

# Confrontation Between Judicial Activism and State of Exception

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## Abstract

The judiciary has excelled in the international and national scene, reaching a role of great importance, thus creating opposition to the legislative and executive powers. The center of gravity of the sovereign power of the state moves toward the judiciary, that happens to have a more active role and controlling of the others powers, but also appears as a great defender of social and fundamental rights causes, seeking to make an effective constitution. Its great public notoriety has attracted great distrust of various sectors of society, especially by the two powers that have an increasing interference. Arises, therefore, a speech that the judiciary would be reversing into a big and uncontrollable power, increasing the suspicion that now it would be living in a real dictatorship of the judiciary through judicial activism. There is a growing concern with the expansion of activism and the role of the judiciary. The purpose of this work is to conceptualize and approach the judicial activism and the state of exception to search and reveal if there is any similarity, to then draw up a possible answer to the concern of forming a dictatorship of the judiciary. The state of exception is one of the rule of law paradoxes, while activism is a political manifestation of the judiciary. The similarity between the institutes appears as appalling in a dynamic expansion of political power of a state institution exercising judicial function, putting in check who would be the sovereign in a rule of law and democratic state.

**Keywords:** judicial activism; state of exception; dictatorship of the judiciary; policy decision.

## Introduction

From 1891, with the creation of the Brazilian Republic and in the years that followed until the end of Rui Barbosa's life, his ideals, that the role of guardian of the Constitution belong to the Supreme Court, remain, alongside with the oligarchic policy in an environment regarded as liberal and the constant state of siege declared, the great political highlight of this historical period. The thought of Rui Barbosa was that only a change in the judicial role in relation to judicial review, inaugurating a movement in direction to the judiciary, would be able to transform the national reality in a truly rule of law State. Rui Barbosa would fight all his life for the judiciary to take a more active political role as the great guardian of what he envisioned it should be the federal constitution, creating a real constitutional exegesis that would inspire all times

to date. This famous scholar of the past was very influenced by the judicial review of the supreme US court, always citing the first major case of unconstitutionality on that court, *Marbury v. Madison* in the year 1803.

Rui Barbosa advocated a protagonism of the judiciary in Brazil to inaugurate a judicial review in the Supreme Court. His goals were thwarted by oligarchic economic interests, the maintenance of power by private interests and constitutional interpretations convenient for this purpose. With the inauguration of the republic, the judiciary has not changed much from what it was in the system of constitutional monarchy, with a kind of secondary to that legislative and executive power who were vying for the center of state power.

Crucial to emphasize that with the removal of the figure of the emperor and the reserve power, the country entered a phase of competition for filling the gap left in power that would attract all the big farmers and businessmen of the time, causing a major oligarchic dispute. The military appear in this historic moment in order to contain the dispute and end metamorphosing the newborn Republic in something worse than the old regime with the constant suspensions of law and Constitutional guarantees through the state of siege declaration (species of the genus exception state). In this context, Rui Barbosa believed that who could make an effective Constitution and the republican dream into reality, would be the judiciary, however, the Supreme Court of that time would prove it unable to transform reality dominated by the oligarchy. Emblematic in national political history is the threat made by Marshal Floriano Peixoto to the Supreme Court at the episode of the *habeas corpus* filed by Rui Barbosa, aiming the declaration of unconstitutionality of the state of siege decree and the immediate release of the prisoners.

In the years following to the end of the Old Republic, this speech and the movement towards the judiciary as guardian of the Constitution dissipates, only returning with the Constitution of 1988. Since then, the judiciary would assume a role of prominence in the political arena, more interventionist, because that would be the institutional design in the new Constitution of Brazil. With power restored and with the most factual democratization, judiciary begins to play a role in the political arena. There is an increased confidence in their positions, and their decisions starts being respected by the motivation of its foundations. Before 1988, with the judiciary's inability to have a more active role on the national scene, as occurred in other historical moments in the centric countries, the political arena was dominated by the performance of the executive, the legislature and the strong presence of the military. Numerous states of exception were decreed by the executive and the military, making the use of power due to force a constant within a constitutional state, without which nothing would be subject to control or judicial intervention.

History indicates that states of exception across the globe were not the work of the judiciary and that hardly suffered its share of legality control, being predominantly enacted by hypertrophy of the executive power or by what would be the great representative of the state, the great leader, the sovereign. This demonstrates the secondary character of the judiciary for many years. Only after World War II, is possible to observe a rescue of the judicial role. With the recent role of the judiciary in Brazil, due to the institutional design, everything becomes liable to assessment and control of this power, a phenomenon that, with the concomitant emptying of the legislature on the national scene, makes clear its supremacy. The horizontal and vertical increase power of the judiciary is viewed with extreme suspicion and mistrust by the executive and legislative, that accuses him of monopolizing the interpretation of the constitution, and to create a true *judicial dictatorship*. Various sectors of society start exchanging blows on the apparent prevalence of the judiciary, but the speech on judicial dictatorship is not something modern.

The political enemies of Rui Barbosa have always used the argument that his thought on the judiciary would lead to an establishment of a judicial dictatorship, which he would reply stating that the judiciary did not use weapons, possessed neither commanded armies, had no militia, not elected presidents or had a proactive role, always depending on provocation to express and enforce the law. In his speech on November 19, 1914 at the Institute of Lawyers of Brazil (IAB) in Rio de Janeiro, entitled "The Supreme Court in the Brazilian Constitution"<sup>1</sup>, Rui Barbosa addresses this issue making it very clear its position on the impossibility of establishment of a dictatorship of the judiciary and that there would be no possibility of arbitrariness in the judicial decision, given that it was always justified by the strength of their motives and subject to appeal.

This movement towards the judiciary, today, brought up a discussion that for years have occurred in the United States: the judicial activism. Arthur Meier Schlesinger Jr. was a journalist and author who coined the term judicial activism and judicial self-restraint in 1947 in an article for Fortune Magazine entitled "*The Supreme Court: 1947*". In this article the author discussed the activist and self-restraint positions of the Justices of that court. Judicial activism is the subject of great criticism, doubts and questions, because of its growing and regular application of the judiciary, having various forms of expression since its first appearance. The germ of judicial review, and in a way also of judicial activism, can be attributed to '*Doctor Bonham's case*' in 1610 in England, case that would influence the birth of the institute in the United States in 1803, where the judicial review and judicial activism would develop and generate numerous studies and disagreements to modern days. In Brazil, the constitutional control is introduced in the Republican Constitution of 1891 by Rui Barbosa, although activism gained its

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<sup>1</sup> Free translation of "O Supremo Tribunal Federal na Constituição Brasileira".

contours from 1988 Constitution, which shows how much is new, and still in 2016, it's possible to observe how much it has expanded. It should be clarified that judicial review and judicial activism are distinct institutions, not being treated as equals.

Within this political context of the judicial role, could judicial activism be considered a concern that could lead to the formation of a judicial dictatorship? In other words: it is legitimate the concern that judicial activism would be able to gestate a judicial dictatorship? The claim of creating a dictatorship of the judiciary has some scientific bias? Or is it a political discourse? The primary objective of this research is to study the relation between judicial activism and state of exception. The method employed is theoretical and literature review, comparative and qualitative analysis. As specific objectives, searches to: (I) conceptualize judicial activism, judicialization and judicial self-restraint, (II) conceptualize state of exception and dictatorship, (III) approach the judicial activism of the state of exception, electing comparative criteria to monitor whether they are objects in the same or different spaces; being different, see if there are any common concepts, and lastly (IV) to make some final thoughts on the possibility of gestating a dictatorship of the judiciary.

### **Activism, Judicialization and Self - Restraint**

Judicial activism is a topic that gains space in Brazil between popular debates, among scholars of law and in political science. This fact is mainly due to the work of the Ministers of the Supreme Court, but do not exhausted in them, having manifestation in various levels of the judicial structure. The judiciary has “the task of framing the human fact in a legal norm, for it is essential to understand it well, and determine its content”<sup>2</sup> through interpretation. Constitutional interpretation in the Supreme Court is the result of a principled exegesis that has the power, when considering the polysemic scope of constitutional principles, to reduce its density at the time of application.<sup>3</sup> The risk taken is to consider the same principle, at different times, of heteronomous and contradictory forms.

In Brazil, the result of institutional designs of the Constitution rises the judicialization alongside with judicial activism. Both represent a move towards the judiciary political and institutional role, leaving a policy-observer function and passing to exercise a political function more interventionist.<sup>4</sup> The judicialization and activism can be best

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<sup>2</sup> Free translation of “a tarefa de enquadrar o fato humano em uma norma jurídica, para o que é indispensável compreendê-la bem, determinar-lhe o conteúdo” in Maximiliano, Carlos. *Hermenêutica e Aplicação do Direito*. 20ª Ed. Rio de Janeiro: Forense, 2011, p.11.

<sup>3</sup> Moraes, Guilherme Peña de. *Constitucionalismo Multinacional: uso persuasivo da jurisprudência estrangeira pelos tribunais constitucionais*. São Paulo: Atlas, 2015. p. 19-20.

<sup>4</sup> Barroso, Luís Roberto. *Judicialização, Ativismo Judicial e Legitimidade Democrática*. Rio de Janeiro: [Syn]Thesis, vol.5, nº1, p. 23-32, 2012, capítulo II ‘A Judicialização da Vida’.

explained by a conjuncture analysis of the legal system and through a sociological analysis regarding the population wishes for the realization of rights.<sup>5</sup>

The Brazilian Constitution creates a system in which no injury or threat to any right will be removed from the appreciation of the judiciary (indeclinability of jurisdiction principle), and every lawsuit will have a sentence that will solve the judicial dispute, regardless if there is legislation in the matter. In this case the judge must be based on customs, analogy and general principles of law. It is a corollary of the force that represents the Constitution for the state that the constitutional rules and principles have significance in verticalized grade<sup>6</sup>, whatever the legal prognosis performed. In this sense, any judicial decision must be within the limits of the pre-established constitutional framework. It happens that this frame suffers increase by way of axiological judicial hermeneutic principles, and may have their power reduced by the same route.

Between judicialization and activism, there is an almost imperceptible difference, because both institutes are born with constitutionalism. At the same time they are very similar, they are also very distant. The modern Brazilian judicialization is the result of prior orchestration of the Constitution, which because of being analytical, broadens the matters examined by the judicial role and creates the principle of indeclinability of jurisdiction<sup>7</sup>. The movement toward the judiciary, ie, the judicialization is the result of this constitutional design. Hence, it becomes possible for the judiciary to intervene in basically any national event and other powers, within the limit of the Constitution, in order to safeguard the balance between the powers and the guard of the Constitution.

Judicial activism it is frequently confused with judicialization by the fact that both are closely linked to the Judicial Power. To defer activism from judicialization is essential to examine whether if, in the decision observed occurred a political-normative expansive judge attitude beyond the legal text through the use of a creative exegesis. The manifestation of activism can be observed within a multidimensional context, representing the many 'faces' of manifestation of activism as well analyzed by Carlos Alexandre de Azevedo Campos<sup>8</sup>, author who brings a remarkable definition of judicial activism, but the classification proposed in his work appears to be so broad that basically all judgments become or activism or judicial self-restraint.

[...] i define judicial activism as an expansive exercise, not necessarily illegitimate, of political and regulatory powers by judges and courts in the face of other political actors, that: (a) must be identified and evaluated according to established institutional designs

<sup>5</sup> Teixeira, Anderson Vichinkeski. *Ativismo Judicial: nos limites entre racionalidade jurídica e decisão política*. São Paulo, Revista de Direito GV, 8(1), p. 037-058, JAN-JUN, 2012.

<sup>6</sup> Moraes, *ibid.*, p.19.

<sup>7</sup> Article 5º, XXXV of the Federal Constitution of Brazil 1988.

<sup>8</sup> *Dimensões do Ativismo Judicial no STF*. Rio de Janeiro: Editora Forense, 2014.

by the constitutions and local laws; (b) respond to various institutional factors, political, social, legal and cultural, existing in particular contexts and in different historical moments; (c) is manifested through multiple dimensions of decision-making practices.<sup>9</sup>

Kmiec<sup>10</sup> teaches that the US judicial activism phenomenon is perceived and labeled in two different ways based on public/political opinion that it has on a particular theme: the judicial attitude is seen as *good* when dealing with fundamental rights, human and social, but is labeled as *bad* when referring to a court decision that creates new law, or when it is guided by political interests, or interfere with other powers giving the final word. Note that this tagging is not only a feature of judicial activism, it comes to how the public interprets the acts and actions of key state political actors, not, therefore, something that can define it, as concludes the author. That is why the argument of the use of judicial activism gained a lot of strength when there is interest in ensuring fundamental and social rights, giving thus space to create a more effective constitutional interpretation of rights, able to make the constitution a reality to rather than appear to be inapplicable or unobtainable projection. Judicial activism loses strength and suffers criticism when the judiciary interferes with the activity of other established powers, either by performing an originally legislative activity, or establish criteria to executive, as impacting the available budget, or by imposing obligations on other powers.

The judicial self-restraint is the result of an opposing interpretation to activism that preaches deference to the constitution and the use of prudence<sup>11</sup> in the act of judging, usually labeled as a conservative attitude of the judiciary. In this mode, the aim is to contain the scope of the power of judicial decision, limiting its length to a more restrictive interpretation of the law. Here, it tries to hold decision-making power of the judiciary within the matters assigned to it, within the meanings of the elaboration of the Constitution<sup>12</sup> (or amendment as applicable) and to maintain the balance of power. The self-restraint is not a non-performance of the judiciary in cases where the Constitution gives it such power (would not activism in this case either), it is in fact a self-limitation of the act of interpretation of the Constitution, less invasive to the other powers and less 'creative', in order not to enlarge, reduce, amend or introduce meaning to the legal text. The self-restraint seeks to create an interpretation of legal texts to prevent a demonstration of power that is characterized as extremely flexible,

<sup>9</sup> Free translation of "... defino o ativismo judicial como o exercício expansivo, não necessariamente ilegítimo, de poderes político-normativos por parte de juízes e cortes em face dos demais atores políticos, que: (a) deve ser identificado e avaliado segundo os desenhos institucionais estabelecidos pelas constituições e leis locais; (b) responde aos mais variados fatores institucionais, políticos, sociais e jurídico-culturais presentes em contextos particulares e em momentos históricos distintos; (c) se manifesta por meio de múltiplas dimensões de práticas decisórias." in Campos, *Ibid.* p.141.

<sup>10</sup> *The origin and the current meaning of judicial activism.* California: California Law Review, vol.92:1441, issue 5, article 4, p. 1441-1478, 2004, p. 1471-1473.

<sup>11</sup> About deference and prudence see Campos, *ibid.* p. 153-166.

<sup>12</sup> An interpretation according to the intention of those who drafted the constitution can be best seen in the North American originalism than in the Brazilian case.

which would allow the appearance of *politically oriented decisions*<sup>13</sup>, and / or the will of judgments<sup>14</sup>. The objective is to respect the checks and balances of the constitutional system and limiting the scope of the judicial function within the state.

*The self-restraint creates a system of interpretation that aims to prevent the spread of judicial activism and its state interference, having the main arguments against activism:*

- judicial activism is a manifestation of power that is a countermajoritarian difficulty, and therefore, hurts the division of powers, the ground that the decision itself, made by unelected judges, would create a new legal standard without the announcement of those elected by the people to do so;
- judicial activism opens the door to the possibility of creating an interpretation that sees the occurrence of the judges will in the decisions, therefore, allow the creation of any court decision according to the will of the judges, bending the legal text to what the judge understand is the best and by making flexible the law in any direction. Criticism is to the effect that the judiciary would become the philosopher-king<sup>15</sup>, deciding what the moral the country should have and what would be best for everyone;
- the risk of politicization of the judiciary, in considering the social demands and any interference with other powers. Legal risks of becoming an essentially political body, whose decisions would no longer be essentially legal with political effects (undeniably) and would become policy decisions with legal justifications;
- the judiciary has limits in its institutional capacity while realizing a function of state powers. It does not dominate other areas of knowledge that are assigned and more typical of other powers. The limits set by constitutional design also create obligations to other state powers, and they interpret the law and the Constitution otherwise. These limits also appears in the sense that it is not possible to master all areas of knowledge, and a judgment would have to recognize that, being precautionary that its decision may, for example, break economic stability, political, or social of the state or of segment of society.

Concerns about activism are extremely valid and can not be dismissed or ignored. Thus, the counter-arguments criticism should also be explored and analyzed, respectively, although synthetically:

- the court decision does not hurt the countermajoritarian will, considering that the very division of powers would provide sufficient information to do so; the judiciary is placed in a role in the constitutional system that would leave him

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<sup>13</sup> Kmiec, *ibid.*, p. 1475-1476.

<sup>14</sup> *Ibidem.*, p. 1475-1477.

<sup>15</sup> Expression created by Plato in his work "The Republic", and used by Justice Scalia, Minister in the Supreme US court when deciding the case *Stanford v. Kentucky* US 492 361, 379 ( 1989).

as the *guardian of the constitution*, besides that the judicial decision would be democratic within a system that providing for its performance. The role of the judiciary in a democratic system can not be confused with majoritarianism.

- there is no judgment, in the authoritarian or despotic sense of the word when it comes to judicial decision, this is because all of its decisions should be essentially grounded, having their reasons for being in its justification, not to mention that every decision is subject the subsequent control by way of appeal. For obvious that there is some discretion in assessing the *casu* by the magistrate, but that is within the limits of the constitutional framework and under the aegis of the reasons for the decision.
- the judiciary is the result of political choices leading up the creation of the state and whereas, therefore, it sets out how it will exercise power. Every court decision, although taken as legal, also has in its essence a political decision, so it is impossible to idealize that there is no political choice by the judge<sup>16</sup>.
- the limit of institutional judicial capacity can not be able to fend off a possible threat or injury of the right of judicial control, that fact would generate high levels of insecurity and uncertainty within the system and put the the judicial office into disrepute.

Thomas Sowell<sup>17</sup> highlights the importance of understanding that judicial activism is exercised when the judge uses sources of *extrinsic* meanings to that issue *sub judice*. Extrinsic sources can be social, cultural, moral, ethical, economic or any other alien to right itself by changing the meaning of the law and turning what would be a strictly judicial decision on a much broader sense. The *intrinsic* sources of meaning would be the one that represents the semantic and legal limits of the institute discussed, allowing the institute to change internally by the historical context, advancement of legal science or through legislative amendment. However, when the change is motivated by extrinsic element - without that extrinsic modification completing a legislative gap supplementary objects, in this case it would admit their use - to aggregate, changes the meaning of the norm or principle, practicing what is called judicial activism. The nearest authors of judicial self-restraint do not accept that the judiciary change the meaning of law with the use of such extrinsic meanings, accept, however, that do it molecularly<sup>18</sup>, intrinsically.

Guilherme Peña de Moraes<sup>19</sup> recommends that illuminate the application of self-restraint and judicial activism through five assessment standards for their manifestation to be careful and to beacon when:

<sup>16</sup> Antagonizes the idea of judge's neutrality in the thought of Hans Kelsen in "Quem deve ser o guardião da Constituição". In. *Jurisdição Constitucional*. São Paulo: Martins Fontes, 2003.

<sup>17</sup> *Judicial Activism Reconsidered*. Hoover: Hoover Institution press, Essays in Public Policy (Book 13), 1989, p. 3-12.

<sup>18</sup> *Ibidem.*, p. 6

<sup>19</sup> Moraes, *ibid.*, p. 21-22.

(i) discrimination or prejudice - activism or judicial self-restraint as the issue involved, or not, minorities subjected to discrimination or prejudice; (ii) popular deliberation - activism or judicial self-restraint depending on greater or less popular deliberation on the matter; (iii) the functioning of democracy - activism or self-restraint whether the issue involves, or not, conditions for the functioning of democracy; (iv) technical capacity - activism or judicial self-restraint depending higher or lower ability to solve the dispute and, finally, (v) the rights of future generations - activism or judicial self-restraint as the issue involved, or not, rights of future generations.<sup>20</sup>

All descriptions about the phenomenon of the activism above are the most common among the authors. In general, all recognize that judicial activism is an attitude of the judge. In the center of the discussion, it is observed a strong relationship of judicial activism with the separation of powers, conceived in the work *“De l’esprit des lois”* (The Spirit of the Laws) from Montesquieu and the role of the judiciary as function of state power. Montesquieu argues the need to create an intermediate state between a system of freedom and an authoritarian system (moderate liberalism), but a state founded on law (rule of law) through moderate constitutionalism<sup>21</sup>. The judicial activism would then be essentially a manifestation and demonstration of power by the judiciary, with expansive trends, and nothing more. The role of the judiciary in a modern liberal democracy is what is at the heart of the matter. Carrese<sup>22</sup> maintains that the judicial activism transports us to a path that suggests the end of liberalism; it affects the *health* of the liberal democratic system, noting that the activism will eventually eradicate the parliamentary system and the majoritarian democracies.

Judicial activism is a political decision of the exercise of power of the judiciary, which promotes an expansion of the judiciary and creates a highly malleable exegesis of signifiers and meanings of the principles and standards, having sources of *intrinsic or extrinsic meanings*<sup>23</sup>, *it is conciliated with the historical moment and political context in which it appears and manifesting through a judicial creation with legal force “extra legem but intra ius”*<sup>24</sup>.

<sup>20</sup> Free translation of “(i) discriminação ou preconceito – ativismo ou autocontenção judicial conforme a questão envolva, ou não, minorias objeto de discriminação ou preconceito; (ii) deliberação popular – ativismo ou autocontenção judicial consoante maior ou menor deliberação popular sobre a matéria; (iii) funcionamento da democracia – ativismo ou autocontenção conforme a questão envolva, ou não, pressupostos para o funcionamento da democracia; (iv) capacidade técnica – ativismo ou autocontenção judicial consoante maior ou menor capacidade técnica de resolução do litígio e, ao final, (v) direitos de gerações futuras – ativismo ou autocontenção judicial conforme a questão envolva, ou não, direitos de gerações futuras” in *Ibidem*, p. 21-22.

<sup>21</sup> Carrese, Paul. *The cloaking of power: Montesquieu, Blackstone, and the rise of judicial activism*. Chicago: The University of Chicago Press, 2003. p. 15-34.

<sup>22</sup> *Ibidem.*, p. 261.

<sup>23</sup> Sowell, *ibid.*, p. 3-12.

<sup>24</sup> Free translation of “*extra legem, porém, intra ius.*” in Moraes, *ibid.*, p. 21.

## Sovereign and the Exception of State

The state of exception and the rule of law can not live in the same place. While the rule of law is directed and organized by laws and regulations in the broad sense, and is structured and created by these laws, the state of exception is the exact opposite, is the suspension of laws, fundamental guarantees, standards. The state of exception exceeds the right, dragging it to one without oxygenation space where he can not *breathe* and manifest, a space where the regulatory forces of law have no validity or expressiveness, remaining in an unconscious state. The state of exception is the emptiness of law, where the law is not revealed or as little assumed, but it is also the law of the void, where all the actions taken by the vehemence of which causes the exception gain the force of law, even not being law. The exception creates a vacuum-space on the right.<sup>25</sup>

In being modern society provide with its “highly complex structured”<sup>26</sup> and consisting of the positive laws in the task of reducing complexity, providing the intelligibility of possibilities for lawful or unlawful conduct and predictability of applicability of global standards, bringing legal certainty to the social system; the state of exception is one that breaks with the current legal framework, transmuting the intelligibility and predictability quoted in an unguarded area, something called the “indeterminate zone”<sup>27</sup>, where prevails the will - where there is “equality of all possibilities”<sup>28</sup>.

State of exception is gender among which many species can manifest, as is the case of the state of defense, state of siege, federal intervention, martial law, dictatorship, totalitarianism, anarchy, even the modern war on terrorism. Giorgio Agamben<sup>29</sup> points in the direction that the state of exception and the rule of law can not live together because they are opposites. However, the author says that while there is decreeing forecast the state of exception within a state of law, the state of exception becomes state paradigm.

When speaking of the state of exception, it's necessary to pay attention to those who have the power to decide on their existence. One who can declare the state of exception is also one that gathers conditions and powers, who is credited as being sovereign, becoming substantively sovereign as long as the exception remains. In

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<sup>25</sup> Agamben, Giorgio. *Estado de Exceção*. 2ªEd. rev., São Paulo: Boitempo, 2011, p. 9-63.

<sup>26</sup> Free translation of “Alta complexidade estruturada”, in Luhman, Niklas. *Sociologia do Direito 1*. Rio de Janeiro: Ed. Tempo Brasileiro, 1983. p. 12.

<sup>27</sup> Free translation of “zona de indeterminação”, in Agamben, *ibid.*, *passim*.

<sup>28</sup> Free translation of “igualdade de todas as possibilidades”, in Luhman, *ibid.*, p.13.

<sup>29</sup> Agamben, *ibid.*, p. 9-49.

other words “Sovereign is he who decides on the exception”<sup>30</sup>. Carl Schmitt<sup>31</sup> argues that the sovereign power (the greatest power of all) is one who has the last word in defining when it is in conflict, which is the public interest, or what is the state of interest, which constitutes public order, which is public safety. Thus, the exception would be the recognition of an external danger and how to eliminate it, considering that there is no provision in the law to deal with this fact. Schmitt<sup>32</sup> indicates that the liberal constitutionalism is unable to cope with these external problems, and that the system of *checks and balances* is insufficient, making it clear to the author that in these situations, the sovereign would be one that would decide on how to deal with the facts. So do because the sovereign is outside the control of the law and at the same time belongs to this order, “Although he stands outside the normally valid the legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety.”<sup>33</sup>.

Carl Schmitt<sup>34</sup> argues that “What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order”<sup>35</sup> and that this justifies the very existence of the state. In this situation, the state would be perpetuated where the law succumbs; therefore, the existence of the state is higher than the existence of the legal system. The decision to break the law eliminates the limits imposed by the legal embarrassment and redirects all absolute state power in certain *nomos*, to the one who decides. Schmitt<sup>36</sup> says that every law is situational and that sovereignty is absolute, so it’s necessary to preserve the power of the sovereign and hence the state. This phenomenon happens by the presence of state of necessity of the state itself, a theory that justifies the existence of the state of exception in Schmitt<sup>37</sup>. The power to decide this necessity is, at a given historical moment, what characterizes the sovereign power, creating the exception and the state.

The Schmittian thinking about the exception is that it is fundamental to the existence and maintenance of the state. Agamben<sup>38</sup> brings the opposite idea that the exception

<sup>30</sup> Schmitt, Carl. *Political Theology*. Chicago: University of Chicago Press, 2005, p. 5.

<sup>31</sup> “From a practical or theoretical perspective, it really does not matter whether an abstract scheme advance to define sovereignty (namely, that sovereignty is the highest power, not a derived power) is acceptable. [...] What is argued about is the concrete application, and that means who decides in a situation of conflict what constitutes the public interest or interest of the state, public safety and order, le salut public, and so on. The exception, which is not codified in the existing legal order, can at best be characterized as a case of extremil peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a preformed law.”, in *Ibid.*, p. 6.

<sup>32</sup> *Ibidem*, p. 7.

<sup>33</sup> *Ibidem.*, p. 7.

<sup>34</sup> *Ibidem.*, p. 12.

<sup>35</sup> *Ibidem.*, p. 12.

<sup>36</sup> *Ibidem*, p. 13

<sup>37</sup> Agamben, *ibid.*, pg.40-49.

<sup>38</sup> *Ibidem.*, p. 83-98.

is not compatible with the rule of law, supporting much of his argument in clashes between Benjamin and Schmitt.

The existing mismatch between the state of exception and the rule of law derives from the fact that with the creation and stabilization of state law, this happens to be governed by the law that created it, and the state of exception originates and is maintained through political act only. Agamben<sup>39</sup> argues that the state of exception, as being an act of political expediency, it can not be transformed into a legal act and that the forecast of the exception in modern constitutions is the most current paradox.

The concept of dictatorship depends on understanding what the state of exception is, but invariably it is an exception plus a purpose. Schmitt<sup>40</sup> creates a distinction between what he calls the dictatorships *commissary* and *sovereign*. The commissary dictatorship or constitutional dictatorship is defined with the the suspension of the legal system in order to preserve the current constitutional order, until it meets the necessary conditions to allow its implementation or realization. The sovereign dictatorship is the one that breaks with the previous law, suspending it and removing it with the aim of creating a new constitution and a new legal system. Fundamental is to realize that "... the distinction between law norms and norms of realization of the right to the commissary dictatorship, and the distinction between constituent power and constituted power to the sovereign dictatorship..."<sup>41</sup> are essential features of the distinction made by Carl Schmitt.

### **By an Approach between Judicial Activism and State Exception**

To achieve a confrontation between the state of exception concepts - and their species - proposed and the concept of discoursed judicial activism, and perhaps establish a relation, it's needed to highlight the differences, observe proximity conceptual in both, electing some criteria that could allow a comparative analysis, to then find out if both are in the same existential plane or in different planes. In being in various fields, see if there is any merger between them or intersection points. Advancing from the previous topics, now, to designate five compared criteria.

The first criterion (1) part listed relates to the appearance of the institutes: a) judicial activism arises within the rule of law; b) the state of exception arises within a rule of law.

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<sup>39</sup> *Ibidem., passim.*

<sup>40</sup> *Apud Agamben, Ibid.,* pg. 53-56.

<sup>41</sup> Free translation of "... a distinção entre normas de direito e normas de realização do direito para a ditadura comissária, e a distinção entre poder constituinte e poder constituído para a ditadura soberana.", in *Ibidem,* p. 54-55.

The second criterion (2) is chosen as the place to where it directs the manifestation, for where it walks: a) judicial activism manifested in the rule of law and stays there; b) the state of exception breaks the rule of law, walking away from it.

The third criterion (3) is about who decides about their existence: a) judicial activism is produced by the judiciary, which is therefore who decides about their existence and the only one who can control it; b) the state of exception is created by the sovereign to decide on their applicability and convenience. Typically, implementation is given by the head of the executive and, in Brazil, with the authorization of the legislative.

The fourth criterion (4) would be about the decision that originates the institutes: a) judicial activism is the result of a political and legal decision; b) the state of exception is created by a political decision.

A fifth criterion (5) would have to be for the purpose of the institutes, which is held here synthetically and even operating certain reductionism, given the complexity that would address this point: a) the purpose of judicial activism appears to be a turbid element, little explored in the literature, but it could be highlighted the issue of responding to a social demand for realization of the rights and even the purpose of political and institutional supremacy; b) the purpose of the state of exception, in the form of commissary dictatorship, is go away from the rule of law in order to keep it, or protect the current constitution by way of exception, the sovereign dictatorship mode is to suspend the rule of law, lacerating the previous constitutional order, with the intent to open a new one.

The first criterion for compatibility, both appear within a rule of law. The third criterion already shows incompatibility, that considering that the judiciary is not the sovereign. The second, fourth and fifth criteria need to be further clarified for better observation. There is a certain similarity between the second and fifth criterion, but the difference is about the space that manifests itself (second) and the reason for your application (fifth).

The criterion that needs to be watched carefully is the fourth, which is able to determine what is meant in the second and fifth criterion. That occurs in the second criterion because the possibility of similarity, or equality, would cause the activist decision broke with the rule of law temporally, beginning another by decision. The fifth criterion could do similar analysis, for the purpose of activism would be shifted to the state of exception, making the judicial activist decision to choose your purpose. Understand what it means decision; political decision and legal decision are fundamental to advance the analysis.

### *Legal decision*

According to Luiz Flávio Autran Monteiro Gomes<sup>42</sup> “decision is the process that leads - directly or indirectly - to the choice of at least one among different alternatives, all these candidates to address a certain problem”. Claudia Servilha Monteiro<sup>43</sup> points out that the decision is made by 3 steps: deliberation, choice and execution. In the first stage, the agent considers all the available options, and then makes a choice among them and then finally executes it.

In the legal decision, a series of other disciplines directly influence, such as values of metamathematics, economics, legal hermeneutics, morality, philosophy, theory of legal argument, the theory of the application of the law.<sup>44</sup> In this indistinguishable moment, it is necessary to know how to make the decision. Here, the debate is about the degree of freedom that can print on a court decision and what are the disciplines that can influence decision-making, especially for the fact that the decision to be taken is coming from a public authority, which is a power of certain legal system<sup>45</sup>. Cláudia Monteiro<sup>46</sup> makes a historical briefing about the applicability of decision theory, rescuing the fact that the court decisions, in its early days, were observed in the judge-priest authority. In that historical stage, the decision stands out for its “willingness of judicial decisions agents to act on the intricacies of the castration language, retention, entrenchment and impediments”<sup>47</sup>, and for the solipsistic judge, autopoietic and isolated from the world.

In the modern Democratic countrys, there is a rescue of the ideals of Enlightenment justice (the Enlightenment is influenced by canon law, Roman law, the rationalist humanism and the system *common law*)<sup>48</sup> to the figure of the court decision, as well as a concern for legitimacy and Legal security. The point moves to the degree of discretion that the borrower of the court decision can accomplish.

According to Streck<sup>49</sup>, discretion is the same as arbitrary, decisionism, something that is not consistent with democratic rule, with the court decision having their cause and their goals justified. It allows the existence of room for legal interpretation and not for the judicial creation of the judge’s will. This is because the political will, moral and

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<sup>42</sup> *Teoria da Decisão*. São Paulo: Thomson Learning, 2007, p. 1.

<sup>43</sup> Fundamentos para uma teoria da decisão judicial. *Anais do XVI Congresso Nacional do CONPEDI*. Florianópolis: Fundação Boiteux, 2008, pg. 6104-6125.

<sup>44</sup> *Ibidem*, p. 6106-6112.

<sup>45</sup> *Ibidem*, p. 6114-6115.

<sup>46</sup> *Ibidem*, p. 6115.

<sup>47</sup> Free translation of “predisposição dos agentes das decisões judiciais para atuarem sob os meandros da linguagem da castração, da retenção, do enriquecimento e dos impedimentos”, in *Ibidem*, p. 6115.

<sup>48</sup> *Ibidem*, p. 6116-6117.

<sup>49</sup> O problema da decisão jurídica em tempos pós-positivistas. *Novos Estudos Jurídicos*, [S.l.], v. 14, n. 2, p. 03-26, out. 2009. ISSN 2175-0491.

personal conviction of the judge does not matter to the court application, otherwise it would institute *will to power*<sup>50</sup> of the judge. This author indicates that the major problem is the subjectivism of the court decision, and the support of the procedural theories and theories of argumentation, stressing that they did not overcome the problem subject-object<sup>51</sup>, which helps to create individualist judges and exclusive holders of hermeneutics<sup>52</sup>. This high degree of subjectivity of the judges, would make the court decision malleable, and would create an unsafe area. The malleability is observed by the possibility, created by subjectivism, to allow the creation of the decision in accordance with the personal discretion of the judge, according to his convictions. Streck<sup>53</sup>, aiming to turn away subjectivity, proposes: (a) the redemption of principled prospectivity of the Constitution; (b) recognition of the moral internalized in the law created by the legislature (not created by the judge); (c) the court decision becomes rationalized by the principles of the Constitution and not the judge's will; (d) the need to state reasons and justification of decisions.

Claudia Monteiro Servilha<sup>54</sup> also highlights the need to state reasons and justification of judicial decisions, indicating its rationality (Theory of Rational Decision) and acceptance (trust) of society. Therefore, it points out that the judgment suffers from two types of controls: internal - related to appellate law (basis of the decision) - and external - consistent with the control exercised by society. Note that when external control is evident, there is a search for democratic legitimacy of the judiciary.

### *Political decision*

Carl Schmitt<sup>55</sup> teaches that "the concept of the State presupposes the concept of the political"<sup>56</sup> and that the concept of political is not adequately explored in the literature. The author start of the antithesis 'friend-enemy' to seek to define what would be the essence of the political. Schmitt points out that the state is composed of the culture, morality, ethics, religion, Law, economics and many other elements, and that all of them would be interconnected. None of these elements are necessarily political and some of them are said to be apolitical (eg. Law and economy)<sup>57</sup>. He also highlights the modern difficulty of discussing what would be political by the fact that the moderns liberal constitutional states, are plural and democratic, and that dilutes what would

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<sup>50</sup> *Ibidem*, p.12.

<sup>51</sup> *Ibidem*, p.13-15.

<sup>52</sup> *Ibidem*, p. 19-20.

<sup>53</sup> *Ibidem*, p.21-23.

<sup>54</sup> *Ibid.*, p. 6119-6120.

<sup>55</sup> *O Conceito do Político/Teoria do Partisan*. Belo Horizonte: Del Rey, 2008.

<sup>56</sup> *Ibidem.*, p.18.

<sup>57</sup> *Ibidem.*, p. 25.

be political, transforming enemies into adversaries, so it makes the very state system becomes debatable<sup>58</sup>.

Schmitt<sup>59</sup> states that the concept of political has its own categories that determine, and that is necessary to distinguish political from other manifestations of human thought and action, such as moral, aesthetic and economic. Therefore, elects to differentiate between friend-enemy, not as a conceptual definition, but as a criterion. It points out that the distinction between friend and enemy is essentially political to be coming from a riddled tilt subjectivism. To this end, doctrine stating that the difference between good and evil (moral), ugly and beautiful (aesthetic), useful and harmful (economy) can not be confused with the political differentiation of friend-enemy, since the differentiation of them gives from another viewpoint (cultural, scientific, secular). The opposition between friend and enemy lies in the political distinction to recognize who is friend or enemy, thus, he recognizes the common psychological association of an ugly enemy, evil and harmful. Concerns here to understand that the political separation between friend-enemy is a highly a subjective appreciation, and can be highly contaminated with an economic objective, personal, or otherwise. The essence of this choice is political<sup>60</sup>. However, the author recognizes the possibility of using moral base, religious, economic, ethnic or any other, to practice a political act, provided that unit of thought and possibility to elect the friends and enemies.

Every religious opposition, moral, economic, ethnic or any other category becomes a political opposition when it is strong enough to group human beings effectively between friends and enemies. Political lies not in the fight itself [...] but, as already said, in a determined by this real possibility behavior, clear understanding of their situation thus determined and the task of distinguishing between friend and enemy.<sup>61</sup>

The plurality of modern States, takes Schmitt<sup>62</sup> to recognize the possibility of multiple political groupings, not necessarily convergent. These groups can come together properly or not, but its existence would make the governance of the state was labored. The fundamental reasoning of the distinction that carries regard is the possibility of only one group can, indeed, make a political decision, and this is accepted by the other members of society. In this case, only this group would take the political decision, deciding on whom the enemy is, closing in the rest of society the power of political

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<sup>58</sup> *Ibidem.*, pg. 24-27 e 39-48.

<sup>59</sup> *Ibidem.*, pg. 27.

<sup>60</sup> *Ibidem.*, p. 27-29.

<sup>61</sup> Free translation of "Toda contraposição religiosa, moral, econômica, étnica ou de qualquer outra categoria transforma-se em uma contraposição política quando é forte o suficiente para agrupar os seres humanos efetivamente entre amigos e inimigos. O político não reside no combate em si[...] e sim, como já dito, em um comportamento determinado por essa possibilidade real, na clara compreensão da própria situação assim determinada e na incumbência de distinguir entre amigo e inimigo.", in *Ibidem.*, p. 39.

<sup>62</sup> *Ibidem.*, p. 39-47

when there is acceptance. According to Schmitt “Political is, in any case, always the group that is guided by the critical case”<sup>63</sup> and

[...] Is always the human group *normative* and therefore, the political unity whenever it exist absolutely, being a regulatory unit and “sovereign “ in the sense that, by conceptual necessity, the decision on the legal case, even when it is an exceptional case, there will always be to reside in it.<sup>64</sup>

### *Reflection criteria*

Judicial activism is a result of a political-normative decision, while the state of exception is of a political decision. It turns out that, as stated earlier, every political decision has a degree of normativity, and hence, judicial activism denotes resemblance to the state of exception as the fourth criterion. With the fourth criterion set, the second and fifth criteria were riddled by it. The purposes of the institutes (fifth criterion) become very close, perhaps interconnected, behold, the result of a political decision. Only the political decision would demonstrate the purpose of the institutes, being creative element of power and normative definition. The hypothesis that judicial activism break for a moment with the rule of law would prove, causing a convergence with the state of exception, precisely as the second criterion. There is no equality in the third criterion as the judiciary is not the sovereign in Modern States, but is in degree of apparent prominence because of activism. The first criterion, as already stated, is identical in both.

Overall, there are great similarities between judicial activism and the state of exception, with two of the five identical criteria (1 and 4), a non-identical criteria (3, but not in opposition) and two very approximate criteria (2 and 5, share of interconnected elements, but not completely identical).

### **Final Considerations**

The work is successful in presenting a concept of judicial activism and the state of exception, although they have not been explored in all it forms of manifestation. The proposed approach between the institutes is presented as a close glimpse of the institutes by means of political decision present in both. The ability to create an exception state through judicial activism seems to be a hasty view, to the extent that *trust* is also a key element of the exercise of judicial power, and the very existence of modern states, an element that was not treated here. That confidence would allow the possibility of the coercion of legal decisions (even political ones). By a need for democratic legitimacy of the judiciary, the court decision needs to be based and

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<sup>63</sup> *Ibidem.*, p. 41.

<sup>64</sup> Free translation of “[...]é sempre o agrupamento humano normativo e por conseguinte, a unidade política sempre quando existe em absoluto, sendo a unidade normativa e “soberana” no sentido de que, por necessidade conceitual, a decisão sobre o caso normativo, mesmo quando este for um caso excepcional, sempre haverá de residir nela.”, in *Ibidem.*, pg. 41.

justified; for the future, it should be considered the possibility to increased democratic participation for setting values for the hard cases.

It would be frivolous to state that they are identical institutes. They are on different planes of existence and do not manifest themselves similarly, although they have interconnected and similar elements. The gestation of a dictatorship, in a Schmittian sense, through judicial activism, depends on how the judiciary could grow as a political power. The Brazilian proposal is that its Supreme Court is the guardian of the Constitution, however, does not mean that he is its master. Concern over judicial activism translates into a real concern and not only apparent, an established political power passing to want to establish politically, ie, a power that goes on to become essentially political, choosing his enemies and his friends, through the choice of moral values, economic, legal innovations. The most worrying fact is the absence to suffer any control, as if the members of the judiciary were angelic beings higher than the land dilemmas and incorruptible.

Despite the frightening similarities between the institutes studied, a dictatorship of the judiciary could only be understood in the sense of arbitrariness in the act of deciding and creating normativity. Judicial activism is presented as something of legitimate concern, as the exercise of political power beyond agreed. Controlling the judicial activism is essential to avoid an exponential growth of the power that it comes. However, this affirmation should not be confused as the limitation of judicial action, what it said is that it is vital to contain it, delimiting a manifestation of power, preventing from becoming the own political state.

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