JUDICIAL ACTIVISM AND JURISTOCRACY - BARROSO'S DECISION ON ABORTION AS A PARADIGM OF SELF-GROUNDED POWER

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Introduction

The debate concerning the contours of constitutional jurisdiction and the distribution of competences among the branches of government has become a decisive axis for understanding the democratic health of Brazilian institutions. Over recent decades, a progressive shift has been observed: the political debate - the natural *locus* of Parliament - has migrated to the judicial forum, with particular prominence of the Federal Supreme Court *(Supremo Tribunal Federal)*. This movement, by expanding the normative density of judicial decisions, has produced a scenario in which the Judiciary, at times, replaces the Legislature in the function of creating Law, thereby reshaping the classical dynamics of constitutionality control and its limits.

Taking as a case study the farewell vote of Justice Luís Roberto Barroso favoring the decriminalization of abortion up to the twelfth week, this work investigates three phenomena frequently noted in specialized literature: **judicial activism**, **juristocracy**, and **ministrocracy**. The first refers to the overcoming of positive normative frameworks through extralegal reasons - moral, political, or ethical views of the adjudicator - culminating in **decisionism** (Cf. Streck). The second, in institutional terms (Hirschl), describes the judicial capture of politically sensitive decisions previously reserved to democratic deliberation. The third, in turn, highlights the intense monocratic activity at the *Supremo Tribunal Federal*, which empties out collegiality and weakens the deliberative virtues proper to a constitutional court.

From this framing, it is argued that the analyzed vote exceeds the typical countermajoritarian function of *judicial review* - guardian of constitutional supremacy - and invades the sphere of political conformation reserved to the legislator, converting individual valuative preferences into normative parameters. The critical point does not reside in the substantive theme in dispute, but in the method of decision: when reasons not extracted from the constitutional text or the law come to govern the outcome, jurisdiction ceases to operate as a limit and begins to act as an autonomous source of normative production, with effects on individual liberties and on the very separation of powers.

The study, finally, articulates the concrete case to the theoretical categories mentioned and confronts a relevant element of the *Supremo Tribunal Federal* itself: the idea of the *"eloquent silence"* of the legislator, whereby the deliberate absence of normative regulation may express a valid political choice to await the maturation of the social debate.

The purpose is to circumscribe the examination to verifiable institutional questions: (i) in the concrete case, was there an unconstitutional gap requiring judicial integration or a valid legislative choice not to regulate the matter? (ii) is the vote grounded in legally and constitutionally controllable reasons (text, history, structure, precedents) or in extralegal preferences? (iii) did the procedural path adopted respect collegiality and the limits of *judicial review*? (iv) what are the impacts of the decision on the separation of powers and on liberties? The introduction also makes explicit the methodological criteria that will guide the analysis - textuality and structure of the Constitution, coherence with consolidated jurisprudence, standard of deference to the Legislature, and observance of collegiality - and anticipates the focus of the study: to assess the compatibility of the vote with the very use, by the *Supremo Tribunal Federal*, of the category of *eloquent silence* as a valid political option of Parliament.

1. Characterization of Judicial Activism in the Abortion Decision

1.1. The Decision Not Grounded in Norms and the Resort to Extralegal Factors

Justice Barroso's manifestation in favor of decriminalizing abortion clearly configures what contemporary doctrine calls **judicial activism**, understood as the exercise of jurisdictional activity through a decision not grounded in the Constitution, the laws, or normative acts in force, but rather in extralegal elements that reflect the worldview of the adjudicator. As Murillo Gutier explains, activism consists of an interpretative judicial practice

that enters the redoubts of politics, morality, ethics, and economics, invading state spheres that do not belong to the Judiciary. In this modality of action, the judge ends up deciding according to his worldview, his moral and ethical values, his social and political perception, culminating in the phenomenon called **decisionism** (Cf. Abboud; Lunelli, 2015; Abboud, 2021).

In the specific case analyzed, the Justice did not limit himself to applying constitutional or legal provisions preexisting to the controversy. On the contrary, he availed himself of his particular understanding of female existential autonomy, reproductive rights, and axiological balancing among potentially conflicting rights to construct a normative solution nonexistent in the Brazilian legal order. Such a posture reveals what Lenio Streck identifies as problematic for democracy: activism stems from personal behaviors and views of judges and tribunals, as if it were possible to have a private language constructed at the margins of the public language that emerges from the democratic legislative process (Cf. Streck, 2016).

1.2. Decisionism and the Corrective Posture Toward Law

The Justice's decision perfectly materializes the **decisionist posture**, characterized by the pretension to correct positive Law when it does not correspond to what the adjudicator considers just. Decisionism manifests itself when the magistrate, imagining himself as legislator, issues a decision that fixes what he perceives as a legislative mistake or omission. In other words, the decision is made on the basis of a sense of justice, on a personal sentiment of the adjudicator about what would be good and just, regardless of what the democratically approved norms actually provide. This posture connects with the etymology of the word *"sentence"*, derived from *sentire*, which refers to the feeling of the judge before the concrete case (Cf. Houaiss, 2009; Gutier, 2023).

By defending the decriminalization of abortion through an interpretation that distances itself from the constitutional text and the criminal legislation in force, Justice Barroso explicitly assumed a corrective role, replacing political-legislative deliberation with his personal conviction about what would be the most adequate solution to the theme. This substitution characterizes the essential core of activism: the judicial imposition of particular views on matters that should be the object of representative parliamentary deliberation (Cf. Abboud; Scavuzzi; Fernandes, 2020).

2. Juristocracy and the Transfer of Political Decisions to the Judiciary

2.1. The Phenomenon of Juristocracy in the Brazilian Context

The concept of **juristocracy**, developed by Ran Hirschl and used by Jeremy Waldron, precisely describes the process of transferring political decision-making from deliberative bodies to judicial bodies. As Gutier explains, it is the idea of a *government of judges* that constitutes a form of democratic degeneration, since the Judiciary invades spheres of constitutional competence of other branches without constitutional authorization to do so, culminating in judicial gigantism and affecting individual freedom rights. Judicial supremacy with infiltration into the political redoubt of other branches constitutes a true political anomaly (Cf. Hirschl, 2020; Waldron, 2018; Abboud, 2021; Leite, 2020).

Barroso's decision on abortion exemplifies and deepens juristocracy in Brazil by demonstrating that the *Supremo Tribunal Federal* has come to function as a true *judicial parliament*, replacing the Legislature in the creation of norms on morally controversial questions. There is a capture of political debate by the Judiciary, notably by the *Supremo Tribunal Federal*, which has come to replace the Legislator in the creative role of Law, inverting the institutional logic proper to the Democratic Rule of Law (Cf. Abboud, 2021; Scavuzzi, 2021; Costa, 2021).

2.2. Deepening of Juristocracy: From Public Debate to the Robed Monologue

The analyzed decision not only illustrates but effectively deepens the Brazilian juristocratic phenomenon by presenting features that aggravate the transfer of power. First, because the vote was issued in an extraordinary virtual session, at the end of the term, in a format that drastically reduces the possibility of robust collegial debate and adequate public scrutiny. Second, because the matter in question - decriminalization of abortion - represents a theme of intense moral, religious, philosophical, and political dissent in Brazilian society, precisely the type of question that democratic theory reserves to the deliberative legislative process.

When the Judiciary acts politically in this way, it places itself in a position of substitution of the legislator, as if it were an antenna capturing society's longings, claiming itself as its representative. An antidemocratic shortcut is created that authorizes the Judiciary to replace the Legislature, acting as a *judicial parliament* that corrects the law or legislative omissions according to its own criteria. This posture raises a fundamental question: may the Judiciary state what is convenient or opportune for society? Does the Constitution permit this? By acting in this way, the tribunal acts as a representative organ of the majority, claiming legitimation it does not possess and harming its essence as a countermajoritarian body designed to safeguard fundamental rights against episodic majorities (Cf. Carvalho, 2021).

3. Extralegal Factors and the Supremacy of Personal Vision over the Norm

3.1. Worldview as the Foundation of the Decision

The analysis of the reasoning presented by Justice Barroso reveals that the decision was not constructed from the application of preexisting constitutional or legal norms, but rather from a specific **worldview** about reproductive rights, female autonomy, and the beginning of life. As Gutier explains, in activism the judge applies his moral-political-social worldview, and were he a legislator, he would consider the rendered decision just. When the law or the Constitution diverges from what the judge thinks is just, he acts to correct the legislator, issuing a decision that fixes the supposed legislative mistake or omission (Cf. Abboud; Lunelli, 2015).

In the concrete case, the Justice replaced the legislative balancing on the theme - materialized in the provisions of the Criminal Code that criminalize abortion - with his own balancing, constructed from personal values about when intrauterine life merits criminal protection and about the extent of the pregnant woman's autonomy. This hermeneutic

operation displaces the legitimation axis of the decision: no longer the democratically approved norm, but rather the conscience of the adjudicator (Cf. Streck, 2016).

3.2. Personal Values and Particular Sense of Justice

The resort to personal values manifests itself in the argumentation used by the magistrate when affirming that the criminalization of abortion would violate women's rights. This affirmation does not derive from a literal or systematic interpretation of the Constitution, but from an axiological choice that privileges certain rights over others also constitutionally protected, such as the right to life. The choice for this specific hierarchization reflects personal values of the adjudicator about what would be the adequate balance among conflicting rights. It is a nefarious legacy of procedural instrumentalism, which privileges and affirms the idea of *"just process"*, in which the judge is a corrector of law in face of social, political, and legal purposes (Cf. Delfino, 2019; Raatz, 2019; Carvalho, 2021; Costa, 2021).

Furthermore, the establishment of the temporal mark of the twelfth week as the limit for decriminalization finds no foundation in any constitutional or legal provision, revealing itself as a discretionary choice based on the personal sense of justice of the Justice. This temporal arbitrariness evidences that the decision does not derive from the application of preexisting norms, but from the individual conviction about what would be the reasonable balance point - a decision typical of legislative policy and not of jurisdiction (Cf. Abboud, 2021).

4. The Suppression of Democratic Debate in Parliament

4.1. Invasion of the Political Sphere and Elimination of Deliberative Pluralism

Justice Barroso's decision materializes the central problem of activism: when the Judiciary decides a matter creating a norm in substitution of the Legislature, it suppresses the sphere of institutional political debate, weakening democracy. The question of abortion was not mature in Brazilian society to receive imposing judicial regulation, since it remains a theme of profound moral and political divergence. As Parliament constitutes the space of public-political deliberation *par excellence* in a democracy, the non-deliberation or non-formation of majoritarian parliamentary consensus on the matter must also be respected, as a duty of submission to the democratic game (Cf. Abboud; Scavuzzi; Fernandes, 2020).

The concept of **eloquent silence** *(silêncio eloquente)*, an expression used by the *Supremo Tribunal Federal* itself, applies perfectly to the case. The legislator's silence also constitutes a political position. Certain matters are not yet politically ready to be regulated or deregulated, the parliamentary silence representing not an unconstitutional omission, but a political decision to await the maturation of social debate. By intervening judicially, the Justice suppressed this valid political decision, imposing a solution that bypasses the democratic deliberative process (Cf. Lenza, 2021).

4.2. Lack of Democratic Legitimacy and Violation of the Separation of Powers

The doctrine emphatically affirms that the Judiciary does not possess democratic legitimacy to legislate on politically and morally controversial matters. When dealing with

subjects not regulated by the Legislator, the magistrate necessarily resorts to his moral, political, ethical, economic, or ideological values, since he cannot extract the solution from the positive legal order. The judge is not an antenna of social longings and, fleeing legality-constitutionality and the binomial *lawful-unlawful*, acts as a vigilante, availing himself of his sense of justice to state Law - a function that belongs to the parliamentary redoubt (Cf. Carvalho, 2021).

When the Judiciary is allowed to claim political matters, the public deliberation of themes is weakened, becoming circumscribed to a redoubt of sages that act as society's superego. This posture frontally violates the principle of the **separation of powers**, fundamental pillar of democratic constitutionalism that distributes state functions among independent and harmonious bodies. When the judge assumes a legislative function, the institutional balance is broken and the very legitimacy of the political system is compromised (Cf. Maus, 2000; Abboud, 2021).

5. Ministrocracy and Self-Grounded Power: The Barroso Case as a Manifestation of Judicial Solipsism

5.1. Monocratic Decision and Violation of Collegiality

Barroso's vote also exemplifies the phenomenon called **ministrocracy**, characterized by the intense monocratic activity of Justices of the *Supremo Tribunal Federal* who issue decisions affecting the functioning of the other branches without submitting the question to the plenary of the Court. Ministrocracy represents *individual judicial review*, that is, constitutionality control exercised solitarily by a single Justice, without such control being analyzed by the plenary composition of the Tribunal, incurring in what Streck calls **judicial solipsism** (Cf. Arguelhes; Ribeiro, 2018; Streck, 2016).

As Godoy explains, ministrocracy, individual *judicial review*, the Supreme Court as a *tribunal of soloists*, undermine the qualities and benefits of a collegial body that should deliberate, exchange reasons, challenge arguments, and build consensus. This mode of acting violates the norms of constitutional procedure, denatures the *Supremo Tribunal Federal* by violating the collegiality and the majority rule that should govern it, and ultimately undermines the very democracy it should protect (Cf. Godoy, 2021).

5.2. Self-Grounded Power: The Philosophical Reading of Byung-Chul Han

The analysis can be deepened through the philosophical reflection developed by Byung-Chul Han in his work *What is Power?*. The Korean philosopher proposes a relational and communicative conception of power, opposing its self-grounded and solipsistic form. In Han's view, power that detaches itself from symbolic mediations, from listening to the other, and from shared deliberation degenerates into institutionalized violence, even when disguised as legality (Cf. Han, 2019).

Judicial activism manifested in Barroso's decision configures what Han classifies as **self-grounded power**: a form of authority that legitimates itself exclusively by itself, dispensing with

normative mediation and democratic legitimation. The judge who decides based on his moral, political, or ideological perception - and not based on the Constitution or the laws produced by Parliament - exercises a type of sovereignty that ignores the republican principle of the separation of powers. It is a power that closes itself to alterity and operates in the logic of permanent exception (Cf. Han, 2019; Schmitt, 2006).

The absence of collegiality and plural debate transforms the Constitutional Court into a stage of multiple private voices, each guided by its own conception of justice, replacing the posited Law with subjective discourse. It is a manifestation of institutional solipsism, in which the exercise of power is detached from listening, alterity, and communication - fundamental requirements of a democratic ethics. In Han's conception, legitimate power does not impose itself through force or moral superiority of the agent, but is constituted in mutual recognition and in the symbolic construction of shared meaning (Cf. Han, 2019).

6. Occasional Activism and the Incoherence of Activism's Defenders

Barroso's decision also illustrates the phenomenon of **occasional activism**, characterized by the selective defense of judicial protagonism according to ideological agreement with the result. As Gutier observes, it is not rare to verify defenders of activism advocating for *just causes* before the Judiciary, elevating it as society's superego. Interestingly, defenders of activism, when the judge decides based on values distinct from what is expected, accuse the same judge of being an activist in a pejorative sense. Hence one speaks of **occasional or opportunistic activism**: the defender of activism accuses of being an activist the decision with which he disagrees, in a Manichean relationship between activism *of good* and activism *of evil* (Cf. Maus, 2000).

This incoherence reveals the theoretical fragility of the defense of judicial activism. All activism is bad, even when we morally or politically agree with what was decided in an activist manner. The problem does not reside in the content of the decision itself, but in the method used and in the usurpation of institutional competence. As Streck emphasizes, judicial activism is linked to the type of response the Judiciary offers to the judicialized question: in the specific case of the judicialization of politics, activism represents a type of decision in which the will of the adjudicator replaces political debate, configuring true **judicial behaviorism** (Cf. Streck, 2016).

7. Institutional Consequences: Democratic Weakening and Legitimacy Crisis

7.1. Weakening of Public Deliberation and Emptying of Parliament

When the Judiciary assumes protagonism in defining fundamental political questions, a double deleterious movement for democracy operates. First, the public deliberation of themes is weakened, since parliamentary debate loses practical relevance in face of the expectation that the tribunal will judicially resolve the controversy. Second, citizens and their elected representatives are discouraged from seeking political consensuses through negotiation, argumentation, and compromise, typical instruments of the democratic legislative process.

Barroso's decision on abortion transmits a problematic institutional message: it is not necessary to convince the parliamentary majority or build political coalitions to approve legislative changes on morally controversial themes; it suffices to sensitize judges who share a certain worldview. This pattern of action substitutes politics with strategic judicialization, transforming political questions into legal questions resolved technocratically by an unelected judicial elite (Cf. Abboud, 2021; Carvalho, 2021).

7.2. Loss of Law's Autonomy and Increase of Legal Uncertainty

As Gutier warns, by fleeing what the Constitution and the laws say, with this individualistic *judicial review*, eleven worldviews are portrayed in the *Supremo Tribunal Federal* in monocratic decisions, in which each supreme judge presents his moral, ethical, economic, philosophical, political, ideological perspective and, naturally, his own sense of justice. This multiplicity of particular views correcting the posited Law contributes, day after day, to the **loss of Law's autonomy**, increasing the malaise already existing in society (Cf. Arguelhes; Ribeiro, 2018; Godoy, 2021).

The inevitable consequence is the increase of legal uncertainty, since the predictability of decisions ceases to anchor itself in objective norms and comes to depend on the personal convictions of the rapporteur drawn to handle a given case. Law loses its expectation-stabilizing function and transforms itself into an instrument for the imposition of individual agendas, compromising fundamental values of the Rule of Law, such as equality before the law and the security of legal relations (Cf. Abboud, 2021).

Final Considerations: Judicial Activism, Juristocracy, and Barroso's Decision

The architecture of the argument is supported by five interconnected logical movements that evidence the problem of the examined decision.

First, it is demonstrated that Justice Barroso's manifestation configures judicial activism because it is not grounded in preexisting constitutional or legal norms, but rather in extralegal factors such as his particular worldview, his personal values, and his individual sense of justice. This characterization is anchored in the doctrinal definition of activism as a judicial decision that enters the redoubts of politics and morality, replacing the application of norms with the imposition of personal convictions of the adjudicator.

Second, it is evidenced that such a decision not only illustrates but effectively deepens the phenomenon of juristocracy in Brazil, consolidating the transfer of fundamental political decisions from the Legislative Branch to the Judicial Branch. The Barroso case materializes the *government of judges*, a political anomaly characterized by judicial invasion of competences constitutionally reserved to the elected representatives of the people. By deciding on the decriminalization of abortion - a theme of profound moral and political dissent - the Justice usurped a legislative function and transformed the tribunal into a *judicial parliament*.

Third, the decisional method employed is analyzed, revealing that the magistrate systematically resorted to extralegal elements to ground his position. The worldview about

female reproductive autonomy, the personal values about the moment when intrauterine life merits criminal protection, and the particular sense of justice about what would be the adequate balance among conflicting rights constituted the true grounds of the decision, with no necessary correspondence with the positive legal order. This posture configures decisionism, characterized by the judicial pretension to correct Law according to subjective criteria of the adjudicator.

Fourth, it is demonstrated that the decision suppressed democratic debate in Parliament, violating the principle of the separation of powers and disrespecting the concept of the legislator's eloquent silence. By judicially intervening in a matter not yet consensual in society, the Justice eliminated the possibility of maturation of public debate and of construction of a democratically legitimated legislative solution. Activism revealed itself as an *"antidemocratic shortcut"* that replaces plural political deliberation with the *"robed monologue"* of a judicial elite that understands itself as enlightened and as bearing the correct direction of History.

Fifth, the analysis in light of Byung-Chul Han's theory of self-grounded power reveals the philosophical dimension of the problem. The decision materializes power that legitimates itself exclusively by itself, dispensing with normative mediation and democratic recognition. It is a manifestation of institutional solipsism that closes the Judiciary to alterity, transforming it into a self-referential production space disconnected from public language and political time. Activism, when clothed in a civilizing mission, dangerously approaches enlightened despotism, a form of authoritarianism characterized by the imposition of values considered superior by an elite that judges itself more enlightened than the common people.

The conclusion is unequivocal: Barroso's decision represents not only a punctual legal error, but a symptom of broader institutional pathology that threatens the very legitimacy of the Brazilian democratic system.

- ***Logic of the Theme (Judicial Activism, Juristocracy, and Ministrocracy)***

The logic of the studied theme can be understood as an institutional crisis continuum that progresses from a methodological level to a structural level and, finally, to a philosophical level. On the methodological level, the problem begins with activism: as soon as the judge abandons the norm - Constitution, law, precedent - as the basis of decision and employs extralegal considerations such as personal values, moral convictions, or social perceptions, the jurisdictional function is transformed into a quasi-legislative one. This transition is not innocuous: it shifts the legitimation axis from the democratic norm to judicial conscience.

On the structural level, from activism, once it stabilizes and systematizes itself, follows juristocracy. It is no longer a punctual decision, but a pattern of governance in which fundamental political decisions - morally sensitive themes such as abortion, drugs, civil rights - are displaced from Parliament to the Court. Juristocracy breaks with the countermajoritarian logic of constitutional jurisdiction, which draws its legitimation precisely from the protection of fundamental rights against episodic majorities: when the Court begins to make *positive*

political decisions instead of setting *negative* limits against constitutional violations, it claims a representative function that does not institutionally belong to it.

Ministrocracy, in turn, represents the monocratic intensification of juristocracy: when the displacement of political decisions from Parliament to the Court is supplemented by a displacement from the plenary to the individual judge, the collegial virtue of the constitutional court - exchange of arguments, consensus building, pluralism of voices - is replaced by eleven parallel individual sovereignties. Here the connection with Han's *self-grounded power* becomes clear: individual judicial action that detaches itself from collegiality, from the constitutional text, and from democratic mediation, transforms itself into solipsistic power that legitimates itself from itself.

Finally, the logic of the theme reveals itself in a fundamental paradox: activism, which presents itself as protection of fundamental rights and acceleration of social progress, undermines the conditions that make such protection and progress possible in the first place - namely democratic deliberation, parliamentary representation, respect for the *eloquent silence* as a valid political option, and predictability of the legal order. The sense of justice of the individual cannot replace the democratic procedure without destroying the procedure itself. Hence the conclusion: every activism is reproachable, also and especially when one agrees with the result, since the problem does not lie in the content, but in the method and in the institutional usurpation.

Overview Table (Quadro Sinótico)

Theme	Explanation
Judicial Activism	Interpretative judicial practice characterized by decisions not grounded in the Constitution, laws, or normative acts, but rather in worldviews, moral values, and social and political perceptions of the adjudicator; consists of jurisdictional exercise that enters the redoubts of politics, morality, and ethics, invading state spheres that do not belong to the Judiciary; manifests itself when the magistrate replaces the application of norms with the imposition of his personal convictions.
Decisionism	Corrective judicial posture toward Law, in which the magistrate applies his moral-political-social worldview to the concrete case; characterized by the decision made on the basis of a sense of justice and personal sentiment of the adjudicator about what would be good and just, regardless of what the democratically approved norms provide; etymologically derives from *sentire*, referring to the feeling of the judge before the concrete case.

Juristocracy	Process of transferring political decision-making from deliberative bodies to judicial bodies; constitutes a form of democratic degeneration characterized by the idea of *government of judges*, in which the Judiciary invades spheres of constitutional competence of other branches without constitutional authorization, culminating in judicial gigantism; represents a political anomaly resulting from judicial supremacy with infiltration into the political redoubt of other branches.
Ministrocracy	Phenomenon characterized by the intense monocratic activity of Justices of the *Supremo Tribunal Federal*, who issue precautionary decisions affecting the functioning of the other branches without submission of the question to the plenary of the Court; represents *individual judicial review*, that is, constitutionality control exercised solitarily by a single magistrate, without analysis by the plenary composition of the Tribunal, configuring what is called judicial solipsism.
Extralegal Factors	Elements used as foundation of judicial decisions that are not extracted from the positive legal order, but rather from sources external to Law; include the worldview of the adjudicator, his personal values, his moral, political, and ideological perception, as well as his individual sense of justice; their use characterizes activism because it replaces the application of norms with the imposition of subjective convictions.
Eloquent Silence *(Silêncio Eloquente)*	Concept according to which the legislator's silence on a given matter also constitutes a valid political position; represents a political decision to await the maturation of social debate before regulating or deregulating a given theme; does not configure unconstitutional omission that would authorize judicial intervention, but rather a legitimate exercise of democratic prudence in face of the absence of minimal social consensus.
Separation of Powers	Fundamental constitutional principle that establishes functional division among Legislative, Executive, and Judiciary, preventing any branch from invading the sphere of competence of the others; constitutes a pillar of democratic constitutionalism that distributes state functions among independent and harmonious bodies; is violated when the Judiciary assumes a legislative function or deliberates on political matters reserved to elected representatives.
Self-Grounded Power	Philosophical concept developed by Byung-Chul Han to designate a form of authority that legitimates itself exclusively by itself, dispensing

	with normative mediation and democratic legitimation; characterized by power that detaches itself from symbolic mediations, from listening to the other, and from shared deliberation, degenerating into institutionalized violence; in the judicial context, manifests itself when the magistrate decides based on personal perceptions, operating in the logic of permanent exception.
Judicial Solipsism	Phenomenon in which the exercise of jurisdictional power is detached from listening, alterity, and communication with other institutional actors; characterized by the absence of collegiality and plural debate, transforming the Court into a stage of multiple private voices, each guided by its own conception of justice; represents a manifestation of power that closes itself to alterity and replaces the posited Law with subjective discourse of the adjudicator.
Occasional Activism	Posture characterized by the selective defense of judicial protagonism according to ideological agreement with the result of the decision; manifests itself when defenders of activism accuse of being activist (in a pejorative sense) the decision with which they disagree, establishing a Manichean relationship between activism of good and activism of evil; reveals theoretical incoherence and instrumental use of the debate on the limits of jurisdiction.
Democratic Legitimacy	Attribute of fundamental political decisions that derives from their origin in representative deliberative processes, in which citizens or their elected representatives participate in the formation of state will; grounds the requirement that relevant moral and political questions be decided through participatory democratic processes, not by judicial imposition; the Judiciary lacks this legitimacy to legislate on controversial matters.
Loss of Law's Autonomy	Phenomenon resulting from the multiplicity of particular views of adjudicators who correct the posited Law according to their own moral, ethical, economic, philosophical, political, and ideological perspectives; characterized by the substitution of the application of objective norms with decisions based on personal convictions, compromising the predictability of decisions and the expectation-stabilizing function of the legal order; generates legal uncertainty and compromises fundamental values of the Rule of Law.

Table of STF Precedents

Precedent	Explanation

ADPF 54	*Arguição de Descumprimento de Preceito Fundamental* No. 54, *Supremo Tribunal Federal*, Rapporteur Justice Marco Aurélio, judgment on 04/12/2012. *Ratio decidendi*: the interruption of pregnancy of an anencephalic fetus does not configure punishable abortion, since there is no viable life to be protected; the criminalization of this conduct violates the dignity of the pregnant woman, health, freedom, self-determination, and sexual and reproductive rights; represents a relevant precedent on the balancing of fundamental rights in reproductive matters, constituting an important antecedent for subsequent discussions on the decriminalization of abortion.
ADI 3,510	*Ação Direta de Inconstitucionalidade* No. 3,510, *Supremo Tribunal Federal*, Rapporteur Justice Carlos Britto, judgment on 05/29/2008. *Ratio decidendi*: the use of embryonic stem cells for scientific research purposes does not violate the right to life, since unviable embryos or embryos frozen for more than three years do not characterize a human person for constitutional purposes; established parameters for the beginning of the constitutional protection of life, a theme connected to discussions on abortion and female reproductive autonomy.
ADI 3,367	*Ação Direta de Inconstitucionalidade* No. 3,367, *Supremo Tribunal Federal*, Rapporteur Justice Cezar Peluso, judgment on 04/13/2005. *Ratio decidendi*: affirmed that the *Supremo Tribunal Federal*, as guardian of the Constitution, cannot replace the ordinary legislator, having to act within the strict limits of its constitutional competences; reinforced the principle of the separation of powers and the limits of constitutional jurisdiction, establishing that fundamental political decisions are within the competence of the elected representatives of the people.
HC 124,306	*Habeas Corpus* No. 124,306, *Supremo Tribunal Federal*, Rapporteur Justice Marco Aurélio, Rapporteur for the Judgment Justice Roberto Barroso, judgment on 11/29/2016. *Ratio decidendi*: in the concrete case, granted the writ of *habeas corpus* affirming that pretrial detention for voluntary abortion in the first trimester of pregnancy was disproportionate; established an important precedent by suggesting, in non-binding reasoning, that the criminalization of abortion in the first weeks would violate fundamental rights of women; inaugurated a broader discussion on the decriminalization of abortion at the STF.
ADPF 442	*Arguição de Descumprimento de Preceito Fundamental* No. 442, *Supremo Tribunal Federal*, action pending since 2017, filed by PSOL. *Ratio decidendi*: this action constitutes the procedural stage of the decision analyzed in the present study; questions the constitutionality of articles 124 and 126 of the Criminal Code in the part criminalizing voluntary abortion in the first twelve weeks of pregnancy; argues that such criminalization would violate sexual and

	reproductive rights, autonomy, physical and psychic integrity, gender equality, and non-discrimination; remains pending definitive judgment by the plenary.
Rcl 4,335	*Reclamação* No. 4,335, *Supremo Tribunal Federal*, Rapporteur Justice Gilmar Mendes, judgment on 03/20/2014. *Ratio decidendi*: recognized *erga omnes* and binding effects to decisions issued in diffuse constitutionality control after intervention by the Federal Senate; expanded the reach of STF decisions in constitutionality control, contributing to the phenomenon of judicial gigantism; reinforced the role of the Supreme Court as a body with expanded normative force, a theme connected to discussions on juristocracy.
ADI 347-SP	*Ação Direta de Inconstitucionalidade* No. 347-SP, *Supremo Tribunal Federal*, judgment on eloquent silence. *Ratio decidendi*: used the expression *"eloquent silence"* to characterize the absence of constitutional provision for the admissibility of ADI having as its object a municipal law confronted with the Federal Constitution; understood that since nothing is said in articles 102, I, *"a"*, and 125, § 2, original concentrated control by generic ADI is not admissible, expressing a rule that the deliberate silence of the constituent represents a valid political decision that must be respected.

Glossary - Technical Terminological Index

Term (Português / English)	Explanation
***Ativismo judicial* / Judicial activism**	Designates the judicial practice in which the decision is not derived from the Constitution, laws, or normative acts, but rather from extralegal factors such as the worldview, moral, ethical, or political convictions of the judge. In Anglo-American legal discourse, the term has different historical valences, sometimes pejorative (referring to *"legislating from the bench"*) and sometimes neutral (designating an active role in protecting rights).
***Juristocracia* / Juristocracy**	Term coined by Ran Hirschl *(Towards Juristocracy)* designating the transfer of political decision-making power from deliberative bodies to judicial bodies. Connected concepts in Anglo-American debate include *"government of judges"*, *"judicial supremacy"*, and *"countermajoritarian difficulty"*, this last classically formulated by Alexander Bickel.
***Ministrocracia* / Ministrocracy**	Specifically Brazilian term, coined by Arguelhes and Ribeiro, without direct equivalent in foreign legal cultures. Designates the intense monocratic activity of individual Justices of the *Supremo Tribunal Federal*, who issue interim decisions with significant political reach without submitting the question to the plenary. In

	the Anglo-American context, this would correspond to a hypothetical situation in which individual Justices of the U.S. Supreme Court could exercise constitutional control alone, outside the collegial decision.
***Decisionismo* / Decisionism**	Originally a concept from German legal-political theory, coined by Carl Schmitt, which holds that the legal order ultimately rests on a sovereign decision rather than on a norm. In the sense used in the text, it designates the judicial posture that corrects positive law through the judge's own sense of justice.
***Solipsismo judicial* / Judicial solipsism**	Term used by Lenio Streck to designate the judicial posture in which the adjudicator isolates himself from alterity, collegiality, and intersubjective communication, deciding based on his private convictions. The term *solipsism* comes from philosophy *(solus ipse - only myself)* and designates the view that only one's own consciousness can be held as certain.
***Poder autofundado* / Self-grounded power**	Term developed by Byung-Chul Han in *What is Power?* to designate a form of authority that legitimates itself exclusively by itself, dispensing with normative mediation and democratic recognition. In the original German, Han speaks of *"selbstgesetzte Macht"* or *"sich selbst setzende Macht"*, in contrast to communicative and mediated power.
***Silêncio eloquente* / Eloquent silence**	Topos used by the *Supremo Tribunal Federal* according to which the legislator's silence on a given theme constitutes a deliberate political decision not to regulate the matter. In Anglo-American legal theory, the concept is approached through related notions such as *"legislative inaction"*, *"deliberate omission"*, or the doctrine of *"political question"*, which excludes certain matters from judicial review.
***Judicial review* / Judicial review**	Anglo-American term for the constitutional control of laws by the Judiciary, classically established in the United States in *Marbury v. Madison* (1803). In the Brazilian system, this corresponds to *abstract* and *concrete control of constitutionality*, exercised through specific procedural instruments. The text distinguishes between *judicial review* (collegially exercised control) and *individual judicial review* (by a single judge).
***Função contramajoritária* /**	Function of constitutional jurisdiction to protect fundamental rights against episodic parliamentary majorities. The expression connects to the *countermajoritarian difficulty* formulated by Alexander Bickel in *The Least Dangerous Branch* (1962): the

Countermajoritarian function	tension between judicial review and democracy, since unelected judges can invalidate decisions of democratically elected representatives.
***Behaviorismo judicial* / Judicial behaviorism**	Term used by Streck that goes back to the theory of *legal realism* and to American *judicial behavior studies*. Designates the thesis according to which judicial decisions result less from norms than from the personal preferences, ideological inclinations, and psychological factors of judges.
***Despotismo ilustrado* / Enlightened despotism**	Historical term from the 18th century designating the form of government of absolutist rulers who, in the spirit of the Enlightenment, claimed to do *"everything for the people, but nothing through the people"*. In the analyzed text, the term is metaphorically transposed to the judicial posture that understands itself as enlightened and imposes its values on a society it considers less illuminated.
***Superego da sociedade* / Society's superego**	Term used by Ingeborg Maus, borrowed from Freudian psychoanalysis, to criticize the Judiciary that places itself as a moral instance above society and acts as a kind of social conscience. In the original article: *"Justiz als gesellschaftliches Über-Ich"*.
***Parlamento judiciário* / Judicial parliament**	Metaphorical term to designate the situation in which the constitutional court assumes the norm-setting function of Parliament. Corresponds, in Anglo-American discourse, to criticisms of *"judicial legislation"* or *"legislating from the bench"*, classically formulated by critics of *Roe v. Wade* (1973) and other expansive decisions of the U.S. Supreme Court.
***Atalho antidemocrático* / Antidemocratic shortcut**	Figurative expression to describe the strategy of bypassing political majority-building and parliamentary deliberation by sensitizing sympathetic judges. The expression captures the strategic dimension of *judicialization* as an alternative to legislative defeat.
***Monólogo togado* / Robed monologue**	Metaphorical expression *(togado* = the one who wears the robe), which characterizes the substitution of plural democratic deliberation by the unilateral voice of the judicial elite.
***Ativismo de ocasião* / Occasional activism**	Designation for the selective defense of judicial activism according to ideological agreement with the result of the decision. In Anglo-American discourse, similar criticism appears under the formulation of *"results-oriented jurisprudence"* or *"ideological*

	judging", indicating the inconsistency of those who support or condemn activism according to whether the result favors their political preferences.
ADPF (Arguição de Descumprimento de Preceito Fundamental)	Brazilian instrument of concentrated constitutional control, provided for in Article 102, § 1 of the Federal Constitution of 1988, having as its object the violation of fundamental constitutional precepts by state acts. Has no direct equivalent in U.S. law; it functionally resembles a hybrid of *abstract review* (typical of European systems) and certain expansive applications of *constitutional adjudication*.
ADI (Ação Direta de Inconstitucionalidade)	Brazilian instrument of concentrated and abstract constitutional control, provided for in Article 102, I, *"a"* of the Federal Constitution. Functionally corresponds to *abstract review* of European systems (such as the German *abstrakte Normenkontrolle*), without precise equivalent in the American diffuse system.
Reclamação (Rcl)	Brazilian constitutional procedural instrument for safeguarding the competence and authority of the decisions of the *Supremo Tribunal Federal*, provided for in Article 102, I, *"l"* of the Federal Constitution. Has no direct equivalent in Anglo-American law; functionally distantly resembles the *writ of mandamus* and certain forms of supervisory jurisdiction.
Habeas Corpus (HC)	Instrument originating from English law for the protection of physical freedom of movement. In Brazil, enshrined in Article 5, LXVIII of the Federal Constitution. Maintains a similar function in the Anglo-American tradition, although with specific procedural variations in each jurisdiction.
Ratio decidendi	Latin expression from the *common-law* tradition that designates the supporting basis of a judgment, in contrast to the *obiter dictum* (incidental remark). In the Brazilian system, it has been incorporated into the precedential doctrine, particularly after the Civil Procedure Code of 2015.
OAB (Ordem dos Advogados do Brasil)	Brazilian Bar Association, functionally corresponds to the *American Bar Association (ABA)* in the U.S. or to the *Bar Council* in the United Kingdom, with the difference that the OAB has compulsory affiliation for all attorneys practicing law in Brazil.
Drittwirkung	German term (implicit in the context of fundamental rights balancing) that designates the effect of fundamental rights

	between private parties *(third-party effect of fundamental rights)*. Doctrine developed by the German Federal Constitutional Court in the *Lüth* judgment (1958). In Anglo-American discourse, the closest concept is the *"horizontal effect"* of constitutional rights, particularly explored in South African and Canadian constitutionalism.

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