JUDICIAL ACTIVISM AND NEOCONSTITUTIONAL DISCRETION - A REFLECTION ON MINISTER BARROSO'S VOTE TO DECRIMINALIZE ABORTION IN HABEAS CORPUS N °. 124,306 / 2016-STF

Ativismo judicial e discricionariedade neoconstitucional – uma reflexão sobre o voto do Ministro Barroso pela descriminalização do aborto no habeas corpus n°. 124.306/2016-STF

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ABSTRACT

Based on the hypothetical-deductive method and a review of the literature on neoconstitutionalism, this Article analyzes the practice of judicial activism in the vote of Minister Barroso, in *Habeas Corpus* n °. 124/306/2016-STF, for the decriminalization of abortion in the first-trimester of pregnancy. We start from the observation that there are no convincing bioethical reasons to consider the life of the fetus only as "potential" in this period, recognizing that human life and the right that protects it do not depend on a subjective choice, but on objective scientific data. To understand the discretion of this vote, we reflect on the theory it refers as its foundation, the neoconstitutionalism, based on constitutional principles and on Alexy's legal argumentation theory, as well as the conception of counter-majoritarian democracy, which privileges the Judiciary, in the post- positivist context of the constitutional rule of law and the judicialization of life. We also analyze the extent to which neoconstitutionalism overcomes positivist discretion and what is the role of the Judiciary in the face of reasonable moral disagreements, as Minister Barroso considers abortion to be. We conclude that the Minister's argument is discretionary and marked by contradictions and fallacies, resulting in judicial activism that moralizes and depoliticizes the law, threatening the integrity of the Constitutional State of Law.

Keywords: Judicial activism. Discretion. Neoconstitutionalism. Legal argumentation theory. Luis Roberto Barroso.

RESUMO

Com base no método hipotético-dedutivo e na revisão da literatura sobre o neoconstitucionalismo, este Artigo analisa a prática do ativismo judicial no voto do Ministro Barroso, no *Habeas Corpus* n°. 124/306/2016-STF, pela descriminalização do aborto no primeiro trimestre de gestação. Partimos da constatação de que não há razões bioéticas convincentes para considerar a vida do feto apenas como "potencial" neste período, reconhecendo que a vida humana e o direito que a protege não dependem de uma escolha subjetiva, mas de dados científicos objetivos. Para entender a discricionariedade desse voto, refletimos sobre a teoria que ele refere como fundamento, o neoconstitucionalismo, baseado na ponderação de princípios constitucionais e na teoria da argumentação jurídica de Alexy, assim como a concepção de democracia contramajoritária, que privilegia o Poder Judiciário, no contexto pós-positivista do Estado constitucional de Direito e da judicialização da vida. Analisamos também em que medida o neoconstitucionalismo supera a discricionariedade positivista e qual é o papel do Poder Judiciário diante dos desacordos morais razoáveis, como o Ministro Barroso considera ser o aborto. Concluímos que a argumentação do Ministro é discricionária e marcada por contradições e falácias, resultando num ativismo judicial que moraliza e despolitiza o direito, ameaçando a integridade do Estado Constitucional de Direito.

Palavras-chave: Ativismo judicial. Discricionariedade. Neoconstitucionalismo. Teoria da argumentação jurídica. Luis Roberto Barroso.

1. Introduction

Luis Roberto Barroso is a paradigmatic case of a jurist, as he performs both the judicial activity, as Minister of the Federal Supreme Court (STF), and the academic activity, as the author of many relevant articles and books in the national legal bibliography.

These two characteristics are didactically evidenced by the book A *judicialização da vida e o papel do Supremo Tribunal Federal* (BARROSO, 2018), whose theoretical part is complemented by the practical part, which brings five votes on emblematic issues: (1) reduction of the privileged forum; (2) decriminalization of abortion up to the third month of pregnancy; (3) criminal enforcement after conviction in the second degree; (4) decriminalization of marijuana; (5) pardon José Dirceu.

This double dimension, of theoretical justification and practical argumentation, allows analyzing his jurisdictional activity in the light of the neoconstitutional theory he defends, underlining his legal-political conception of judicial activism. Indeed, Barroso (2018, p. 88) attributes to the Judiciary the "função iluminista" of a nation, in order to "empurrar a história", anchored in public reasons, even if it acts in a countermajoritarian way.

Its performance in general and in the particular case of Habeas Corpus n°. 124,306/2016, in which he voted for the decriminalization of abortion in the first trimester of pregnancy, is the subject of numerous criticisms of different legal shades, from its interpretation by authors such as Robert Alexy, Ronaldo Dworkin and John Rawls, some of its main theoretical references, to the logical consistency of the argument, considered from an internal point of view (DIMOULIS, 2009; SACRAMENTO, 2018; STRECK; BARBA, 2016; FERREIRA FILHO, 2009; PEREIRA JÚNIOR. ALMEIRA; MACHADO, 2020 CABETTE, 2020; WIVIURKA, 2020).

The Minister recognizes that "o aborto é, inequivocamente, a questão moral mais controvertida do debate público contemporâneo" (BARROSO, 2012, p. 101). The complexity of the topic is inexhaustible, as it deals with the interdisciplinarity of bioethics, involving (bio)medical, moral, legal, political and economic issues. If the subject presents wide philosophical and ideological divergence, who should decide about the right to life of the embryo and fetus? Who should unionize on women's right to terminate their pregnancy?

In this article, we analyze these neoconstitutional and countermajoritarian "razões", which act frankly *contra legem* based on legal principles (the formal of proportionality and the material of human dignity). We ask if these reasons are supported in the public debate in a persuasive and democratic way, in order to resolve the controversy and pacify society around a fair, egalitarian and inclusive conception.

Therefore, we analyze the practical application of the legal and political theory of neoconstitutionalism, which proposes judicial activism as a way of balancing representative (political) democracy with deliberative (legal) democracy.

With the support of critical legal theorists from Barroso (STRECK; BARBA, 2016; STRECK, 2011; DIMOULIS, 2009; SACRAMENTO, 2018; BARZOTTO, 2017; SANTOS, 2017), we realize that this model does not overcome positivist discretion, nor does it meet to the rationality requirements of Alexy's theory of principles; on the contrary, it degenerates the Rule of Law into a Judicial State, sharpening the moral disagreement it was intended to resolve. Finally, we recognize the role of legislative and political discretion, legally controlled by the Judiciary, in respect of representative and deliberative democracy.

In the case of the analyzed HC, Minister Barroso grants the habeas corpus order ex officio, for two reasons: (1) first, the requirements that legitimize the precautionary arrest are not present; (2) second, interpretation according to the Constitution of arts. 124 to 126 of the Penal Code, which typify the crime of abortion. Even without being a legislator, the Minister affirms that the criminalization of abortion in the first trimester "viola diversos direitos fundamentais da mulher, bem como o princípio da proporcionalidade" (§3 of the Introduction to the vote)[1].

In this article, we critically analyze the judicial activism resulting from the adoption of the theory of neoconstitutionalism, with its distinction of rules and principles and its adoption of the maxim of proportionality, which allows the type of rhetoric present in this vote. Our hypothesis is that, by denying the objectivity of the interpretation of the criminal law, the constitutional principle adopted, whatever it may be, does not guarantee hermeneutic security, due to the rhetorical fluctuation of the meanings, in the context of the arguments practiced by the Minister.

[1] We follow the numbering of paragraphs that Minister Barroso himself (2018, p. 203-217) uses in his vote.

We intend to show that Barroso's neoconstitutional theory legitimizes his activist judicial practice, which is a fallacious argument that approaches a political ideology contrary to the Democratic and Constitutional State of Law, replaced by a Judicial State, without democratic control of decisions in cases of reasonable moral disagreements. We focus our analysis, therefore, on the theories of Barroso (2018, 2013, 2005, 2003, 2001) and Alexy (2013, 2011, 2004), with a reference also to the positivist discretion of Kelsen (2012).

2 The abortion controversy: a subjective religious or philosophical choice?

In 2011, at Harvard University, he debated with Professor Mark Tushnet on the role of the Judiciary and the supreme courts in contemporary democracies and argued that, in cases such as abortion, the Judiciary should overcome the inertia of the Legislative Branch: "em alguns cenários, em razão das múltiplas circunstâncias que paralisam o processo político majoritário, cabe ao STF assegurar o governo da maioria e a *igual dignidade de todos os cidadãos*." (BARROSO, 2018, p. 88, emphasis added).

Why the embryo, for the human fetus is not recognized as human to human life, the human right too, are considered? This Article considers fallacious the argument of the Minister, defending the right to abortion based on the "dignidade igual de todos os cidadãos".

On the contrary, the recognition of human dignity requires the recognition of the right to life of all human persons "desde a concepção", as provided for in Article 1 of the American Convention on Human Rights (Pact San Jose de Costa Rica, 1969), ratified for Brazil.

Throughout his vote, the Minister does not mention the most complete work of Bioethics in Brazil (DINIZ, 2017), nor does he face the bioethical, legal and philosophical arguments of jurists who, based on the International Human Rights and Constitutional Treaties and Conventions Federal and in the most recent discoveries in embryology, recognize the right to life from conception (MARTINS, 2005; RIBEIRO, PINHEIRO, 2017; KACZOR, 2011)[2]. In this article, we

[2] Na nota de rodapé n. 8 do item '1. Violação a direitos fundamentais das mulheres' do seu voto, o Ministro arrola oito referências nacionais e dez estrangeiras, todas favoráveis ao aborto, evidenciando a ausência de contraditório e dialética de sua análise. A bibliografia nacional e estrangeira favorável à vida desde a concepção é, pelo menos, tão numerosa como a da posição abortista.

will not refute these bioethical arguments by Barroso, as we consider this task sufficiently accomplished by Ribeiro (2021), especially for demonstrating, based on embryology, that:

> *Não é ponto controvertido o fato de que o feto ou embrião humano é um ser vivo*. Não se pode falar em 'vida potencial do feto' (§12), se com isso se quiser dizer que ele meramente está próximo a viver, mas ainda não vive. *Não há debate sobre esta questão* nem na literatura especializada sobre o aborto, nem na sobre a embriologia. (grifos no original)

However, ignoring the state of the art of biomedical science, Barroso states that "[n]ão há solução jurídica para esta controvérsia. Ela dependerá sempre de uma escolha religiosa ou filosófica de cada um a respeito da vida." (§22).

Therefore, the Minister " chooses", until the first trimester, there is only " vida potencial do feto ", because "não há qualquer possibilidade de o embrião subsistir fora do útero materno nesta fase de sua formação." (§22) After this period, the fetus remains entirely dependent on the mother, as in the first year of life, but, of course, no one considers that the right to life of the fetus or the child depends on the mother's decision.

But, assuming that there was real doubt about the biological beginning of human life, the mere fact that there is disagreement and possible arguments for both sides - both those who defend life from conception, and those who consider it to start only in the second trimester - is not enough. to consider the question insoluble or dependent on mere subjective choices. As Silva (2016) argues,

> O uso feito aí do adjetivo 'filosófico' é particularmente intrigante. Junto com o complemento do final da oração, o que está sendo afirmado é que posições filosóficas sobre o tema são idênticas a "escolhas […] de cada um", o que significa dizer que não podem ser reconduzidas a nenhuma esfera objetiva, acessível a outros sujeitos racionais, e que prescinde absolutamente de argumentação que possa ser compreendida e, eventualmente, refutada. É no mínimo curioso que o ministro qualifique o substantivo "escolhas" com o adjetivo "filosófico" para, ao final das contas, significar apenas opções individuais absolutamente relativas ao gosto próprio ou, ainda, escolhas privadas sobre as quais não é necessário dar razões (deixo de lado aqui a questão sobre o dar razões das "escolhas" religiosas; basta mencionar que dificilmente alguém que leva a sério o problema religioso "escolhe" nos moldes do que o ministro parece entender por escolha). De Tales de Mileto a David Chalmers, posições filosóficas caracterizam-se justamente por imporem sobre si mesmas o dever de apresentar razões intersubjetivas passíveis de serem discutidas e não, como denota Barroso, por serem meras expectorações do foro íntimo. Talvez seja por conta desse entendimento particularmente restrito acerca do que seja uma tomada de posição filosófica que, após rechaçar a validade da "escolha" filosófica, Barroso compromete-se com algumas delas sem, absolutamente, fornecer razão alguma.

This first point is central to demonstrating the fragility of Barroso's argument. On the one hand, he considers the "philosophical and religious" question to be merely subjective and therefore indisputable. On the other hand, it takes a philosophical and subjective position, without needing to justify it, suspending public debate. Anyone who wants to refute it will have a "philosophical and subjective" position, incapable of appearing in public discussion. Why should the Minister's philosophical and subjective reason prevail over all other innumerable reasons of the same nature?

As demonstrated throughout this article, the Minister's subjectivist relativism is self-contradictory and seems to point to a rhetorical dispute, in the context of postmodernity that dismisses the pretensions of philosophical and scientific truth, overcoming the ideas of neutrality and objectivity, in favor of a "conjunto de possibilidades interpretativas que o relato da norma oferece." (BARROSO, 2001, p. 24).

In other words, the application of Law is not only an "ato de conhecimento – revelação do sentido de uma norma preexistente -, mas também um ato de vontade – escolha deu uma possibilidade dentre as diversas que se apresentam." (BARROSO, 2001, p. 24). These "possiblidade interpretativas" derive, according to him, "(i) da discricionariedade atribuída pela norma ao intérprete; (ii) da pluralidade de significados das palavras ou (iii) da existência de normas contrapostas, exigindo ponderação de interesses à vista do caso concreto" (BARROSO, 2001, p. 24).

If we are faced with a plurality of possible meanings in the case of the right to life, how can we prevent "voluntarismos de matizes variadas", within a constitutional "frame", if objectivity is denied to establish the beginning of human life? Why the three months as a milestone that separates the mother's right to abortion from the child's right to life, if it is a "escolha religiosa ou filosófica de cada um a respeito da vida" (§22)?

In the aforementioned debate at Harvard, Barroso recognizes that he and his interlocutor Tushnet are "progressistas" and "comprometidos com o avanço social", but the American considers that the Legislative Power is the representative of the people and, in a democracy, it is this Power that must decide on issues such as abortion and same-sex marriage. However, the Brazilian jurist thinks the opposite, attributing to the Judiciary the leadership of the democratic process in case of omission of the Legislative Power:

> a política majoritária, conduzida por representantes eleitos, é um componente vital para a democracia. Mas a democracia é muito mais do que a mera expressão numérica de uma maior quantidade de votos. Para além desse aspecto puramente formal, ela possui uma dimensão substantiva, que abrange a *preservação de valores e direitos fundamentais*. A essas duas dimensões – formal e substantiva – soma-se, ainda, uma dimensão deliberativa, feita de *debate público, argumentos e persuasão*. A democracia contemporânea, portanto, exige votos, direitos e *razões*. (BARROSO, 2018, p. 88, grifo nosso)

This excerpt is quite illuminating on Barroso's conception of representative and deliberative democracy, with the countermajoritarian judiciary protagonism in favor of "valores e direitos fundamentais". One can ask: shouldn't the value of life and the fundamental right to be born be preserved by the Judiciary, in the face of the crime of abortion, typified by the Brazilian Penal Code (art. 126)?

But, before specifically addressing the incongruities of the Minister's vote and his conception of judicial activism and countermajoritarian democracy, we need to understand the general context of the judicialization of life.

3 Constitutional rule of law and judicialization of life

Having as a landmark the promulgation of the Federal Constitution of 1988, the historical process in Brazil of the last decades is marked by the judicialization of social life. There is no important issue that is not debated in legal and political terms and that does not have the potential to reach the STF because it involves fundamental human rights, interpreted from constitutional principles that require moral and political arguments.

The undeniable fact of judicialization is accompanied by a theoretical elaboration of the current called neoconstitutionalism, which places it in a specific key and which has Minister Barroso as one of its protagonists (SANTOS, 2017).

Barroso's legal career, both in academia and in judicial activity, first as a lawyer, then as Minister of the STF, is marked by the recognition and proposal of this paradigm shift. He cites, for example, numerous controversial issues that flow daily into the Judiciary and that demand a reasonable solution that pacifies society. In the ethical sphere, for example, it mentions same-sex

marriage, abortion, embryonic stem cell research; in the social sphere, he recalls the racial quotas for admission to universities and public examinations (BARROSO, 2018, p. 21).

This "judicialização da vida, tanto do ponto de vista quantitativo quanto qualitativo" gives incomparable relevance to the Judiciary, the higher courts and the STF, which stand out "na paisagem política e no imaginário social." (BARROSO, 2018, p. 22), as they are provoked to decide the "hard cases", the issues of great social repercussion, in which, not infrequently, the dilemma arises of (1) sticking to the letter of the law and what has already was decided (model of judicial containment), or (2) adopt a more activist stance, in order to implement fundamental rights, as in the case of freedom of expression and protection of minorities, administrative morality, the prohibition of nepotism, or the defense democracy, previously defining the impeachment procedure (judicial activism model).

The resolution of this dilemma involves a specific understanding of the nature of constitutional democracy and the role of the STF as guardian of the Constitution, as well as the nature of law, formed by rules and principles, in the context of the post-positivist paradigm, and based on the method of interpretation of formal (such as proportionality) and material (such as dignity) principles.

As we have seen, the vote in favor of the decriminalization of abortion until the first trimester is paradigmatic of this neoconstitutional practice, as it is based on the technique of interpretation according to the Constitution to rule out the incidence of crime provided for by the Penal Code in the practice of abortion in this interstice. Indeed, as already mentioned, the second part of the book *A judicialização da vida e o papel do Supremo Tribunal Federal* brings this decision as one of the "questões emblemáticas", in which judicial activism took place (BARROSO, 2018).

It should be noted that the term judicial activism, in this context, is not used in a critical and pejorative way, but as an achievement of constitutional jurisdiction, which has a proactive role in the Constitutional State of Law, in which the Judiciary does not remain subservient to the Legislature (BARROSO , 2018, p. 43).

With the rise of constitutional charters after World War II, marked by the principles that defend the dignity of the human person and fundamental human rights, this hierarchical relationship between the Judiciary and Legislative Powers is no longer possible, because, in the Constitutional State of law, the Constitution becomes effective as a norm, with the principles having normative force. In this context, it is up to the Judiciary to guard it, providing its ultimate meaning:

> Nesse novo modelo, vigora a centralidade da Constituição e a supremacia judicial, como tal entendida a primazia de um tribunal constitucional ou suprema corte na interpretação final e vinculante das normas constitucionais (BARROSO, 2018, p. 43).

Hence, the problem of relations, always tense, between law and politics, dormant by the paradigm of legal positivism, which tried to build robust walls between both, in order to guarantee scientific rationality, objectivity, impartiality and purity of interpretation judicial.

Barroso (2018, p. 42) believes that, in the real world, there is a dialectic between, on the one hand, (1) the voluntaristic and political tendency of legal realism and critical theory and, on the other hand, (2) the cognitivist tendency and legal aspects of positivist formalism.

> Na concretização das normas jurídicas, sobretudo as normas constitucionais, direito e política se influenciam reciprocamente, numa interação que tem complexidades, sutilezas e variações. Em múltiplas hipóteses, não poderá o intérprete fundar-se em elementos da pura razão e objetividade, como é a ambição do direito. Nem por isso, recairá na *discricionariedade* e na *subjetividade*, presentes nas *decisões políticas*. Entre os dois extremos, existe um espaço em que a vontade é exercida dentro de *parâmetros de razoabilidade e de legitimidade*, que podem ser *controlados pela comunidade jurídica e pela sociedade*. (BARROSO, 2018, p. 42, grifo nosso)

In his vote on HC 124.306/2016, the Minister does not seem to achieve this balance, as he does not provide the "parâmetros de razoabilidade e legitimidade" that justify the election of the first trimester as a period in which abortion should not be considered a crime.

He does not present any defining criteria for the absence of human life in this period, none that make later abortion or even infanticide substantially different, since his argument for "formação do sistema nervoso central e da presença de rudimentos de consciência" (§ 21) does not stand up to biomedical science (KACZOR, 2011). Indeed, the Minister does not develop this central thesis of his argument, relegating it to the relativism of "escolha religiosa ou filosófica de cada um a respeito da vida" (§ 22).

We need, then, to better understand the neoconstitutional theory that inspires its argumentative practice, its discretionary (or arbitrary) use of constitutional principles.

4 The neoconstitutional practice: (ab)use of the maximum of proportionality

Barroso is the protagonist of the legal trend called neoconstitutionalism in Brazil. It is a diversified paradigm, which encompasses different authors and theories, but whose unity can be discerned by the common attention to the normative force of constitutional principles, redimensioning, hermeneutically, the rules of positive law.

Therefore, neoconstitutionalism concerns the post-positivist trend, in which legality and formalist and objective interpretation are rethought based on the consideration of principles[3]. As his main theoretical frameworks, Barroso (2005, p. 215-220) lists: (1) the normative force of the constitution; (2) the expansion of constitutional jurisdiction; and (3) the new constitutional interpretation. As we have already treated, synthetically, the first two in the previous item, we approach the third milestone now, verifying the practice of this new constitutional interpretation.

In the vote analyzed in this Article, Justice Barroso expressly refers to Robert Alexy's theory of fundamental rights (footnote n. 12 of §17), in which fundamental rights are seen essentially as principles, whose collision with each other or with state-owned companies requires the balancing technique, presided over by the formal principle of proportionality.

Considering the "relevância e a delicadeza da matéria", he justifies a "very brief incursion into the general theory of fundamental rights" (§ 14), which are "brevíssima incursão na teoria geral dos direitos fundamentais", fruits of the history of the individual's affirmation in the face of political, economic and religious power, the latter conforming to the dominant social morality.

It is important to note, from now on, that the right to life of the unborn child is the first of the fundamental rights, because it guarantees that human life, from its conception, is not discarded for utilitarian reasons - of a social, political, economic and eugenic order - or religious, as in the

[3] In this article, it is not our intention to problematize Barroso's neoconstitutionalism as a whole, the variations of post-positivism and the unfolding of judicial activism, but only his neoconstitutional theory applied in the case of abortion (HC 124.306/2016). From the abundant critical bibliography on the subject, we highlight: Santos (2017), Streck (2011), Dimoulis (2009), Duarte; Pozzolo (2010); Fellet; Paula; Novelino (2011), Verbicaro (2019) and Wiviurka (2020).

case of sacrificial infanticides, present in certain cultures. This right prevents the use of human guinea pigs for scientific experiments, as well as the unsanitary conditions of slave labor, which risk the person's life. In other words, as a fundamental right, the right to life is part of the logic of protecting the individual against social domination in general.

Then, the Minister mentions the Kantian categorical imperative, by which "toda pessoa deve ser tratada como um fim em si mesmo, e não um meio para satisfazer interesses de outrem ou interesses coletivos. Dignidade significa, do ponto de vista subjetivo, que todo indivíduo tem valor intrínseco e autonomia" (§ 15). We have already discussed, in the previous section, the reasons why the Minister disregards the life and personality of the unborn child during the first trimester of pregnancy, contrary to biomedical science, which does not recognize any substantial distinction between this period and the next.

More importantly, these fundamental rights are "oponíveis às maiorias políticas" and are endowed with "aplicabilidade direta e imediata, o que legitima a atuação da jurisdição constitucional para a sua proteção, tanto em caso de ação como de omissão legislativa" (§ 16). This justifies the Minister's judicial activism, who, assuming there is a subjective right to abortion, based on the constitutional principle of human dignity, applies it immediately, regardless of the Legislative Power debating various bills on the subject, both prohibiting it, as allowing it.

In the case of the decriminalization of abortion, the Minister considered that there was a collision between two fundamental rights: (1) on the one hand, the right to life of the unborn child (provided for by the Penal Code, articles 124 and 126); (2) on the other hand, the sexual rights of women and their autonomy (these rights are not expressly provided for in any rule, but extracted from the principle of human dignity, provided for in article 1, item III, of the Federal Constitution).

Streck and Barba (2016, p. 2) consider that, in the Minister's vote, the postulation of the problem was given the wrong form, resulting in a "simplificação da teoria alexyana cumulado com argumentos retóricos que não respeitam o mínimo de exigência aos parâmetros institucionais do Direito, como coerência e integridade." In their critique, seven objections to the Minister's vote are outlined:

(1) First, there is a misunderstanding of Alexy's nomenclature, which proposes a "maximum" of proportionality, and not a "principle" of proportionality, to equate the collision of principles, by measuring the relative weight of each one of them. How could a principle resolve the collision between principles? If there were only rules and principles, the maxim of proportionality would be more properly considered as a rule, since principles are optimization commandments, which can be applied to a greater or lesser degree. “Como o critério que julga a otimização dos princípios colidentes poderia ser, ele mesma, otimizado?” (STRECK; BARBA, 2018, p. 2)

(2) Furthermore, still in the context of the elementary distinction between rules and principles, the criminal types of art. 124 and 126 of the Penal Code are, of course, rules, applying by means of subsumption, in the all-or-nothing modality. That is, there is no gradation or optimization of this rule, because it is not a principle. There is not a little abortion, a medium abortion, or a lot of abortion; little life, half-life or too much life to be taken by abortion. Either there is life, so abortion is a crime; or there is no life, so abortion is not a crime.

The logic here is subsuctive and does not depend on balancing with another principle.[4]. It is not the greater or lesser freedom of the mother that determines, by weight, the greater or lesser life of the fetus. There is no gradation in life, nor “vida potencial do feto”, as the Minister supposes (§ 12). A penal type does not protect a potential good, only an actual good. If the legal interest of life were protected only at birth, there would be no crime of abortion, only infanticide. Abortion is exactly the criminal type that protects the unborn child, that is, the life of the embryo and fetus, which develops during the months of pregnancy. How can the Minister weigh this rule and decide that this protection only starts after the first trimester? In the next item, we will deal with the subjectivist discretion of his argument.

As if (1) the confusion between maxim and principle and (2) the confusion between rule and principle were not enough, Minister Barroso also does not pay attention to (3) the subsidiary application of the three sub-maxims of proportionality, (3.1) adequacy, (3.2) necessity and (3.3) proportionality in the strict sense.

[4] In another study, Streck (2011, p. 34-24) criticizes the fact that Barroso and Barcellos (2003) foresee the possibility of a “weighting of rules”, which neutralizes the distinction between rules (to be applied by subsumption) and principles. (to be applied by weighting).

For legal argumentation to meet the requirement of formal rationality, it is necessary for the interpreter to demonstrate each of these steps: “É possível que a análise da proporcionalidade termine na mera observância da adequação, sem necessitar que se chegue às duas últimas submáximas. Mas nada disso se vê no voto do Ministro.” (STRECK; BARBA, 2016, p. 3)

(4) The sub-maxim of adequacy concerns the Pareto efficiency logic, aiming to eliminate the means mobilized by the legislator that not only do not protect the legal good, but also undermine other goods protected by the legal order. According to the Minister, the criminalization of abortion would have “duvidosa adequação para tutela da vida do nascituro” (§ 39); in fact, “o que a criminalização de fato afeta é quantidade de abortos seguros” (§ 36). In other words, the Minister already presupposes, *contra legem*, that abortion is not a crime and that, being a right, it must be performed safely.

But if the protected good is the life of the unborn child, what other legal means would be adequate to protect it? How to protect, criminally, the good of life, except with the type of homicide? Streck and Barba (2018, p. 3) claim:

> Se o número de abortos praticados no país é um argumento válido para afastar a meio legal escolhido para proteção à vida, por que não seguimos esse mesmo raciocínio para os demais crimes contra a vida? Afinal, somos o país que nos últimos anos alcançou a meta de 60 mil homicídios anuais. Não se mede a adequação de meios para obtenção de fins por meio do seu grau de eficácia social, do contrário, a própria noção de norma jurídica “iria por água abaixo” na medida em que a sua concretização ficaria à mercê das condições contingenciais e aleatórias. O que o ministro Barroso fez foi um retorno ao realismo jurídico por meio de uma equivocada interpretação da teoria dos princípios de Alexy.

It is really difficult to follow the Minister's legal arguments at this step, mainly because he claims to use the sub-maxim of adequacy of Alexy's theory of fundamental rights. As the crime of abortion does not prevent it from being practiced in the country, the Minister considers it proportionate to decriminalize it completely, so that it is done in a “safe” way (§ 36).

But, in this case, what would be the most appropriate norm to protect the legal good of the unborn child's life? For the Minister, the decriminalization of abortion does not contribute to the most adequate protection of the life of the unborn child (which will no longer be protected at all), but to the life of “mulheres pobres, privadas de assistência.” (§ 36)

Let's make an analogy between abortion and murder, both criminal types that protect the good of life. Following the Minister's reasoning, as the criminal type of homicide does not achieve effective results within the scope of criminal policy, and its annual rate is high, it would be more appropriate to protect murderers who risk their own lives in this practice, than to protect the lives of victims. by an ineffective penal type.

(5) Then we move on to the sub-maxim of necessity, the application of which by the Minister generates the same logical contradiction. For this sub-maxim, if there are two adequate means to promote a certain principle, the one that affects other principles less intensely should be chosen. Therefore, "é preciso verificar se há meio alternativo à criminalização que proteja igualmente o direito à vida do nascituro, mas que produza menor restrição aos direitos das mulheres" (§ 40). According to the Minister, "é possível que o Estado evite a ocorrência de abortos por meios mais eficazes e menos lesivos do que a criminalização, tais como educação sexual, distribuição de contraceptivos e amparo à mulher que deseja ter o filho, mas se encontra em condições adversas" (§ 6).

The question that arises, at this moment, is to what extent is it up to the Judiciary to propose public policies for the prevention of a legal good? To try to understand the Minister's reasoning, let's say that all Brazilian women have sex education, access to condoms and a maternity support network. Even so, many women want to have an abortion. How does this policy necessarily protect the legal interest "life", protected by the criminal law? If abortion becomes a woman's right, it is enough for her to decide to perform it, regardless of sex education, contraceptive methods and gestational support. "Passado a ser lícita a conduta, a vulnerabilidade do feto aumenta expressiva e inexoravelmente, já que o Direito nada mais tem a dizer sobre isso." (STRECK; BARBA, 2016, p. 4)

(6) In the end, it remains to analyze the way in which the Minister mobilizes the sub-maxim of proportionality in the strict sense. This is the famous law of balancing or balancing, by which it is verified "se as restrições aos direitos fundamentais das mulheres decorrentes da criminalização são ou não compensadas pela proteção à vida do feto" (§ 43).

The reasoning is, once again, fallacious because Barroso already assumes that the criminalization of abortion violates women's sexual and reproductive rights, their autonomy,

integrity and gender equality. This is the undeniable premise of all her vote, the woman is free and autonomous to decide the fate of her pregnancy in the first trimester He equates every pregnancy with rape, in which the woman did not compete with her free will for the pregnancy and for the which has no legal liability in the first quarter. This fallacious premise makes the argument based on Alexy's maxim of proportionality idle and rhetorical:

> A criminalização viola, também, os direitos sexuais e reprodutivos da mulher, que incluem o direito de toda mulher decidir sobre se e quando deseja ter filhos, sem discriminação, coerção ou violência, bem como de obter o maior grau possível de saúde sexual e reprodutiva. A sexualidade feminina, ao lado dos direitos reprodutivos, atravessou milênios de opressão. O direito das mulheres a uma vida sexual ativa e prazerosa, como se reconhece à condição masculina, ainda é objeto de tabus, discriminações e preconceitos. Parte dessas disfunções é fundamentada historicamente no papel que a natureza reservou às mulheres no processo reprodutivo. Mas justamente porque à mulher cabe o ônus da gravidez, sua vontade e seus direitos devem ser protegidos com maior intensidade. (§ 27)

But the question remains: how does the Minister weigh the weight of the principle of protection of the life of the fetus in relation to the principle of the autonomy of the pregnant woman? He claims, again, that "a criminalização do aborto promove um grau reduzido (se algum) de proteção dos direitos do feto, uma vez que não tem sido capaz de reduzir o índice de abortos" (§ 45). Barroso considers that, as abortion is decriminalized during the first trimester, women's autonomy and sexual and reproductive rights increase in proportion to the decrease in the protection of the fetus' life. To understand Barroso's reasoning, it is necessary to resume his bioethical argument of the variation in the value of intrauterine life, which we saw above to be unsustainable from a bioethical point of view:

> o peso do direito à vida do nascituro varia de acordo com o estágio de seu desenvolvimento na gestação. O grau de proteção constitucional ao feto é, assim, ampliado na medida em que a gestação avança e que o feto adquire viabilidade extrauterina, adquirindo progressivamente peso concreto. (§ 45)

In other words, for the Minister, during the first trimester, the woman's autonomy must proportionally overlap with the protection of the fetus's life, since its cerebral cortex has not yet been (fully) formed, which will allow it to develop feelings and rationality, just as there is no potential for life outside the mother's womb.

However, at the end of the third month, the weight of the fetus' life proportionally overlaps with the woman's sexual and reproductive rights, who no longer have the right to abortion, which is now considered a crime.

In the reasoning of the Minister, this is the argument of the sub-maxim of proportionality in the strict sense of Alexy, in which the degree of non-satisfaction of a principle is proportional to the degree of satisfaction of the colliding principle.

According to Streck and Barba (2016, p. 5), "simplesmente" by "um juízo ideológico-pessoal", the Minister interprets the balance of principle as an opposition of right X versus right Y, which allows.

> concluir, por coerência argumentativa, que através de argumentos principiológicos abstratos possam ser justificadas violações gravíssimas a bens jurídicos concretos e reais. Na verdade, por intermédio da lei do sopesamento, esconde-se a facticidade atrás da abstratalidade semântica de conceitos como "dignidade sexual", "direitos reprodutivos" ou "autonomia", que, por sua força simbólica, acabam, na prática, distorcendo a proteção constitucional a bens jurídicos indispensáveis a qualquer Estado de Direito, como o direito à vida. Aliás, o próprio Alexy refere, como uma das etapas da lei da ponderação, considerar o peso abstrato dos princípios (*GPi,jA*), o que foi sonegado na ponderação do Supremo. (STRECK; BARBA, 2016, p. 5)

(7) In addition to this abstraction, the use of the submaximal of proportionality in the strict sense was still distorted, by the Minister, by the consequentialist argument of the generation of expenses and costs for the health system. Based on social, medical and economic contingencies, this is a typical utilitarian policy argument (policies), which aims to maximize the welfare of the majority, eventually to the detriment of individual rights. If there were economic and material means of safeguarding the right to life of the fetus without the same costs and expenses as the health system, would abortion be criminalized again? That is, does the right to life of the unborn child, in the first quarter, depend on budgetary contingency, on the economic balance of the nation?

Naturally, this defense by Minister Barroso confuses law and politics, as "faz com que o próprio Direito seja submetido a decisões baseadas em argumentos contingenciais, a depender das condições empíricas particulares, o que gerará inevitavelmente arbitrariedade." (STRECK; BARBA, 2016, p. 5).

It is the responsibility of the Executive Power to propose and execute public policies (particular conclusion of political reasoning), considering both the laws and constitutional

principles (major, abstract, universal and normative premise, of political reasoning), as well as social contingencies (minor, concrete premise, particular and factual, of political reasoning).

At this moment, with his judicial activism, Minister Barroso does not argue in a legal way (analyzing the validity of laws), but politically (proposing public policies). He starts from utilitarian and contingency considerations of healthcare costs (minor, phatic premise) to repeal the law on abortion in the first trimester (major, normative premise), in a fallacious political inversion of legal reasoning.

> Afinal, determinado ato normativo é (ou não) constitucional porque sua disposição viola o texto constitucional, em sua dimensão formal ou material, *e não por meio de argumentos contigenciais; subjetivos, se quisermos ser mais claros*. Estes (os argumentos) nada mais são do que modos em que a subjetividade ideológica do juiz encontra um resguardo para poder decidir conforme suas preferências pessoais. Por isso o apego a argumentos de política, como o "custo-benefício" para o Estado, a dificuldade de acesso ao SUS ou simplesmente conceitos abstratos cujo conteúdo é preenchido livremente pelo intérprete. Ora, o Direito é, por definição, um mecanismo contrafactual. Ele opera no plano do dever-ser. É deontológico. Se assim não o fosse, não haveria qualquer sentido a noção de norma jurídica, pois sua normatividade ficaria submissa ao subjetivismo do juiz. No caso em discussão, ficou.
> (...)
> Não se invalida uma lei com argumentos de política; os julgamentos devem ser de princípio. Por isso, é desimportante aquilo que o juiz pensa ou acha pessoalmente acerca do conteúdo da lei. Cada um tem o seu papel na democracia. (STRECK; BARBA, 2016, p. 6, grifos no original)

What can be seen from this analysis of the fallacious appropriation of Robert Alexy's theory of fundamental rights is the discretion of Minister Barroso, who feels free from the law to apply the moral and political principles he considers relevant to the case. Let us then analyze the issue of judicial discretion, oversized by Barroso's neoconstitutionalism.

5. The permanence of positivist judicial discretion

The main content of Streck and Barba's (2016) criticism of the Minister's vote is that it falls into an extreme form of "ativismo judicial", a "retorno ao realismo jurídico", in which the "subjetividade ideológica do juiz" and his "preferências pessoais" supersedes the current laws, imploding the "Estado Democrático", in which "aquele ente estatal que tem a função de julgar casos sob a lei, não deve criá-las."

In a previous work entitled ‘Contra o neoconstitucionalismo', Streck (2011, p. 22-24) argues precisely that this current only sharpens the central problem of legal positivism that it intended to overcome, namely, subjectivism and judicial discretion, judicial activism, a judicial stance beyond the limits established by the Constitution:

> se a discricionariedade é o elemento que sustenta o positivismo jurídico nos “casos difíceis” e nas vaguezas e ambiguidades da linguagem dos textos jurídicos, não parece que a ponderação [defendida pelo neoconstitucionalismo] seja “o” mecanismo que livre (ou arranque) o direito dos braços do positivismo. Pode até arrancá-lo dos braços do positivismo primitivo; mas o atira nos braços de outra forma de positivismo – axiologista, normativista ou pragmaticista. Veja-se: a teoria da argumentação – de onde surgiu a ponderação – não conseguiu fugir do velho problema engendrado pelo subjetivismo, a discricionariedade, circunstância que é reconhecida pelo próprio Alexy (...)
> Esse é o problema. O sopesamento. Quem escolhe os princípios a serem sopesados? (...)
> Desse modo, afastei-me do neoconstitucionalismo porque ele aposta em elementos não democráticos, como a ponderação e a discricionariedade judicial. Ou seja, a grande pergunta não é respondida pelas teses neoconstitucuionalistas: quem controla aquele que controla ou diz por último o que a lei (ou a Constituição) é? A pergunta que acrescento é anterior: no caso da ponderação, quem escolhe os princípios a serem ponderados? E quais os pesos a serem conferidos a cada um dos princípios para a construção da regra de ponderação? (STRECK, 2011, p. 24)

Indeed, Alexy (2008, p. 611) recognizes that both the legislature and the judiciary have discretion regarding fundamental rights. But, in a constitutional democracy, to which power does this discretion fall?

Sacramento (2018) addresses precisely this issue, contrasting Minister Barroso's vote with Alexy's theory. But, before moving on to this issue, we need to better understand why neoconstitutionalism does not overcome the discretion of positivism, promoting, as it does, judicial activism, based on the analysis of Barzotto (2017).

In the Introduction to one of his most publicized and influential texts, ‘Neoconstitucionalismo e constitucionalização do direito no Brasil’, Barroso (2005, p. 212) recognizes “a perplexidade” and “angústia da aceleração da vida”, consoante a “grave crise existencial”, according to the “grave crise existencial” that the Law goes through, unable to “entregar os dois produtos que fizeram a sua reputação ao longo dos séculos”, security and justice:

> Na aflição dessa hora, imerso nos acontecimentos, não pode o intérprete beneficiar-se do distanciamento crítico em relação ao fenômeno que lhe cabe analisar. Ao contrário, precisa operar em meio à fumaça e à espuma. Talvez esta seja uma boa explicação para o recurso recorrente de prefixos pós e neo: pós-modernidade, pós-positivismo, neoliberalismo, neoconstitucionalismo. Sabe-se que o que veio depois tem a pretensão de ser novo. Mas ainda não se sabe bem o que é. Tudo é ainda incerto. Pode ser avanço. Pode ser uma volta ao passado. Pode ser apenas um movimento circular, uma dessas guinadas de 360 graus. (BARROSO, 2005, p. 212)

It is precisely this permanence or return to the discretion of positivism that is revealed in the decision of the analyzed vote. Instead of providing solid bases of legal argumentation, with objective criteria to be controlled by the democratic society, a subjectivist and ideological discretion is perceived, in an activism that politicizes and moralizes the law, by assimilating elements external to it.

This ambiguity and indefinition of the neoconstitutional movement – the "fumaça" and the "espuma" mentioned by Barroso above – was also registered by Dimoulis (2009, p. 224), who, ironically using the neologist prefix, calls it "paleoconstitucionalismo", by demonstrating that the theoretical frameworks presented by Barroso (2005), in fact, are already found in the theories and practices of institutions of modernity, with neoconstitutionalism being a way of re(vi)ver uma prática constitucional utilizada há mais de 200 anos, como (velha) solução para problemas que acompanham o direito desde a sua estruturação com base na Constituição", "um sinônimo vago e impreciso do moralismo jurídico".

When dealing with the "nova" constitutional interpretation based on the weighting of principles of this form of "pós-positivismo", Dimoulis (2009, p. 222) considers it compatible with Kelsen's juspositivist proposal, which defended the creative role of the judge and criticized the illusion of justice.

Indeed, Barzotto (2018, p. 11) brings neoconstitutionalism closer to positivism because both conceptions "favorecem o ativismo judicial ao desvincular o juiz do direito expresso na lei", basing the judicial decision on an uncontrollable and unpredictable discretion, as we saw in the vote from Barroso above.

What is clear is that it is the will that determines the decision, not reason. As if the judge first decided, based on his political ideology, and then justified it with supervening legal reasons, which do not disguise his arbitrariness.

In the present case, we are faced with a very clear extravasation of the cognitive framework of the criminal law on abortion, which, as it is an objective rule, does not present doubts about the protected legal interest, nor does it condition it to the fulfillment of any subsequent condition, as required. the Minister, namely the "formação do sistema nervoso central e a presença de rudimentos de consciência – o que geralmente se dá após o terceiro mês" (§ 21).

Kelsen (2012, p. 387-397) explains that legal interpretation combines an act of objective knowledge and an act of subjective will. Unlike what the "teoria usual da interpretação" advocated, there is no single correct answer, whose correction comes exclusively from the intellectual act of clarification and understanding of the interpreter in relation to the law, "como se, através de uma pura atividade de intelecção, pudesse realizar-se, entre as possibilidades que se apresentam, uma escolha que correspondesse ao Direito positivo, uma escolha correta (justa) no sentido do Direito positivo." (KELSEN, 2012, p. 391)

There is no single decision possible, because of the relative indeterminacy of the application of law, which always provides a plurality of options, either (1) intentionally or (2) unintentionally.

(1) To illustrate the intentional indeterminacy of the application, Kelsen (2012, p. 389) mentions a criminal law that provides for the option of pecuniary penalty or imprisonment, allowing the judge to decide between them, in the specific case, "podendo, para esta determinação, ser fixado na própria lei um limite máximo e um limite mínimo."

(2) Unintentional indeterminacy concerns, for example, but not exclusively, the "pluralidade de significações de uma palavra": when "o sentido verbal da norma não é unívoco, o órgão que tem de aplicar a norma encontra-se perante várias significações possíveis." (KELSEN, 2012, p. 389).

In order to distinguish legal interpretation from scientific interpretation, Kelsen explains the concurrence of an act of reason and will in the former, whereas, in the latter, only reason is involved. It is the act of the will that characterizes the judicial *decision* in positivism. Does this act of will depend on the act of reason, which delimits the frame with the interpretive possibilities of the norm? At first, one might think so:

> Na aplicação do Direito por um órgão jurídico, a interpretação cognoscitiva (obtida por uma operação de conhecimento) do Direito a aplicar combina-se com um ato de vontade em que o órgão aplicador do Direto efetua uma escolha entre as possibilidades reveladas através daquelas mesma interpretação cognoscitiva. (KELSEN, 2012, p. 394)

But then, Kelsen (2012, p. 394) states that, once the judge has been authorized by the legal system to say the law, he "cria" it in an "sempre autêntica" way, producing a legally valid norm, even that it "se situe completamente fora da moldura que a norma a aplicar representa."

Until it is invalidated by another higher judging body, an illegal sentence is normative and produces legal effects. If it is no longer subject to appeals, it becomes "coisa julgada" and is validly integrated into the legal system.

This is what Barzotto (2017, p. 18) explains: "o juiz está autorizado a prolatar sentenças legais ou ilegais. A estrutura hierárquica do ordenamento jurídico não permite apenas explicar a validade da legalidade, mas também a validade da ilegalidade."

As counterintuitive as this may seem, Kelsen affirms a radical subjectivist voluntarism, basing the judicial decision on an act of will, which is not limited to the rational possibilities of the norm:

> A interpretação feita por um órgão julgador do Direito é sempre autêntica. Ela cria o Direito. (...) A propósito importa notar que, pela via da interpretação autêntica, quer dizer, da interpretação de uma norma pelo órgão jurídico que a tem de aplicar, não somente se realiza uma das possibilidades reveladas pela interpretação cognoscitiva da mesma norma, como também *se pode produzir uma norma que se situe completamente fora da moldura que a norma a aplicar representa*. (KELSEN, 2012, p. 394, grifo nosso)

So, what would be the criterion of the judge's decision? "A sua própria perspectiva política ou moral. Como não há critério jurídico, objetivo, para decidir entre as possibilidades, este critério só pode ser extrajurídico, subjetivo." (BARZOTTO, 2017, p. 18) Note that this subjective judgment is determined by merely emotional factors, valid only for those who judge, as Kelsen is skeptical and relativist in morals. No moral value is better than the other, as there is no criterion other than the subject to evaluate them (KELSEN, 2012, p. 72; BRAGA, 2020).

This voluntarist conception of law divorces it from reason, allowing an absolute discretion, characteristic of judicial activism, which seeks to justify the sentence not by the reason of the

arguments, but by the force of the authority of those who determine them. Barzotto (2017, p. 21) summarizes the argument:

> o voluntarismo kelseniano leva a que o conteúdo do que é aplicado dependa essencialmente da valoração do juiz, único dado imutável da decisão judicial. Com efeito, a própria moldura [racional] é opcional para o juiz. Deste modo, a sua perspectiva pessoal, ou sua ideologia, é que constitui o verdadeiro conteúdo da decisão judicial.
>
> O positivismo na Teoria Pura [de Kesen] pode ser visto como um racionalização do poder na sociedade, não no sentido de dar fundamentos racionais, mas de fornecer uma justificação teórica para um despotismo prático.

The most interesting thing about Barzotto's analysis (2017) is the articulation of this positivist discretion with the neoconstitutionalism that intends to be post-positivist, as we advanced above when referring to Streck's (2011) argument. And the convergence is in the reinsertion of morals (will) in law, which led positivist authors such as Dimoulis (2009, p. 224) and Ferrajoli (2012)[5], in addition to the two just mentioned, to consider neoconstitutionalism a form of legal moralism.

6 Moralization and (de)politicization of law

One of the greatest exponents of neoconstitutionalism, Sarmento (2009, p. 268) summarizes his legal-political program as a "ativismo judicial em defesa dos valores constitucionais", with "teorias de democracia mais substantivas" and "força normativa de princípios revestidos de elevada carga axiológica". The most intriguing is that this movement intends to overcome the positivist discretion, through theories of argumentation that confer moral objectivity to the interpretation, which was not verified in the vote of Minister Barroso, as analyzed so far.

> As teorias neoconstitucionalistas buscam construir novas grades teóricas que se compatibilizem com os fenômenos acima referidos, em substituição àquelas do positivismo tradicional, consideradas incompatíveis com a nova realidade. Assim, por exemplo, ao invés da insistência na [1] *subsunção* e no silogismo do *positivismo formalista*, ou no mero reconhecimento da [2] *discricionariedade política* do

[5] However, the direct association that these authors make between moralism and natural law does not reach the New Theory of Natural Law by John Finnis and Robert P. George, especially with regard to the exercise of the jurisdictional function. See Wiviurka (2020).

> intérprete nos casos difíceis, na linha do *positivismo* mais moderno de Kelsen e Hart, o neoconstitucionalismo se dedica à discussão de métodos ou de [3] *teorias da argumentação que permitam a procura racional e intersubjetivamente controlável da melhor resposta para os 'casos difíceis' do Direito*. (...)
>
> No neoconstitucionalismo, [4] *a leitura clássica do princípio da separação dos poderes*, que impunha limites rígidos à atuação do Poder Judiciário, cede espaço a outras visões mais favoráveis ao [5] *ativismo judicial em defesa dos valores constitucionais*. No lugar de concepções estritamente majoritárias do princípio democrático, são endossadas [6] *teorias de democracia mais substantivas*, que legitimam amplas restrições aos poderes do legislador em nome dos direitos fundamentais e da proteção das minorias, e possibilitem a fiscalização por juízes não eleitos. E ao invés de uma teoria das fontes do Direito focada no código e na lei formal, enfatiza-se [7] *a centralidade da Constituição* no ordenamento, a ubiquidade da sua influência na ordem jurídica, e [8] o *papel criativo da jurisprudência*.
>
> Ao reconhecer [9] *a força normativa de princípios revestidos de elevada carga axiológica, como a dignidade da pessoa humana*, *igualdade, Estado Democrático de Direito e solidariedade social*, o neoconstitucionalismo abre as portas do Direito para [10] *o debate moral*. (SARMENTO, 2009, p. 268, grifo nosso)

This excerpt is quite representative of the argument raised so far: neoconstitutionalism aims to overcome (1) the subsumption of formalist positivism and (2) the political discretion of more modern positivism, based on (3) theories of argumentation that allow rational control and intersubjective of difficult cases of law. To this end, it proposes (4) a reinterpretation of the classic principle of separation of powers, with (5) judicial activism in defense of constitutional values, according to (6) a substantial and counter-majoritarian theory of democracy, which recognizes (7) the centrality of Constitution and (8) the creative role of constitutional jurisprudence in recognizing (9) the normative force of principles of high axiological load, such as the dignity of the human person, which open (10) the moral debate in Law.

In the summary exposition of this article, we have already covered most of these characteristics. We now need to focus on legal moralism and the principle of human dignity, which characterize Justice Barroso's judicial activism in the analyzed vote.

Alexy's thesis (2004, p. 79), theorist mentioned by Barroso, is that the existence of principles in the legal system requires a necessary connection between law and morality. But this is a weak connection, because it does not link him to a correct morality, but to any morality, to be developed in legal argumentation.

Therefore, in his vote, Barroso argues that fundamental rights "representam uma abertura do sistema jurídico perante o sistema moral", according to the principle of human dignity (§ 15).

In addition, the principle of proportionality and weighting structures “a argumentação de uma maneira racional, permitindo a compreensão do itinerário lógico percorrido e, consequentemente, o controle intersubjetivo das decisões” (§19)

For Barroso, human dignity is explained from one of the formulations of the Kantian categorical imperative, by which “toda pessoa deve ser tratada como um fim em si mesmo, e não um meio para satisfazer interesses de outrem ou interesses coletivos” (§ 15).).

It is interesting to note that, throughout his vote, the Minister considers that the recognition of the right to life of the unborn child from conception and, therefore, the permanence of the crime of abortion would satisfy "interesses coletivos ", of a religious, philosophical and/or or subjective of the majority, and not the protection of the individual right to life. In view of these majority interests (to protect the life of the unborn child from conception onwards), the fundamental rights of women must be safeguarded by the activism of the Judiciary, against the democratic and formal representation of Parliament, which did not revoke the provision of the Penal Code, nor did it propose some Amendment to the Constitution in the sense of relativizing the right to life (in the event that it could do so, if the right to life were not a stony clause, according to article 60, § 4, inc. IV, of the Constitution) or inscribe the right to abortion in the list of individual rights and guarantees.

This thesis of individual rights as trumps opposable to the majority goes back to Dworkin (2002, p. 266), another author mentioned in the minister's vote and who supports Alexy's distinction between rules and principles.

However, Barzotto (2017, p. 21-31) explains the legal moralism of neoconstitutionalist activism not as an overcoming of positivism, as Alexy and Dworkin intended, but in continuity with the voluntarist and subjectivist discretion of positivism, underlining the conception (1) the subject of rights, (2) the nature of rights and (3) the democracy that inspires them.

(1) Because it is situated on the philosophical horizon of “pensamento pós-metafísico”, neoconstitutionalism rejects any speculation and identification of a human nature or essence, engendering a vicious circle in the foundation of human rights: “O ser humano é aquele que tem direitos humanos, e os direitos humanos são aqueles que pertencem ao gênero humano.” (BARZOTTO, 2017, p. 22)

Without a metaphysical conception of human nature, the concept of human rights becomes (1.1) *empty*, devoid of any objective and universal content. Because it is empty, it becomes (1.2) *instrumental*, for "qualquer grupo social e político" to "legitimar suas pretensões e interesses. Não tendo nenhum conteúdo, pode ser assumido por qualquer um como arma em disputas jurídico-políticas ", and (1.3) *inflationary*, "na medida em que todas as pretensões e desejos presentes na sociedade contemporânea podem pretender constituir o conteúdo de direitos." (BARZOTTO, 2017, p. 22).

The basis of this empty, instrumental and inflationary conception of human rights, in the post-metaphysical horizon, is liberal individualism, which postulates the existence of pre-political rights, independent of the community, potentially opposable to it. Society is thus fragmented and atomized, formed by individuals who exercise their freedom through moral rights that are opposed to each other.

It should be noted that Barroso develops his argument with the statement that fundamental rights are human rights incorporated into the constitutional order that allows the individual to react against political, economic and religious power, the latter – religious power – "procura conformar a moral dominante" (§ 14). It is clear that, for the Minister, the right to life of the unborn child and the presence of the crime of abortion in the Penal Code are impositions of the religious power of the majority to dominate women. This reality changed in the historical moment in which they have their fundamental rights recognized by the Constitutional Jurisdiction.

(2) Barzotto (2017, p. 23-24) realizes that this atomized and conflicting conception of rights of neoconstitutionalism, in fact, depoliticizes them, in a semi-constitutional gesture, because it ignores the political articulation of powers that characterizes modern constitutionalism, when focus exclusively on the protection of rights. neoconstitutionalism

> É levado a isso pela perspectiva do individualismo moral que o anima: o tema da organização dos poderes não lhe interessa porque a política, como prática do autogoverno, é um assunto que diz respeito à comunidade política, uma realidade completamente irrelevante face ao indivíduo e seus direitos. (BARZOTTO, 2017, p. 24)

This depoliticization is accompanied precisely by legal moralism, by the evaluative burden of constitutional principles. The positivization of the moral elements of human rights ends up

associating the right with morality, overcoming "a pretensa neutralidade axiológica do positivismo e seu legalismo indiferente a valores: 'a lei é a lei" (BARZOTTO, 2017, p. 24).

Now, in addition to the law, there are the constitutional principles that moralize it, that give it axiological density. This is what allows the Minister to appeal to the (explicit) constitutional principle of human dignity and (implicit) proportionality to suspend the criminal law on abortion in the first trimester, interpreting it in accordance with the Constitution, that is, in accordance with the morality of human rights. fundamental rights (which do not include the right to life from conception, given the sexual and reproductive right of women to have an abortion in the first trimester of pregnancy).

The emphasis on the moral character of constitutional principles and the superiority of the Constitution in the legal system requires the interpretation of all laws on the basis of them. Judgment on the laws will, therefore, also be moral, because it is principiological, and not just juridical-formal (as it supposedly was in the positivism paradigm). According to Barzotto (2017, p. 25), the result is not the connection between law and morality, but "a identidade entre direito e moral. Não pode haver crítica moral ao direito como crítica externa ao sistema jurídico, pois toda moral relevante para a discussão jurídica está positivada constitucionalmente."

(3) However, as this positivization takes the form of principles of open texture and indeterminate content, judicial arguments are necessary to interpret them. The constitutional judge then mobilizes his own moral theory to interpret the principles that constitutionally legitimize the rules and block democratic discussion in the representative parliamentary instance. Here, lies the type of enlightened despotism of the Enlightenment avant-garde proposed by Barroso (2018, p. 165-179), in the neutralization of democracy that allows the critique and self-criticism of law. Representative parliamentary policy is subject to the rational and enlightened determinations of the Judiciary, protagonist of the elucidation of fundamental rights.

According to Barzotto (2017, p. 25), in the narrative that neoconstitutionalism built on itself, the solution to the axiological neutrality of the Legislative State, subject to the "tirania das maiorias" would be

> [u]ma constituição repleta de princípios éticos que, efetivada por um 'jurisdição constitucional', só reconheça como lei válida para o sistema as normas que se conformem com a moral constitucionalizada. Paradoxalmente, era isso que propunha o Estado totalitário: que não houvesse distinção entre ética e direito. Como afirma

> Hannah Arendt, o Estado Total não reconhece 'qualquer diferença entre lei e ética', porque a 'lei em vigor é idêntica à ética comum.' Deste modo, o neoconstitucionalismo, longe de afastar o risco totalitário, o realiza, ao utilizar a ética como critério de identificação daquilo que vale como lei. Não há possibilidade de crítica moral ao direito positivo, porque não há moral para além da constituição: o direito legitima moralmente a si próprio. (BARZOTTO, 2017, p. 25)

The consequence of this moralization of law is the depoliticization of the other Powers, which will have their political actions constantly controlled by the moral and definitive, irrevocable interpretation of constitutional principles by the activist Judiciary, according to the judicialization of politics. Far from solving social conflicts, neoconstitutional activism only sharpens them, because

> todos os grupos e movimentos sociais pretendem que suas crenças e interesses valem como 'direitos', e que, portanto, devem incondicionalmente ser 'efetivados'. (...)
>
> Ora, quando as discussões envolvendo os 'direitos' não são levadas à conclusão alguma, salvo por uma decisão de um tribunal (que decide muitas vezes por apertada maioria), sem que nenhum dos grupos que lutam por seus 'direitos' sejam convencidos pelas 'razões' levantadas no processo, teme-se que 'direitos' seja apenas uma máscara para pretensões carentes de fundamentação racional. Usa-se assim o termo 'direitos' de um modo subjetivista e arbitrário, para veicular interesses, desejos e preferências incapazes de se fazerem valer na esfera pública por meio de razões. (...) O que para alguns é efetivação de um direito (direito à privacidade) para outros será a violação do direito (liberdade de imprensa). Grande parte dos direitos positivados em uma Constituição não faz parte das soluções jurídicas, mas dos conflitos políticos. O Judiciário não tem como entrar nessas questões sem tomar partido, isto é, abandonar o que o constitui como Judiciário, a imparcialidade, garantida pela referência a um critério objetivo: a lei. (BARZOTTO, 2017, p. 28-29)

This excerpt by Barzotto accurately describes the political conflict underlying the legal debate on abortion, which neoconstitutionalism intends to neutralize by ending it with the moralist argumentation of constitutional principles. Note that Sarmento (2009, p. 268, emphasis added), in the excerpt reproduced above, makes it very clear that "ativismo judicial em defesa dos valores constitucionais", "no lugar de concepções estritamente majoritárias do princípio democrático", endorses "teorias de democracia mais substantivas, que legitimam amplas restrições aos poderes do legislador em nome dos direitos fundamentais e da proteção das minorias, e possibilitem a fiscalização por juízes não eleitos". Here, there is a clear defense of jurisprudence, or Supremocracy as an expression coined by Vieira (2009).

Barroso (2018, p. 129 et seq.) justifies this procedure not only as countermajoritarian and representative, but also as Enlightenment. He points out that this is not an enlightened judicial despotism, because the argumentation meets the requirements of a public reason, open to everyone's scrutiny.

However, given the discretion we saw in his vote and the absence of a robust moral theory to support the rights, we can consider, with Santos (2017, p. 89), that neconstitutionalism is an "ideologia fadada ao fracasso do arbítrio", which runs the risk of promoting the "partidarização da justiça", through judicial discretion, promotes an "disputa ideológica", contrary to the rule of law.

7 Judicial activism and countermajoritarian democracy

Judicial activism was the concept used to designate the performance of the US Supreme Court presided over by Earl Warren, between 1954 and 1969, in which "ocorreu uma revolução profunda e silenciosa em relação a inúmeras práticas políticas nos Estados Unidos, conduzidas por uma jurisprudência progressista em matéria de direitos fundamentais" (BARROSO, 2018, p. 48). In the face of this "revolução", there was an "intensa reação conservadora", which conferred a "conotação negativa, depreciativa, equiparada ao exercício impróprio do poder judicial." (BARROSO, 2018, p. 48).

It is in this pejorative sense that the term is usually understood in Brazil, but Barroso argues that it should be purified from this ideological criticism, in order to associate it with "a uma participação mais ampla e intensa do Judiciário na concretização dos valores e fins constitucionais, com maior interferência no espaço de atuação dos outros dois Poderes." (BARROSO, 2018, p. 48-49). If judicialization is a reality related to the Brazilian institutional design, activism "é uma atitude, a escolha de um modo específico e proativo de interpretar a Constituição, expandindo o seu alcance e sentido." (BARROSO, 2018, p. 49)

Faced with the retraction and omission of the Legislative Power, according to the "descolamento entre a classe política e a sociedade civil ", it would be up to the Judiciary to effectively meet certain social demands, extracting from the constitutional text "o máximo das

potencialidades", "inclusive e especialmente construindo regras específicas de conduta a partir de enunciados vagos (princípios, conceitos jurídicos indeterminados).” (BARROSO, 2018, p. 50)

The opposite of activism is judicial self-restraint, a conduct by which the Judiciary reduces its interference in the actions of other branches, respecting its own pace of action, with “forte deferência em relação às ações e omissões desses últimos.” (BARROSO, 2018, p. 50)

As mentioned in the Introduction to this Article, before becoming Minister of the STF, Barroso discussed the consolidation of the right to abortion through judicial activism with the jurist Mark Tushnet, at Harvard University, in 2011. While Tushnet defended judicial self-restraint and the deference to the Legislative Power, since this matter would be up to the people and their representatives, Barroso advocated that, if the Legislative Power failed to recognize the right to abortion, the Judiciary Power should recognize it, exercising its countermajoritarian function, to defend rights fundamental rights of women, exercising the “função iluminista”, in order to “a empurrar a história quando ela trava.” (BARROSO, 2018, p. 87-88)

It is important to point out, therefore, that the defense of the implementation of abortion through the judicial process is prior to his appointment as Minister, in 2013, and concerns his conception of constitutional democracy, based on fundamental rights that are opposable to the majority represented by Congress.

Therefore, Barroso's judicial activism presupposes (1) a legal thesis (post-positivist neoconstitutionalism) and (2) a political thesis (anti-majoritarian, representative and enlightened jurisdictional democracy), so that the politicization of law would be a natural consequence of the judicialization of politics (VERBICARO, 2019).

Since the Penal Code since 1940, the crime of abortion is normally applied in Brazil. During the National Constituent Assembly, there was an agreement not to include an explicit rule in the Constitution, neither allowing nor prohibiting abortion, relegating the matter to infra-constitutional legislation.

In art. 1, the Federal Constitution refers to the inviolability of the right to life, but does not state that it is “desde a concepção”, as art. 1 of the American Convention on Human Rights (Pact San Jose of Costa Rica). This Convention, however, has the exception “em geral”, which would hardly allow interpretations favorable to abortion (MARTINS, 2005).

The feminist movement demanded, together with the constituents, the recognition of the right to abortion, while the Catholic Church and part of the evangelical caucus pleaded for the defense of life from conception, according to the American Convention. However, due to the lack of consensus, the constituents decided not to include any provision on the subject (ROCHA, 2006, p. 371).

Since then, there have been several legislative projects in favor and against the right to life since its conception in the National Congress, as well as legal actions to face this issue. The fundamental question that arises: is it up to the Judiciary to decide on the issue? Is there inertia in the Legislative Power, even though there is a Penal Code in force that foresees abortion as a crime, without relativizing the beginning of life and allowing abortion until the first trimester? Can one speak of a legislative gap in this case? Does the neoconstitutional resource of "interpretação conforme a Constituição" allow the Constitutional Jurisdiction to review the entire legal system based on moral principles, to be explained by theories of argumentation?

Does the Magna Carta provide for the right to abortion, so that a diffuse control of constitutionality can be carried out and affirm that the crime of abortion, provided for by the Penal Code, was not fully accepted by the Constitution?

No, but, according to neoconstitutionalist activism, the Constitution contains fundamental principles and rights, to be interpreted by the technique of balancing. The problem is that the right to life is also a fundamental right, to be protected by the STF, in case of threat.

The debate between Barroso and Tushnet is decisive on this issue. As Barroso was determined, on "fundamentos objetivos e racionais" – which we have seen do not hold up to logical, legal and bioethical scrutiny – he did not hesitate to forego "o argumento formal de que a competência é do Congresso" in favor of the substantive argument of the "direitos fundamentais", provided for in the Constitution (BARROSO, 2018, p. 156).

According to Barroso (2018, p. 156), democracy has a double dimension: (1) the procedural and formal dimension of popular representation by the Legislative Power, and (2) the substantive dimension, which includes equality, freedom and justice, which can also be promoted by the Judiciary, by the constitutional jurisdiction, especially in the absence of the Legislative Power.

In this context, the constitutional courts would fulfill the countermajoritarian function of protecting the fundamental rights of each individual, even if they are members of a minority not represented by Congress, establishing a tension between the representative democracy of the Legislative Power and the discursive democracy of the Judiciary Power.

> É isso que a transforma [a democracia], verdadeiramente, em um projeto de autogoverno, em que ninguém é deliberadamente deixado para trás. Mais do que o direito de participação igualitária, democracia significa que os vencidos no processo político, assim como os segmentos minoritários em geral, não estão desamparados e entregues à própria sorte. Justamente ao contrário, conservam a sua condição de membros igualmente dignos da comunidade política. Em quase todo o mundo, o guardião dessas promessas é a suprema corte ou o tribunal constitucional, por sua capacidade de ser fórum de princípios – isto é, de valores constitucionais, e não de política – e de *razão pública* – isto é de *argumentos que possam ser aceitos por todos os envolvidos no debate*. Seus membros não dependem do processo eleitoral e *suas decisões têm de fornecer argumentos normativos e racionais que as suportem*. (BARROSO, 2018, p. 156-157, grifo nosso)

We have already seen that the minister's vote does not meet the requirements of rationality. Let us take a closer look at the relationship between judicial and legislative discretion in a constitutional democracy.

8 Reasonable moral disagreements in a representative and deliberative democracy: the role of legislative discretion

Throughout this article, we consider that Barroso's arguments in the analyzed HC cannot be accepted by all those involved in the debate and that they *do not* constitute public reasons, as they are not normative and rational arguments and do not allow intersubjective control of decisions; on the contrary, they are fallacious arguments and incompatible with the current bioethical discussion (DINIZ, 2017).

Starting from the objective premises (1) that there is life from conception and (2) that the human right to life is inclusive and should not be limited by accidental and extrinsic factors, such as the developmental stage of the embryo, fetus or child, or the health of the person or its social utility, we consider (3) that abortion should not be considered a subjective right, to be eventually recognized, in a discretionary way, by the Legislative Power (RIBEIRO; PINHEIRO, 2017,

DUARTE, 2021). In this section, we consider only Barroso's hypothesis, that there would be a reasonable moral disagreement, in the case of abortion, in order to follow Alexy's argument, that, in these cases, there would be legislative and not judicial discretion.

Sacramento (2018, p. 245) demonstrates the legal uncertainty generated by this activist stance, when considering the opposite hypothesis, such as the one decided by the German Constitutional Court, in the first decision on abortion, in 1975, annulling a legislative reform that allowed the abortion up to 12 weeks of gestation (decision of 25.02.1975, 39 BVerfGE 1):

> Se a sociedade brasileira é extremamente dividida, se nunca houve maioria suficiente para revogar o tipo penal, se os constituintes de 1988 não quiseram efetivamente decidir a questão, é aceitável que, com base na interpretação de princípios constitucionais e em defesa dos direitos fundamentais da mãe, o Poder Judiciário sobreponha sua visão sobre aquela que até agora prevaleceu na sociedade?
> E a dúvida se mantém independentemente do mérito. Se a parcela da sociedade favorável ao aborto obtiver a maioria suficiente para editar uma lei revogando o crime de aborto, poderá o Judiciário intervir, declarando-a inconstitucional, e com isso manter o delito em função da defesa dos direitos fundamentais do nascituro? Em suma, pode a decisão de liberar ou proibir o aborto ficar unicamente a cargo da Justiça? [...]
> Algumas decisões das cortes constitucionais expõem claramente a tensão existente entre direitos fundamentais e democracia. Nesses temas, comumente polêmicos e divisivos, como o aborto, a pena de morte, a eutanásia, a descriminalização de drogas leves – os chamados desacordos morais razoáveis – o problema ganha especial relevo e enseja a reflexão sobre os limites de atuação dos tribunais e a legitimidade de suas decisões num Estado de direito democrático e pluralista.
> Além da legitimidade, a decisão [de Barroso no HC 124.306/2016] é um ótimo exemplo para reflexão sobre a metodologia utilizada pela jurisdição constitucional nas decisões envolvendo direitos fundamentais. Ora, se o tipo penal do aborto é aplicado normalmente desde 1940, inclusive após a promulgação da Constituição de 1988, como pode, da noite para o dia, tornar-se inconstitucional com base na aplicação de princípios? (SACRAMENTO, 2018, p. 245)

As mentioned above, in the presentation of Streck's (2011, p. 24) critique of the ideological subjectivism of neoconstitutionalism, Alexy (2008, p. 611) recognizes that, in the realization of rights, “existe uma discricionariedade para sopesar, uma discricionariedade tanto do legislativo quanto do judiciário”. In the present case, who would have the discretion?

Sacramento's study (2018) is decisive at this point, as it analytically demonstrates the mistake in Barroso's appropriation of Alexy. It is clear that it is not loyalty to a theorist that legitimizes the Minister's vote, but the legal consistency of his arguments. However, as he adopts

the theory of fundamental rights, to argue based on the discretion of the principles, it is worth reflecting on whether this reception proceeds.

Alexy's central idea, legitimizing Barroso's neoconstitutionalism, is that constitutional courts perform the function of (1) deliberative (argumentative, discursive) democracy, complementing (2) representative democracy (which is, on the one hand, volitional , decisionist, and, on the other hand, argumentative, discursive). While Parliament represents the will and speech of the people, the constitutional court exercises discursive representation, "institucionalizando o discurso como meio de tomada de decisão pública" (SACRAMENTO, 2018, p. 249-250).

For Alexy, if democracy were based only on elections and majority rule, it would fall back on a purely decisionist model, in which the will of the people prevails, regardless of the reasons that justify it. Hence the need for a constitutional court, whose legitimacy is purely argumentative. That is, the court does not act on the basis of will (political), but on the basis of (legal) reasons.

To the criticisms of idealization and simplification, Alexy responds that "é possível distinguir argumentos jurídico-constitucionais bons de ruins, ou melhores de piores. A fundamentação racional permite a objetividade suficiente para que se controle a plausibilidade dos argumentos." (SACRAMENTO, 2018, p. 250). The rational plausibility of the legal argument guarantees deliberation or reflection, but not necessarily representation.

This is because the people need to agree and accept, even if they think differently, the rational argument used by the judicial decision. Even if they do not agree, the people recognize the legal-constitutional rationality of the court's arguments. To this end, argumentative representation presupposes not only (1) solid or correct arguments, but (2) rational people capable and willing to accept them, recognizing them as such.

Thus, Alexy (2013, p. 526) states that his theory of rational discourse does not preclude reasonable disagreement, which is one in which more than one correct alternative can be rationally accepted, but allows identifying that not all disagreements are reasonable, for there are cases where a correct answer is discursively possible. Therefore,

> a existência de argumentos bons ou corretos é suficiente para a deliberação ou reflexão, mas não para a representação. Por esta razão, o nível real de argumentação e correção tem de ser conjugado com o nível real de aceitação efetiva. (ALEXY, 2013, p. 526)

Faced with this thesis, one can ask whether the abortion case is a reasonable disagreement, or does it present a discursively correct answer? If the Brazilian people are made up of rational people, capable of accepting the correct arguments, would they accept Barroso's decision, who represents him discursively? Now, as is well known, defenders of the right to life from conception and defenders of the right to abortion start from radically different philosophical, legal and bioethical assumptions, never reaching any reasonable agreement. Abortion is a typical *hard case* and a reasonable disagreement, as the losing side always remains dissatisfied.

This is why Waldron (2010, pp. 93 et seq.) is so strongly opposed to judicial review, since, in our liberal and pluralistic societies, rational, good-faith, well-informed and well-intentioned people radically disagree about core moral and political issues such as abortion and euthanasia. Because this pluralism is immeasurable, as MacIntyre (2001) argues, one party will never convince the other, because it starts from different argumentative premises, not only from a moral but also a legal point of view. Therefore, Waldron (2010) considers that the democratic authority to arbitrate these disagreements belongs to Parliament, which effectively represents the people and guarantees the participation of all, opposing the constitutional jurisdiction that claims to supplant democratic political decision.

Alexy does not ignore the risk of usurpation of legislative power by judicial activism, so he proposes a theory of discretion or deference to the legislator, due to the self-restraint of the Judiciary. Sacramento (2018, p. 253-254) considers that the case of abortion belongs to this category of legislative discretion, and not of judicial discretion (as practiced by Barroso).

To respect legislative democracy, reducing the intensity of judicial review of constitutionality, it is necessary to distinguish between the decision-making spaces of the legislator in:

(1) structural or material discretion, when the consideration recognizes that the constitution clearly left it to the legislator's freedom, such as balancing principles and defining means and objectives; and

(2) epistemic or cognitive discretion, when the uncertainty is empirical or normative, that is, when it is uncertain what is mandatory, prohibited or provided by fundamental rights.

This theory of discretion, with its formal principles, is a later complement to Alexy's theory, normally associated almost exclusively with the principle of proportionality. It is these formal principles, however, that prevent the abuse of the theory of principles. Without them, which limit the performance of constitutional jurisdiction precisely in reasonable disagreements, the Constitutional and Democratic State can degenerate into a Judicial State. This is how Sacramento summarizes:

> diante da profunda e persistente divergência moral, política e filosófica na sociedade sobre a decisão correta em temas específicos que envolvem os direitos fundamentais, como se viu, [1] *cabe ao parlamento eleito, por meio do voto da maioria, a arbitragem provisória desse desacordo*, adotando uma entre as possíveis soluções.
> Já [2] *à jurisdição constitucional, cabe o papel de verificar se a solução encontrada pelo legislador está de acordo com os parâmetros da constituição*. Naqueles casos excepcionais em que o legislador constituinte já disciplinou a matéria por meio de uma regra, a atuação do tribunal não suscita maiores problemas. Nos outros, porém, o desacordo persiste, e o que importará à jurisdição constitucional é sua dimensão jurídica, se a opção legislativa viola ou não os princípios constitucionais, normalmente, direitos fundamentais.
> (...) Com base nessa estrutura de argumentação jurídica, o tribunal decidirá a questão, justificando se a solução encontrada pelo legislador é ou não proporcional e, portanto, constitucional.
> Nessa sistemática, o resultado dependerá do peso concreto dos princípios diante das circunstâncias do caso. Esse peso, por sua vez, dependerá dos pesos abstratos de cada princípio, da intensidade da intervenção sobre um dos princípios e da importância da satisfação do outro. Esses elementos é que vão determinar qual dos princípios terá prioridade. Acontece que a classificação de cada uma dessas variáveis em, por exemplo, leve ou grave, para inserção na fórmula do peso, será realizada fundamentalmente com base em argumentos morais, o que corresponderá à justificação externa da decisão. Logo, [3] *as diferentes concepções morais refletem diretamente sobre o conteúdo e o peso dos princípios que são otimizados na ponderação* e, portanto, no seu resultado no sentido da constitucionalidade ou da inconstitucionalidade da norma fiscalizada. (SACRAMENTO, 2018, p. 257-258, grifo nosso)

Some elements need to be underlined in this excerpt from Sacramento that elucidates Alexy's theory of principles: (1) "cabe ao parlamento eleito, por meio do voto da maioria, a arbitragem provisória desse desacordo [moral, político e filosófico], adotando uma entre as possíveis soluções"; (2) it is up to the constitutional jurisdiction "verificar se a solução encontrada pelo legislador está de acordo com os parâmetros da constituição"; (3) the Judiciary necessarily resorts to moral arguments, in a justification external to the law, in cases of reasonable moral disagreement.

Regarding the third point, there is (3.1) the internal justification of the decision - related to the formal structure (3.1.1) of the subsumption, in the deductive scheme of the rule, and (3.1.2) of the weighting, in the mathematical scheme of the weight formula - and (3.2) the external justification of the decision – relative to the truth of the premises that conforms to the reasons given in the weight formula, either (3.2.1) of the empirical premises, or (3.2.2) of the normative premises. Reasonable disagreements, which require legislative discretion, concern only the normative premises of external justification.

(3.2.1) Controversial empirical premises can be remedied by scientific elucidation, refuting the objective errors of unreasonable argumentation. In the previous section, item 2.1, we contradict the Minister's argument that there is empirical divergence in relation to the legal interest in question, the life of the human fetus, which, scientifically, cannot be considered "potencial". Even the most notorious advocates of abortion, such as Peter Singer, Michael Tooley, and Mary Ane Warren, clearly admit that the fetus is not just a living being, but a living human being (KACZOR, 2011). Indeed, this position is clear in Dworkin's (1994) argument for abortion.

The fact that the Minister erred in an empirical premise, scientifically demonstrable, would allow, by itself, the judicial review of his decision, for the control of constitutionality. Analogously, it would be something like interpreting the chronological measure of "*year*", of the Penal Code, as having 200 days, and not 365, which is the time of the earth's translation around the sun, as evidenced by astronomy.

The Minister neutralizes the possibility of epistemic truth of a scientific datum of embryology, by attributing, to the "escolha filosófica e religiosa de cada um", the moment when human life begins (§ 21). This subjectivist relativism deprives of all rationality the empirical premise of the external justification of the argument, making it, more than discretionary, totally arbitrary.

> (3.2.2) In relation to the normative premise, *reasonable* moral disagreements arise. Once the empirical question (human life) has been clarified, the normative question (which fundamental rights protect it or make it available) is debated. In a democracy, the external justification of the argument, marked by a reasonable disagreement with the normative epistemic premise, belongs to Parliament, which acts with legislative discretion. Let's follow the Sacramento exposition once more:
> A insegurança decorre da divergência sobre as premissas empíricas ou normativas. É esta última que está ligada ao caso dos desacordos razoáveis. Ela se manifesta em função da divergência sobre os pesos que cada um dos direitos fundamentais possui

> em determinado caso e aquilo que é possível deduzir do que a constituição expressamente manda, proíbe ou permite.
> Como se viu, esse é o típico caso dos desacordos morais razoáveis. Normalmente, as constituições não os resolvem definitivamente. Tais assuntos, em regra, são regulados por meio de princípios abstratos em razão da falta de consenso e justamente para que se possa acomodar as diferentes concepções políticas, morais, religiosas e filosóficas do que é o correto.
> (...)
> Nessas hipóteses, a ponderação acaba não consistindo num procedimento racional de argumentação jurídica, porquanto não representa o que se pode extrair com segurança sobre o que a constituição manda, proíbe ou permite, mas apenas uma escolha do que é bom, ou melhor, dentre as opções constitucionalmente possíveis. Nas sociedades democráticas, porém, essa tarefa cabe ao povo. Essa é a razão pela qual a existência da divergência razoável capaz de gerar insegurança ou incerteza sobre as premissas é razão para a atribuição de um espaço de discricionariedade legislativa, a discricionariedade epistêmica normativa. (SACRAMENTO, 2018, p. 259-260)

In cases such as abortion, reasonable disagreement with the normative premise precludes the court's argumentative representation, because of deep moral or philosophical divergence. Therefore, discretion cannot be judicial, but legislative. In other words, in addition to legal reason, political will also operates. Naturally, there is jurisdictional control of constitutionality so that the legislative decision is not arbitrary, that is, it does not go beyond the limits of the legal framework, within which discretion takes place. Unlike the Kelsenian positivist paradigm, in a Constitutional State of Law, there are limits to judicial and legislative arbitrariness.

As seen in item 3.3, positivist discretion in Kelsen (2012, p. 394) is confused with arbitrariness, since every decision rendered by an official, formally valid judging body is legitimate, regardless of respect for the legal framework established by scientific reason. A decision based on an exclusive act of political will and therefore legally unreasonable is, even so, valid and produces legal effects, until its review by a higher hierarchical instance.

In Alexy's theory, on the other hand, considering not only the material but also the formal principles of legislative competence, legislative discretion is the only democratic alternative to face the dilemma of moral disagreements, with the judge being contained by the very Constitution he defends. . As Sacramento explains:

> nas concretas situações que revelem a existência de profundo desacordo moral e jurídico, o princípio democrático deve ser otimizado, ganhando mais peso a decisão do legislador legitimado pelo voto popular. Vale dizer, quanto maior for o desacordo, maior é a insegurança das premissas normativas constitucionais e, portanto, maior é a exigência de respeito à decisão legislativa.

> Ao legislador, assim, é dada uma primazia para atuar nos cenários de incerteza normativa. (...)
> Assim, os princípios formais e, especialmente, o princípio da competência decisória do legislador, são um importante instrumento para delimitação das competências de ponderação e de tomada de decisão. Considerar apenas a existência de princípios materiais, levaria a uma solução extrema que corresponderia ao Estado judicial. (SACRAMENTO, 2018, p. 265-266)

We realize that the appropriation of Alexy's discursive theory by Minister Barroso was wrong not only in relation to the maxim of proportionality, discussed above, in item 3.2, but also in the articulation of judicial discretion, which, under the pretext of promoting a deliberative democracy, neutralizes representative democracy, in a judicial activism that generates legal uncertainty and sharpens the moral disagreements of a pluralist society, defying the Constitutional Rule of Law.

9 Conclusion

In this article, we analyze the neoconstitutionalist theory of Luis Roberto Barroso, in order to understand the discretion of his vote in HC 124.306/2016. We consider his judicial activism in the practice of applying the constitutional principles that give moral density to legal arguments.

We also discuss the political conception of deliberative and representative democracy, arguing that, in cases of reasonable moral disagreements, the Legislative Power has the discretion to equate them; it is then up to the Judiciary Power to control the constitutionality, in the verification of the legal framework of the political decision.

The moral argument necessary for the Judiciary to resolve a disagreement of this nature, based on constitutional principles, disfigures the Democratic State of Law and the functional tripartition of Power, degenerating into a Judicial State.

The judicial activism of Barroso's neoconstitutionalism, in the analyzed vote, neutralizes representative (political) democracy by wanting to promote deliberative (legal) democracy. The moral argumentation of the principles of constitutional jurisdiction unduly overlaps with legislative discretion, sharpening the moral disagreement it intended to resolve.

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