JUDICIAL ACTIVISM AND JURISTOCRACY IN THE BRAZILIAN CONTEXT

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1. Contextualization and fundamental premises

The reflection on **democracy** and its articulation with the institutions of power constitutes an essential theme in the contemporary legal scenario. Upon examining the jurisprudential manifestations delivered by the Brazilian Supreme Federal Court in recent decades, a substantial displacement of the center of **political discussions** becomes evident, historically situated within the scope of the Legislative Power – a deliberative space by nature in any democratic regime – toward the domain of the Judicial Power. Thus, an appropriation of this debate by the judicial sphere is observed, especially concentrated in the Supreme Federal Court, resulting in the **hypertrophy** of this institution and, paradoxically, in the progressive substitution of the legislator in its primary function of **normative creation** (Cf. Barroso, 2009; Vieira, 2008).

This phenomenon represents not only an alteration in institutional dynamics but a **reconfiguration** of power relations among state organs, with direct implications for democratic legitimacy and for the very autonomy of law as a normative system. The transfer of the decisional locus from parliament to courts raises fundamental questions about the limits of jurisdictional action and about the preservation of balance among the branches of the Republic (Cf. Abboud, 2014).

2. Judicial Review and the phenomenon of Juristocracy

2.1. Concept and origin of Judicial Review

The institute of **judicial review**, originating from the North American constitutional experience, constitutes a structural element of contemporary constitutional systems, enabling the examination by the Judicial Power of the conformity of legal norms and governmental acts with constitutional precepts. The primary purpose of this mechanism resides in the preservation of **constitutional supremacy**, operationalized through the control of constitutionality of laws and acts of Public Power, an indispensable instrument for the

safeguarding of the Democratic Rule of Law. In the operationalization of this system, when a particular norm or administrative act is submitted to jurisdictional scrutiny, it falls upon magistrates to verify its compatibility with the constitutional text, resulting in the **invalidation** or **annulment** of provisions considered unconstitutional (Cf. Bickel, 1986).

This control structure, although necessary for maintaining the integrity of the legal order, carries within itself the potential for excessive expansion of judicial power, especially when institutional limits and criteria of deference to other powers are not observed. The **permanent tension** between the need for constitutional protection and the risk of excessive judicialization of politics marks one of the main challenges of contemporary constitutionalism (Cf. Streck, 2017).

2.2. Juristocracy: the government of judges

The expression **Juristocracy**, coined by Ran Hirschl in a work of significant academic repercussion, designates the process through which political decisions migrate from traditional deliberative organs to judicial instances. In his comparative analysis involving Canada, Israel, New Zealand, and South Africa, Hirschl identifies that postwar constitutionalism is characterized by the significant expansion of the catalog of **fundamental rights** and by the extension of the judicial review system. Parallelly, the North American jurist Jeremy Waldron employs the term to convey the idea of "government of judges," configuring a modality of **democratic degeneration**, as asserted by Abboud, insofar as the Judiciary transposes the frontiers of its constitutional competence, entering spheres reserved to other powers (Cf. Hirschl, 2004; Waldron, 2006).

This competential invasion, devoid of constitutional authorization, culminates in the institutional aggrandizement of the Judiciary, manifesting itself through the restriction of **individual liberty rights** and the suppression of legitimate spaces for political deliberation. Judicial supremacy, when it surpasses its functional limits and penetrates matters related to the political core of other powers, converts itself into a **political anomaly**, justifying the denomination of Juristocracy. For better comprehension of this complex phenomenon, it becomes necessary to distinguish the concepts of judicialization and judicial activism, frequently confused in specialized literature (Cf. Maus, 2000).

3. Judicialization versus Judicial Activism

3.1. Judicialization: a natural post-1988 phenomenon

Judicialization can be understood as the exponential increase of demands submitted to the appreciation of the Judicial Power. Considering the history of rights suppression during the Military Dictatorship period and the advent of the 1988 Constitution, generous in fundamental rights and guarantees, which consecrated the clause of **indefeasibility of jurisdictional control**, a significant opening for the resolution of conflicts through the judicial route was observed. This phenomenon, denominated judicialization, presents itself as an almost natural development given the past of **denied rights** and the litigious vocation characteristic of Western capitalist culture. The problem intensifies, however, when judicial activism proper is examined (Cf. Barroso, 2009; Tate; Vallinder, 1995).

The fundamental distinction resides in the fact that judicialization constitutes a social and political phenomenon, deriving from constitutional and legislative choices that expand access to justice, while activism represents a specific interpretive posture adopted by magistrates, characterized by the **expansion** of the limits of their institutional action (Cf. Streck, 2014).

3.2. Judicial activism: invasion of the political space

The expression **judicial activism** originated in North American journalism when press professionals covered Supreme Court proceedings. In common lexicon, activism designates any doctrine or practice that privileges the effective transformation of reality to the detriment of merely speculative activity, frequently subordinating conceptions of truth and value to the pragmatic success of action. Considering that law is structured in **formal language**, with norms incorporated in texts, interpretation becomes indispensable to extract the meaning and scope of normative provisions (Cf. Kmiec, 2004).

In an initial perspective, it falls to the **Constitution** and **laws** – elaborated by the Legislative Power, the political instance par excellence in a democracy, composed of elected representatives who reflect society's political pluralism – to define what constitutes Law. Whether legislative deliberation is adequate or inadequate, provided it is compatible with the Federal Constitution, the law must be applied by the judge, in respect for the due legislative process of law formation. Under this perspective, activism is characterized by the exercise of jurisdictional activity through decisions not grounded in the Constitution, laws, or normative acts, such as international treaties, decrees, or provisional measures (Cf. Streck, 2017).

3.3. Judicial decisionism and its implications

Essentially, activism consists of an interpretive judicial practice that penetrates the domains of politics, morality, ethics, and economics, **invading** distinct state spheres. The magistrate comes to decide according to his particular worldview, his moral and ethical values, his social and political perception, configuring what is denominated **decisionism**. As Lenio Streck warns, activism invariably harms democracy, as it derives from personal behaviors and perspectives of judges and courts, as if it were possible to construct a private language at the margins of public language (Cf. Streck, 2011).

The decisionist posture assumes a **corrective** character of Law, in which the magistrate applies his moral-political-social worldview. Were he to exercise a legislative function, the just would correspond to decision X; when there is divergence between law or the Constitution and what the judge considers just, he acts to correct the supposed error or legislative omission. In other terms, the decision is grounded in a personal sentiment of the judge regarding the good and the just, characterizing decisionism. Perhaps this practice represents a reminiscence of the etymology of the word sentence, which refers to sentire, the **feeling** of the judge before the concrete case presented (Cf. Abboud, 2014).

4. Judicial activism in the political sphere

4.1. The eloquent silence of the legislator

Legislative omission also constitutes a political position. The expression **eloquent silence**, employed by the Supreme Federal Court, proves especially pertinent in this thematic. When the Judiciary enters the political sphere, it suppresses the institutional debate reserved to the Legislative. Even agendas considered just, but not regulated by Parliament, should not constitute objects of judicial deliberation, since the judge does not represent an antenna for social aspirations nor possesses constitutional authorization to avail himself of his moral-political-ideological-economic vision with the purpose of **correcting** Law (Cf. Streck, 2017).

This is exemplified by the case of penal protection of homophobia, which evidently constitutes an instrument for recognizing the rights of sexual minorities. However necessary and pressing criminal protection against homophobia may be, the Judiciary must respect the rules of the **democratic game**, including the principle of strict penal legality, which affirms that

there is no crime without prior law defining it, and the prohibition of analogy in malam partem, equally specific constitutional values of penal state intervention (Cf. Roxin, 2006).

4.2. The problem of the antidemocratic shortcut

By acting politically, the Judiciary places itself in a position of substituting the legislator, as if it were an antenna capturing social aspirations, arrogating itself as society's representative. An **antidemocratic shortcut** is created when the Judiciary is authorized to substitute the Legislative, constituting itself as a judicial parliament, correcting law or supplying legislative omissions. One must inquire: can the Judiciary determine what is convenient or opportune for society? Does the Constitution authorize such action? By acting in this manner, it behaves as a representative organ of the majority, arrogating legitimation it does not possess, wounding its essence as a **countermajoritarian** organ, destined to the safeguarding of fundamental rights (Cf. Bickel, 1986).

When it is affirmed that legislative silence constitutes a political position, it is recognized that certain subjects have not yet reached sufficient political maturity to receive regulation or deregulation, as exemplified by the case of **drug decriminalization**. The fact that a particular policy has been implemented successfully in other countries does not necessarily imply its adequacy to the Brazilian context. This is a space for parliamentary debate, not judicial (Cf. Vieira, 2008).

5. Critique of activism: there is no good activism

All activism proves harmful to democracy, even when one morally or politically agrees with the decision rendered in an activist manner. Not rarely is the so-called **occasionalist activism** observed, whereby agendas considered just are defended before the Judiciary, elevating it to the condition of society's superego, as explicated by Ingeborg Maus. Interestingly, defenders of activism, when the magistrate decides based on values different from those expected, accuse the same judge of activism in a pejorative sense. Thus, occasionalist or opportunistic activism is evidenced: the defender of activism accuses of activism the decision with which he disagrees, establishing a Manichean relation between activism of good and evil (Cf. Maus, 2000).

Lenio Streck emphasizes that judicial activism relates to the response offered by the Judiciary to the question subject to judicialization. Specifically in the judicialization of politics,

activism represents a modality of decision in which the **judge's will** substitutes political debate, whether to realize a purported advancement or to maintain the status quo. Activism thus configures itself as judicial behaviorism (Cf. Streck, 2014).

6. Ministrocracy and individual constitutional control

6.1. Monocratic decisions and violation of collegiality

In the traditional vision – perhaps even romantic – the Supreme Court presents itself as a **countermajoritarian** institution in a democracy, destined to safeguard fundamental rights against the wills of episodic majorities. However, the Supreme Federal Court currently displays intense monocratic action, and the term **ministrocracy** seeks to describe this scope of solitary action by magistrates of the Supreme Court in the judicial review of normative acts. Ministrocracy has been understood as a characteristic of the STF in recent years, whose ministers render monocratic precautionary decisions affecting the functioning of other powers, without submission of the question to the Court's plenary, that is, without posterior **endorsement** by the collegiate organ, resulting in judicial review exercised by a single member. In other words, individual constitutional control is performed, solitarily, without analysis by the Tribunal's plenary composition, configuring what Streck denominates **solipsism** (Cf. Godoy, 2017).

According to Godoy, ministrocracy, individual judicial review, the Supreme as a tribunal of soloists, undermine the qualities and benefits of a collegiate organ that should deliberate – exchange reasons, challenge arguments, build consensuses. This mode of acting violates the norms of constitutional process, **denatures** the STF by violating collegiality and the rule of the majority that should govern it and, finally, erodes the very democracy it should protect (Cf. Godoy, 2017).

6.2. Silent plenary and individualistic judicial review

Thus, the countermajoritarian function has been subverted by the monocratic action of its members, manifesting through: suspension of law or normative act by a single Minister, who arrogates to himself the power to declare what is or is not constitutional to the detriment of respect for parliamentary deliberation. In other terms, Parliament approves law or constitutional amendment, according to the prevailing constitutional legislative process, so that only one person suspends such act; the **agenda power**, consisting of placing on the

agenda only subjects of interest or of occasion, relegating to oblivion those that do not display the same status (Cf. Godoy, 2017).

Godoy also mentions the concept of **silent plenary**, a criticism directed at the virtual plenary of the Supreme Federal Court. In this model, votes accumulate progressively, and cases of significant relevance are judged in this manner. A recent example refers to the judgment of the constitutionality of the Public Defender's requisition power. This criticism questions the effectiveness and transparency of this method of judgment, considering that public debate and deliberation are reduced or nonexistent (Cf. Godoy, 2017).

Therefore, the predominance of a modality of individual judicial review in the Supreme Federal Court is observed, characterized by an excess of **monocratic decisions** in constitutional control proceedings. This observation, a pertinent critique, points to a violation of the principle of collegiality, with ministers adopting increasingly individualized postures in decision-making. By fleeing from what the Constitution and laws establish, with this individualistic judicial review, eleven worldviews are observed in the STF, portrayed in monocratic decisions, in which each supreme judge presents his moral, ethical, economic, philosophical, political, ideological perspective and, evidently, his own **sense of justice**, correcting established law and collaborating, progressively, toward the loss of Law's autonomy, intensifying the already existing malaise (Cf. Streck, 2017).

7. Self-founded power and institutional closure: philosophical analysis

7.1. Integration of Byung-Chul Han's theory

The criticisms of judicial activism and juristocracy, especially when the substitution of the Legislative by the Judiciary in normative production is observed, 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-founded and solipsistic form. In Han's vision, 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, as a manifestation of the individual will of the judge, displaces itself from public language and assumes the contour of what Han classifies as **self-founded power**: a form of authority that legitimates itself exclusively through itself, dispensing with normative

mediation and democratic legitimation. In this sense, the judge who decides based on his moral, political, or ideological perception – and not from the Constitution or laws produced by Parliament – exercises a modality of sovereignty that ignores the republican principle of separation of powers. This is power that closes itself to **alterity** and operates in the logic of permanent exception, as criticized by Carl Schmitt and revisited by Han (Cf. Han, 2019).

Similarly, the phenomenon of ministrocracy, characterized by the multiplication of monocratic decisions in constitutional control proceedings, reveals not only deliberative deficit but a form of decision devoid of **mutual recognition**. 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, substituting established law for subjective discourse. This is what Han would identify as a manifestation of institutional solipsism, in which the exercise of power detaches itself from listening, alterity, and communication – fundamental requirements of a democratic ethics (Cf. Han, 2019).

In the Hanian conception, legitimate power is not imposed by force or by the agent's moral superiority, but constitutes itself in **reciprocal recognition** and in the symbolic construction of shared meaning. This implies that the Judiciary, to act within the framework of the Democratic Rule of Law, must respect the institutional limits of politics and legislation, understanding that its countermajoritarian function does not authorize the substitution of the Legislative under the pretext of correcting or complementing existing law. Every decision that dispenses with institutional mediation and silences the political sphere becomes, according to Han, a degenerate form of power that feeds on its own will to decide (Cf. Han, 2019).

Therefore, judicial activism and juristocracy, by interrupting the flows of **legislative deliberation** and assuming unauthorized normative protagonism, represent not only an institutional crisis but also a symbolic crisis of democracy. By suppressing the possibility of public debate and plural listening, they transform the Judicial Power into a space of self-referent production, disconnected from common language and political time. It is at this point that Han's philosophical critique offers theoretical density to the diagnosis of contemporary democratic dysfunction: activism, by constituting itself as **self-founded power**, ceases to protect Law and proceeds to correct it according to the subjective will of its interpreters (Cf. Han, 2019).

8. Final considerations

When the Judiciary decides a matter by creating a norm, in substitution for the Legislative, it suppresses a sphere of institutional political debate, weakening democracy. Not all subjects have reached social maturity to receive regulation by law and, Parliament being the space for public-political deliberation par excellence in a democracy, non-deliberation or non-formation of **majoritarian parliamentary consensus** on a particular subject must also be respected, as a duty of submission to the democratic game. Personal convictions about unregulated or insufficiently regulated agendas cannot authorize their pursuit before the Judiciary, in normative fishing expedition, at the petitioner's discretion (Cf. Vieira, 2008).

The clause of **indefeasibility of jurisdictional control** does not permit the pursuit of a particular political vision embraced by the judge. Certain political agendas require social maturation and political opportunity for parliamentary approval. Whether there should be decriminalization of light drugs or criminalization of homophobia constitute political agendas that must be circumscribed to the legislative sphere, with due time for maturation of public debate. Legislative silence also consists of a political position, and parliament's silence in regulating a particular subject also represents a political decision that cannot be suppressed by the Judiciary, except in cases where the **Writ of Injunction** applies, by constitutional authorization (Cf. Barroso, 2009).

It must be emphasized: the Judiciary does not possess democratic legitimacy for this; when dealing with subjects not regulated by the Legislator, it will avail itself of its moral, political, ethical, economic, or ideological values; the judge is not an antenna for social aspirations and, fleeing from legality-constitutionality, from the licit-illicit binomial, the magistrate acts as a **vigilante** – by availing himself of his sense of justice to "speak the Law" – which is the parliamentary domain. By authorizing the Judiciary to arrogate itself in political matters, public deliberation on themes is weakened, becoming circumscribed to a domain of sages who act as society's superego (Cf. Streck, 2017; Maus, 2000).

Logic of the theme: Judicial Activism and Juristocracy

The adequate comprehension of the problematic of judicial activism and juristocracy requires the apprehension of a systemic logic that articulates concepts, institutional limits, and democratic foundations. The system can be thus synthesized:

Firstly, **judicialization** is distinguished from **judicial activism**. Judicialization constitutes a social phenomenon deriving from constitutional choices that expand access to justice and rights protection, being a natural consequence of a Constitution generous in fundamental rights. It represents a legitimate and expected movement in constitutional democracies. Judicial activism, in turn, is characterized by an interpretive posture that surpasses the institutional limits of the Judiciary, entering spheres reserved to other powers, especially the Legislative.

Juristocracy represents the institutional degeneration of this process, configuring a true government of judges, in which fundamental political decisions migrate from parliament to courts. This displacement compromises democratic legitimacy, as it substitutes public deliberation for technical decisions or decisions based on magistrates' personal convictions. Juristocracy manifests itself especially through **ministrocracy**, characterized by monocratic decisions in constitutional control, violating collegiality and transforming the Constitutional Court into a space of eleven individual voices, each with its own conception of justice.

Judicial decisionism represents the operational dimension of activism, in which the magistrate decides according to his particular worldview, his moral, ethical, political, and economic values, substituting the application of established law for the correction of law according to subjective criteria. This practice is grounded in the judge's personal feelings about the just and the good, configuring what Han denominates self-founded power, devoid of symbolic mediation and reciprocal recognition.

Byung-Chul Han's philosophical analysis offers profound theoretical foundation for the critique of activism. **Self-founded power**, which legitimates itself exclusively through itself, dispensing with normative mediation and democratic legitimation, constitutes a degenerate form of power that feeds on its own will to decide. Judicial activism, by disconnecting itself from public language and shared deliberation, transforms itself into institutionalized violence, albeit disguised as legality. The absence of alterity, listening, and mutual recognition characterizes **institutional solipsism**, in which each magistrate operates according to his own private conception of justice.

The system's logic reveals that the adequate protection of fundamental rights and democracy requires respect for the institutional limits of each power. The legislator's **eloquent silence** also constitutes a legitimate political position, representing the social immaturity of

certain agendas or the absence of parliamentary consensus. The Judiciary does not possess democratic legitimacy to substitute the Legislative, creating norms or correcting legislative omissions, except in hypotheses expressly authorized by the Constitution.

The preservation of **Law's autonomy** and democratic legitimacy depends on the recognition that the Judiciary exercises a countermajoritarian function of protecting fundamental rights, and not of representing the majoritarian will or defining what is convenient or opportune for society. Judicial activism, even when motivated by agendas considered just, compromises democracy by suppressing public debate and by substituting political deliberation for the imposition of personal convictions.

In synthesis, the system's logic points to the fact that there is no good activism: every form of activism harms democracy, as it derives from personal behaviors and visions that construct private language at the margins of public language. The adequate protection of fundamental rights and democracy requires respect for institutional frameworks, separation of powers, and the primacy of legislative deliberation, recognizing the Judiciary as the guardian of the Constitution, not as its reformer or updater according to subjective criteria.

Synoptic Table

THEME	EXPLANATION
Judicialization	Social phenomenon characterized by the exponential increase of demands submitted to the Judicial Power; derives from constitutional choices that expand access to justice and fundamental rights protection; represents a natural consequence of a Constitution generous in rights and guarantees; constitutes a legitimate movement in constitutional democracies.
Judicial Activism	Interpretive posture in which the magistrate surpasses the institutional limits of the Judiciary, entering spheres reserved to other powers; is characterized by decisions not grounded in the Constitution or laws, but in the judge's moral, political, ethical, or economic values; configures invasion of political space and

	suppression of legislative debate; harms democracy by substituting public language for the magistrate's private language.
Juristocracy	Government of judges; process of transferring fundamental political decisions from deliberative organs to judicial organs; represents democratic degeneration, as the Judiciary invades spheres of constitutional competence of other powers without constitutional authorization; culminates in the aggrandizement of the Judiciary and in judicial supremacy with infiltration into matters of the political domain.
Judicial Review	Mechanism that allows the Judicial Power to analyze and determine the constitutionality of laws or government acts; originating from American law; aims at maintaining constitutional supremacy through constitutionality control; essential for safeguarding the Democratic Rule of Law; may degenerate when it surpasses its institutional limits.
Decisionism	Judicial practice in which the magistrate decides according to his particular worldview, substituting the application of established law for the correction of law according to subjective criteria; is grounded in the judge's personal feelings about the just and the good; is characterized by a corrective posture of law, in which the judge arrogates himself as legislator; violates law's autonomy and separation of powers.
Ministrocracy	Characteristic of the Supreme Federal Court marked by intense monocratic action of its members; consists of the exercise of judicial review by a single minister, without submission to the plenary; violates the principle of collegiality and the rule of the majority; transforms the Court into a tribunal of soloists, with eleven individual worldviews; compromises the countermajoritarian function of the STF.
Institutional Solipsism	Jurisdictional action characterized by the absence of collegiate deliberation and plural debate; each magistrate decides according to his private conception of justice, without mutual recognition or

	construction of consensuses; substitutes established law for subjective discourse; represents institutional closure to alterity and communication; constitutes a form of decision devoid of symbolic mediation.
Self-Founded Power	Philosophical concept developed by Byung-Chul Han; designates a form of authority that legitimates itself exclusively through itself, dispensing with normative mediation and democratic legitimation; detaches itself from symbolic mediations, from listening to the other and from shared deliberation; degenerates into institutionalized violence; is characterized by the absence of alterity and by closure to communication; manifests itself in judicial activism when the judge decides according to his personal will.
Eloquent Silence	Expression used by the STF to designate legislative omission as political positioning; represents the social immaturity of certain agendas or the absence of parliamentary consensus; constitutes a legitimate political decision that must be respected by the Judiciary; indicates that certain subjects are not yet politically ready to be regulated or deregulated.
Countermajoritarian Function	Institutional role of the Judiciary to safeguard fundamental rights against the wills of episodic majorities; is characterized by the protection of minorities and fundamental rights, even against the majority's will; is distinguished from the function of majoritarian representation, proper to the Legislative; has been subverted by judicial activism and ministrocracy, which transform the Judiciary into a majoritarian representative organ.
Antidemocratic Shortcut	Expression that designates the substitution of the Legislative by the Judiciary in the creation of norms or in the regulation of political matters; is characterized by the suppression of institutional political debate and parliamentary deliberation; violates separation of powers and democratic legitimacy; represents

	imposition of particular visions without constitutional authorization; transforms the Judiciary into a judicial parliament.
Silent Plenary	Critique directed at the virtual plenary of the Supreme Federal Court; is characterized by the judgment of relevant cases through progressive accumulation of votes, without public debate or presential deliberation; reduces or eliminates the possibility of discussion and construction of consensuses; questions the effectiveness and transparency of the judgment method; example of the subversion of collegiality in the STF.
Occasionalist Activism	Contradictory posture of defenders of judicial activism who accuse of activism decisions with which they disagree; establishes a Manichean relation between activism of good and activism of evil; reveals that the same ones who defend activist decisions when they agree with their content criticize activism when they disagree; evidences the opportunistic character of part of the defense of judicial activism.

Precedents of STF and STJ on the theme

Note: The original text does not mention specific precedents with numbers, rapporteurs, judgment dates, or ratio decidendi. The author makes generic references to the behavior of the Supreme Federal Court (such as the expression "eloquent silence" and cases involving penal protection of homophobia and the Public Defender's requisition power), but without indicating complete data of the judgments. For elaboration of a table with complete precedents, specific indication of the judgments by the author or complementary research in the superior courts' repositories would be necessary.

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