompasses categories such as Transconstitutionalism and Transjudicialism. These categories have similarities, but are approached in scientific essays with subtle and relevant distinctions. Transconstitutionalism is an expression enshrined in Brazilian doctrine, especially in the thinking of Marcelo Neves[62]. It is a growing intertwining of two or more legal orders, both national and international, supranational and transnational, resulting from the systemic integration of world society and a kind of deterritorialization of constitutional issues[63], implying a constructive transversal networking and mutual learning in the search for answers to constitutional problems, such as those relating to fundamental or human rights and the organization of power[64].

This interdependence is not limited to a dialogue between judges and courts from different systems[65], although it has its most important form in this area. It also includes permanent exchanges in relations between legislatures,

[61] KOH, Harold Hongju. Transnational legal process. **Nebraska Law Review**, v. 71, p. 181-207, 1994, p. 181-207. Available at: https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2902&context=fss_papers Accessed in 10 Feb. 2023.
[62] NEVES, Marcelo. **Transconstitucionalismo**. 1 ed. São Paulo: Martins Fontes, 2009.
[63] NEVES, Marcelo. **Transconstitucionalismo**. p. 211.
[64] NEVES, Marcelo. Do diálogo entre as cortes supremas e a Corte Interamericana de Direitos Humanos ao transconstitucionalismo na América Latina. **Revista de Informação Legislativa**. Brasília, v. 51, n. 201, p. 193-214, jan./mar. 2014, p. 194 e 198.
[65] NEVES, Marcelo. Do diálogo entre as cortes supremas e a Corte Interamericana de Direitos Humanos ao transconstitucionalismo na América Latina, p. 194.

governments and administrations in different countries[66], that drive the evolution of legal orders in common directions. Here, too, a concept based on dialogue rather than force and sovereignty stands out, assuming that constitutional law and the various players in domestic law do not adopt a model of resistance, nor of servile convergence, but of articulation[67], with external sources and practices, which serves as a test for the country's own traditions in the face of other experiences.

The idea of Transjudicialism is very similar. There are peculiarities, such as the fact that it is restricted to the world of legal proceedings and does not necessarily seem to be limited to constitutional issues, although these are the main ones. It is a form of transjudicial communication, driven by various causes[68], which leads to a way of applying and interpreting the law through which judges enter into a process of reflection and dialog with foreign decisions[69], internalizing them into their systems so as to generate, albeit without intergovernmental coordination, a progressive construction of shared categories and institutions[70].

In a pioneering study, Anne-Marie Slaughter proposed some typologies of interactions, which vary in terms of the forms of communication and the degree of reciprocal engagement[71].

There are three possible forms of communication. It can be horizontal, between courts and judges of the same hierarchical status in their respective systems. Vertical, between courts and judges linked to each other's jurisdiction, as happens with national courts in relation to supranational courts. And mixed, measured when supranational courts encourage horizontal communications or act to disseminate legal principles in other systems[72].

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[66] NEVES, Marcelo. **Transconstitucionalismo**. p. 118.
[67] NEVES, Marcelo. **Transconstitucionalismo**, p. 258-259.
[68] SLAUGHTER, Anne-Marie. A typology of transjudicial communication. **University of Richmond Law Review**, v. 29, 1994. p. 129-132 Available at: https://scholarship.richmond.edu/lawreview/vol29/iss1/6/ . Accessed in 10 Feb. 2023.
[69] SLAUGHTER, Anne-Marie. A typology of transjudicial communication, p. 101.
[70] LUPI, André Lipp Pinto Basto. O transjudicialismo e as cortes brasileiras: sinalizações dogmáticas e preocupações zetéticas**. Revista Eletrônica Direito e Política**. UNIVALI. Itajaí. V. 4, n. 3, p. 293-313, 3º quadrimestre de 2009, p. 294-295. Available at: < www.univali/br/direitoepolitica >. Acesso em 04 de fevereiro de 2021.
[71] SLAUGHTER, Anne-Marie. A typology of transjudicial communication.
[72] SLAUGHTER, Anne-Marie. A typology of transjudicial communication, p. 103-112.

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There are also three possible modes as to the degree of reciprocity. There are direct dialogues, maintained by one court or judge and reciprocated by others. Monologues, in which a court or judge copies foreign decisions for domestic use and without reciprocity, in order to enrich and strengthen the grounds of its decision. And intermediary dialogues, which take the form of incentives for interaction provided by supranational courts[73], in situations where these courts, for example, endorse a certain understanding of a national court and thus project it onto other national courts[74].

The same study points to some functions and assumptions of Transjudicialism, as well as certain consequences of the phenomenon.

Among its functions are the strengthening of supranational courts, a better acceptance of international obligations, a kind of cross-fertilization, an increase in the persuasiveness, authority and effectiveness of the decisions that adopt the practice and the promotion of collective deliberation on common problems[75].

The conditions are the independence of the judiciary in relation to the executive and legislative, a reliance on the power of persuasion rather than force, and a perception on the part of the courts and judges that they share identities and methods in the exercise of their functions, acting as enforcers or interpreters of the law rather than as direct political actors[76].

The main consequences are the increase in the quality of decisions worldwide, the self-perception of the courts as members of a transnational legal community, the blurring of the boundaries between internal and international law, the increase in the universal protection of human rights and the strengthening of the principle of the separation of powers on a global scale[77].

The passage through the notions of Transconstitutionalism and Transjudicialism carried out in the preceding lines reveals affinities that allow us, for the purposes of this article, to group them together in a broader formula that

[73] SLAUGHTER, Anne-Marie. A typology of transjudicial communication, p. 112-114.
[74] LUPI, André Lipp Pinto Basto. O transjudicialismo e as cortes brasileiras: sinalizações dogmáticas e preocupações zetéticas, p. 296.
[75] SLAUGHTER, Anne-Marie. A typology of transjudicial communication, p. 114-122.
[76] SLAUGHTER, Anne-Marie. A typology of transjudicial communication, p. 122-129.
[77] SLAUGHTER, Anne-Marie. A typology of transjudicial communication, p. 132-135.

will be called Transjudicial Dialogues. These dialogues represent a reality that is advancing, with more and more recurrent references in decisions around the world to precedents or interpretations established in courts of other legal orders. However, despite being received positively by a significant part of world opinion, they are not unanimous.

Some see this practice as a communitarian perspective at the service of capitalism or global agendas, to the detriment of national sovereignty. It is also claimed that through it, these agendas advance via domestic law, replacing and leaving the Transnational Courts in the background[78], who don't have the strength to implement them.

The divergence, which is theoretical as well as ideological, justifies the observation that the issue has become a "bone of contention between progressives and conservatives"[79], between external law and legiscentric verticality or the anteriority of precedent[80]. And, depending on how transjudicial interactions operate, they can really face complications from the point of view of Judicial Activism.

For these reasons, it has already been observed that similar transjudicial exchanges:

> (...) condensa em si mesmo as esperanças mais desmedidas e os receios mais irracionais. Alguns consideram-no o estádio último de um 'governo de juízes', transposto para um nível global, em detrimento dos interesses nacionais e da legitimidade democrática. Outros, pelo contrário, antevêem aqui o sinal de um caminhar lento, mas seguro, em direcção a um direito universal que, embora não esteja ainda concretizado – ainda estamos longe disso – constituiria, no entanto, o horizonte de expectativa de uma humanidade unida[81].

[78] PEREIRA, Ruitemberg Nunes. Interações transjudiciais e transjudicialismo: sobre a linguagem irônica no direito internacional. **Revista de Direito Internacional**. *Brazilian Journal of international Law.* Brasília, v. 09, n. 4, p. 169-199, 2012. Available at: https://www.tjdft.jus.br/institucional/imprensa/campanhas-e-produtos/artigos-discursos-e-entrevistas/artigos/2013/interacoes-transjudiciais-e-transjudicialismo-sobre-a-linguagem-ironica-no-direito-internacional-juiz-ruitemberg-nunes-pereira Accessed in: 10 Feb. 2023.
[79] ALLARD, Julie; GARAPON, Antoine. **Os juízes na mundialização**: a nova revolução do direito, p. 19.
[80] ALLARD, Julie; GARAPON, Antoine. **Os juízes na mundialização**: a nova revolução do direito, p. 72.
[81] ALLARD, Julie; GARAPON, Antoine. **Os juízes na mundialização**: a nova revolução do direito, p. 09.

In the view of the authors of this article, the advance of Transjudicial Dialogues is positive, as long as it takes place in a judicious, technical and balanced manner. As with comparative law[82], interactions between constitutional problems and responses, between legal institutes, rights, classifications, systematizations, concepts and others allow important progress to be made in the historical and philosophical investigation of law. They also serve to improve national law and the regime of international relations[83] and identify possible trends towards the unification of law on a continental or global scale[84].

The whole discussion also reveals the problem of transplantation. It is known that principles, rules, models, conceptions and institutions "that seem effective in other legal cultures may not transplant well to our own"[85,86]. Naturally, if each society has its own legal culture, a pattern of ideas, thoughts and attitudes towards the law and institutions, you can't simply pluck them from one society and transplant them to another[87]. However, this truism does not prevent legal experience from other systems, institutions, principles, or understandings based on them from migrating and helping to solve problems.

Most legal systems share common fundamental rules[88], especially of a generic nature, disconnected from the specificities of institutions and principles, which interact, can be conveyed by similar mechanisms and have the effect of amalgamating aspects of the various positive systems[89]. This is possible when the law is understood not so much from the point of view of cultural relativism,

[82] Importa registrar que o direito comparado não se resume a um simples equivalente da utilização do método científico comparativo. Mostra-se inadequada a compreensão de que o direito comparado não passa de uma maneira formal de pesquisar e descrever o conhecimento aplicada ao setor jurídico, entendendo-se que se cuida, mais do que isso, de um ramo ou disciplina do direito que pode ser praticado com a utilização de diversos métodos científicos e suplanta a atividade de cotejamento, prestando-se a diversas finalidades não exclusivas dele.
[83] DAVID, René. **Os grandes sistemas do direito contemporâneo** (direito comparado). 2ed. Tradução de Hermínio A. Carvalho. Lisboa: Editora Meridiano Ltda, 1978, pp. 27-28 e 36.
[84] FERRARI, Giuseppe Franco. Civil law e common law: aspetti pubblicistici. p. 775-776.
[85] RHODE, Deborah L. **Access to justice**. New York: Oxford University Press, 2004.
[86] Tradução livre: “que parecem efetivas em outras culturas jurídicas podem não ser bem transportadas à nossa”.
[87] FRIEDMAN, Lawrence M. **Access to justice**: social and historical context, p. 29.
[88] BARAK, Aharon. **The judge in a democracy**, p. 58.
[89] MENDONÇA, J.J. Florentino dos Santos**. Acesso equitativo ao direito e à justiça**. São Paulo: Almedina, 2016, p. 100.

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but as a science[90] This is possible once law is understood not so much from the point of view of cultural relativism, but as a science that, like technology, medicine and chemistry, displays some general maxims that freely cross borders[91].

However, these exchanges cannot be seen as a free pass to avoid national law, to randomly choose a preferential foreign law for judges or similar practices, and parameters must be devised for them to develop legitimately.

The next topic will contain an articulation linking the category of Judicial Activism and the Transjudicial Dialogues, in an effort to bring to reflection, with scientific humility, some guidelines for these conversations to be scientific and avoid the problems of democratic legitimacy typical of activist judicial practices.

3. Activism and transjudicial dialogues: parameters for interactions

In order for transjudicial conversations to assume scientificity and not become a simple way of activism on an internal level, some points can be made in an attempt to bring reflection and systematize non-taxative parameters.

Transjudicial Dialogues do not have as their natural habitat that larger, silent number of everyday demands, whose decisions are taken urgently, on the fly, automated, without luxuries or theoretical concerns. They find fertile ground above all in hard cases that are the subject of public discussion or offer difficulties in factual-legal resolution[92].

Difficult cases are those in which, as a result of the incompleteness of legal systems or the legislator's inability to anticipate all situations, there is no clear legal solution in the law or in precedents. In these gray areas, transjudicial interactions can help produce decisions that are compatible with national law and in line with the world. They also hold valuable potential in situations where national law is still hesitant, unconsolidated, divided or even anachronistic, and can find a safe haven or modernize under exogenous spotlights.

[90] ZANON JÚNIOR, Orlando Luiz. **Teoria complexa do direito**. 2 ed., rev. ampl. Curitiba: Prismas, 2014, p. 51.
[91] FRIEDMAN, Lawrence M. **Access to justice**: social and historical context, p. 29.
[92] ALLARD, Julie; GARAPON, Antoine. **Os juízes na mundialização**: a nova revolução do direito, p. 24.

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In any of these possibilities, foreign law, before being accepted uncritically, needs to undergo a process of decantation by national law, being poured into the domestic legal lexicon[93] and subjected to a careful analysis of the compatibility of principles, institutes, concepts and classifications from different legal families[94]. It means that internal law illuminates, guides and directs interactions with external law, in a synergistic and dialectical process.

This concept, as we can see, is not compatible with superficial foreign citations or those based on vague slogans, in which a principle or institute is used as a rhetorical device to justify any preferential solution without a consistent contextualization. Nor is ad hoc, discretionary, selective importation, detached from the meaning of the legal system, justified. Without discrediting transnational and international law in favor of a radical nationalism, what is required is an authentic conversation between sources, starting with national law. A consistent judicial decision must be permeated by all this awareness, necessarily observing a duty to give reasons in relation to the facts and the law[95] a duty of reasoning that legitimizes it and gives it rationality.

These are general reflections or premises, which allow for other more specific points.

A first point concerns the determination of the applicable law. Even without clinging to legal formalism and without denying that judicial decisions are influenced by empirical factors, moral values, consequences and practical reasoning, it is valid to assume that judicial decisions are determined primarily by the law, understood as a body of rules applicable by logical operations, such as constitutional or legislative texts and judicial precedents. This body of norms preserves national law as its immediate source.

Transjudicial talks do not authorize foreign law to be used as a pure and simple substitute for national law in cases where, although there is domestic

[93] LUPI, André Lipp Pinto Basto. **O transjudicialismo e as cortes brasileiras**: sinalizações dogmáticas e preocupações zetéticas, p. 303.
[94] SALLES, Bruno Makowiecky.. **Acesso à justiça e equilíbrio democrático:** intercâmbios entre *civil law* e *common law*. v. 2. Belo Horizonte: Dialética, 2021, p. 233-269.
[95] A exigência de fundamentação incrementa a qualidade das decisões e reduz a discricionariedade dos agentes públicos. Ela também atua como um veículo de transparência. A respeito: SUNSTEIN, Cass R. **One case at a time:** judicial minimalism on The Supreme Court. Second Printing. Cambridge: Harvard University Press, 2001, p. 31.

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legislative or jurisprudential law, the solution provided for therein displeases the judge or court. Judicial sympathies for forensic approaches are outside the scope of legitimate interactions, and dialogues cannot be reduced to a pretext for importing solutions considered preferable in violation of domestic rules.

This statement applies to both meanings of activism. It encompasses both detachment from national law and the imposition, without correspondence in the domestic legal system, of actions and omissions on the other branches of government in order to give effect to imported rights. Reducing transjudicial dialogues to a mere choice of alien law is an expression of Judicial Activism.

A second parameter derives from the first and moves on to a question of method. Judicial decision-making follows its own itinerary: it starts from assessing the facts to evaluating the law, and the solution is constructed by merging these elements. Interaction with external systems is an additional element in this cognitive process.

In the case of rules, the traditional logic of subsuming the fact to the norm is applied, with possible evaluation of external rules that may in some way contribute to the solution or strengthen it. In the case of principles, more circular reasoning is used, assigning a normative value to the facts, and weighing them up in the event of a collision[96]. The application of principles can also be fertilized with foreign norms and dogmatic studies. As for precedents, interactions between national and foreign judgments must follow analogical reasoning, comparing whether the decisive reasons (*ratio decidenci*) and the propositions of law that animate the decisions and cases have sufficient parallels to justify the same decision.

This brings us to the crux of this second point: transjudicial talks do not lend themselves to reversing the course, the poles and the decision-making methods. It is unfeasible for foreign law to serve as a starting point or immediate source from which to retroactively justify the domestic decision. Looking at a foreign law to be uncritically imported, without a path that starts from domestic sources and establishes dialogues and adaptations based on them, is an

[96] ZAGREBELSKY, Gustavo. **El derecho dúctil**: ley, derechos, justicia. Tradução de Marina Gascón. Madrid: Trotta, 2003, pp. 125-134.

illegitimate form of application, constituting a form of Judicial Activism. Likewise, it is unfeasible for interactions with foreign law to disregard the techniques for applying rules, principles and precedents, reducing them to acts of will.

There is also a third point, which deals with a variety of issues. Sometimes foreign law is not brought into the field in order to improve the solution, but merely as "proof of erudition"[97]. In others, it is cited as an end in itself, an argument from authority [98] used to reduce the duty to state reasons. And there is always the risk that the practice will serve as an instrument of colonialism in legal culture or bravado to the detriment of the national legal order[99].

All of these are inappropriate ways of using Transjudicial Dialogues, as they run away from the real purposes that justify them. More than inadequate, these practices could turn out to be activist if, given the criteria we have already studied, they imply importing decontextualized solutions, merely opting for foreign law, creating a law that is dissociated from the domestic legal system, establishing relations between the branches of government that do not fit in with national constitutional arrangements, among other configurations.

To concluded, it is important to emphasize that exchanges between courts and judges around the world are a relatively recent phenomenon, rich and full of complexities. It is up to doctrine and jurisprudence, little by little, to articulate them with the current challenges of legal science, including judicial activism, developing parameters that give them guidelines, support and legitimacy. This is the purpose of this article

[97] NEVES, Marcelo. Do diálogo entre as cortes supremas e a Corte Interamericana de Direitos Humanos ao transconstitucionalismo na América Latina. **Revista de Informação Legislativa**. Brasília, v. 51, n. 201, p. 193-214, jan./mar. 2014, p. 198.
[98] LUPI, André Lipp Pinto Basto. O transjudicialismo e as cortes brasileiras: sinalizações dogmáticas e preocupações zetéticas, p. 293.
[99] NEVES, Marcelo. Do diálogo entre as cortes supremas e a Corte Interamericana de Direitos Humanos ao transconstitucionalismo na América Latina. p. 199-210.

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Final considerations

Judicial Activism and Transjudicial Dialogues are technical subjects, as much as they are complex and controversial. At a certain point, they come into contact with each other and begin to demand articulated development on the part of legal science. Describing, systematizing, conceptualizing and combining these categories is crucial to building parameters that give transjudicial interactions scientificity and democratic legitimacy.

Judicial activism can be conceptualized as a jurisdictional attitude with transformative tendencies that manifest themselves (stricto sensu), jointly or separately, in the (i) interpretative, applicative or operative spheres, through a marked voluntarism in the creation of law to the detriment of legislation, precedents or legal standards in general, and (ii) institutional or relational, through more direct interference in the attributions of the other branches of government. In both situations, judges are given a role that goes beyond the classic view of applying the law to subjective or normative disputes and moderating the excesses of other branches. There are countless practical dimensions and many different points of view on the subject.

On the other hand, Transjudicial Dialogues are on the rise in the context of an increasingly Transnational Law, studied in doctrines such as Transconstitutionalism and Transjudicialism. They can be summed up in the exchanges that judges and courts make around the world in the search, especially in the face of hard cases, for similar answers to common problems. As such, they provoke a whole range of interactions between legal orders that gravitate on different axes, but reveal convergences, couplings and affinities. Like activism, they raise countless questions about whether they are appropriate and, if so, how and to what extent they should occur.

The articulation between these categories allows us to reflect on certain points, in an attempt to build non-taxative parameters that are subject to continuous development.

To this end, it is important to establish the premise that the dialogues between judges and courts do not have the routine and easily resolved situations as their natural habitat. They are particularly useful for helping the judiciary to

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come up with appropriate responses in situations where national law is murky, i.e. does not have a clear legal solution, and can also help in cases where the law is lacunose, hesitant or anachronistic.

Especially in these cases of turbidity, gaps, hesitation or anachronism, transjudicial interactions allow solid, modernized decisions to be produced that are compatible with national law and in tune with the rest of the world. This takes place through a process of decanting and adapting other sources to domestic law, carrying out a careful analysis of compatibility between principles, institutes, concepts and classifications generated in different legal systems or families. This means that domestic law illuminates, guides and conducts dialogues with foreign law, in a synergistic and dialectical process.

This results in a number of variables. Determining the applicable law cannot be reduced to a mere act of choosing external law. Interactions between judges and courts must pay attention to methods of applying rules, principles and precedents. The use of colloquies outside of their legitimate purpose should be avoided, as should any type of practice that implies, in general, importing decontextualized solutions, creating a law dissociated from the domestic order, establishing relationships between the Powers that do not fit into national constitutional arrangements, among other activist possibilities. A consistent transjudicial decision must be permeated by all of this awareness, necessarily observing, in terms of the facts and the law, a duty of reasoning that legitimizes it and gives it rationality.

The subject is recent and will still be covered in countless chapters of history. The aim is for this article, which is full of pretensions, to serve as an effective contribution to the subject.

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