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JUDICIAL ACTIVISM OR JUDICIAL REVIEW
DISTINCTION CRITERIA AND COMPARATIVE ANALYSIS: BRAZIL, ARGENTINA, MEXICO, GERMANY[1]

Cláudia Toledo

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This article presents the results of a research project, whose central objective was to study judicial actvism, its concept, and to scientifically assess the performance of the Brazilian judiciary, in order to verify the validity of the criticism of judicial activism attributed to it recurrently. The judiciary controls the acts and omissions of the legislative and executive branches through judicial review. However, when the judiciary exceeds the limits of its competence (or jurisdiction), it unduly interferes in the competence of the political powers and practices judicial activism. In order to scientifically assess whether judicial performance in the concrete case is about regular judicial review or undue judicial activism, it is essential to analyze the institutional acts of the judiciary, that is, the judicial decisions, and the arguments provided by this power in the justification of its acts. Since judicial decisions are discursive acts, criteria for their assessment were sought in the discourse theory developed by Jürgen Habermas and the theory of legal argumentation elaborated by Robert Alexy.

I. INTRODUCTION

This article presents the results of a research project, whose central objective was to study judicial activism, its concept, and to scientifically assess the performance of the Brazilian judiciary, in order to verify the validity of the criticism of *judicial activism* attributed to it recurrently.

While the *principle of the separation of powers* establishes the tripartite division of state power in order to better organize its exercise, the *system of checks and balances* is embedded in it, and determines that the three public powers control each other's acts and omissions, so that no excessive or insufficient action is taken by any of them.

[1] This paper presents the results of a two-year (2017-19) research project coordinated by the author, and funded by FAPEMIG (the research funding institution of the state Minas Gerais, Brazil) and by the Federal University of Juiz de Fora (UFJF). The following students took part in the project: Marcello S. Figueiras, Anny Santana, Michelle A.M. Silva, Caio A.M.D. e Souza, Danielle F. Doehler, Lívia M.H. Campos, Camille O. Castro, Daniela C. Meira, Aline de O.M. da Silva, Ana Clara V.Nogueira, Caio H.C. Zanon, Chafei P. Aiex.

The judiciary controls the acts and omissions of the legislative and executive branches through *judicial review*. However, when the judiciary exceeds the limits of its competence (or jurisdiction), it unduly interferes in the competence of the political powers and practices *judicial activism*.

In order to scientifically assess whether judicial performance in the concrete case is about regular *judicial review* or undue *judicial activism*, it is essential to analyze the *institutional acts* of the judiciary, that is, the *judicial decisions*, and the *arguments* provided by this power in the justification of its acts. Since judicial decisions are *discursive acts*, criteria for their assessment were sought in the *discourse theory* developed by Jürgen Habermas and the *theory of legal argumentation* elaborated by Robert Alexy.

According to Alexy, *legal discourse* is a *special case* of *general practical discourse* and is linked to *institutional* arguments – statutes, precedents and (ruling) doctrine. It is the typical discourse of the *judiciary*, whose main function is to apply the Law, which is formed exactly by those institutional arguments. In turn, the *general practical* discourse, on which legal discourse is based, is composed of *non-institutional* arguments (pragmatic, ethical and moral arguments), to which are added the also *non-institutional* arguments that are part of the *empirical* discourse, concerning concrete facts and scientific data. In legal discourse, there must *necessarily* be institutional arguments to which it is bound, but non-institutional arguments typical of general practical discourse and empirical discourse may also be used in it.

To the extent that the judiciary practices its institutional acts, that is, it renders its decisions based on the discourse that is proper to it, legal discourse, the tendency is that it is acting within the margin of its competence, applying the Law expressed in institutional arguments. Thus, the more arguments proper to legal discourse are duly used by the judiciary in the grounds for its decisions, the more likely it is that its actions are within the limits of its competence, that is, the greater the chances that its activity represents the regular *judicial review* of the acts and omissions of the other powers. However, the fewer institutional arguments there are in the justification for the judicial performance, or the greater the use of non-institutional arguments, the higher the probability that the judicial decision represents undue interference in the competence of the other powers. That is, the greater the chances of *judicial activism* in the exercise of jurisdiction.

This argumentative taxonomy was then applied to the analysis of the constitutional case law of different countries (Brazil, Argentina, Mexico and Germany). Based on the comparative study of arguments used in the reasoning of the decisions of the Constitutional Court of each country, this article aims to contribute to the clarification of the issue often mentioned, but rarely grounded, which is *judicial actvism* and its practice (or not) by the Brazilian judiciary.

II. JUDICIAL ACTIVISM – CONCEPT

The principle of *separation of powers* establishes the division of responsabilities into three government branches, in order to better organize the exercise of power by the state and to avoid an overly empowered government. The *system of checks and balances* integrates this principle, and determines that the three public powers must reciprocally control each other's acts and omissions, so that there is a balance among the branches, without abuse of power by any of them. Judicial review of the performance of legislative and executive powers is called *judicial review*. Thus, judicial review is the regular compliance with this system of checks and balances by the judiciary.

While judicial review stems from judiciary performance within its scope of competence, *judicial actvism* refers to an excessive performance of judicial power. The concept of judicial activism is controversial in legal doctrine. The origin of the term "judicial activism" is attributed to the North American context, although it is polemic when exactly it came about – when the Supreme Court created judicial review, in the case *Marbury v. Madison* (1803)[2], or during E. Warren Court (1953-69), due to its remarkable performance in the realization of individual and political fundamental rights, such as in the case *Brown v. Board of Education* (1954)[3].

The mention of right-wing or left-wing judicial activism is common in the USA. Despite the identification of judicial activism with a conservative or a progressive ideology, in both cases reference is made to "some excess or distortion in the exercise of jurisdictional function"[4] [free translation]. This conception is present both in American and Brazilian

[2] J. Celso M. Paganelli et al., *Ativismo judicial: paradigmas atuais* [Judicial activism: present paradigms], São Paulo, 2011, 132

[3] J. D. Carter, *Warren Court and the Constitution: a critical view of judicial activism*, Los Angeles, 1972, 41-42

[4] J. de Souza Machado, *Ativismo judicial no Supremo Tribunal Federal* [Judicial activism in Federal Supreme Court], Rio de Janeiro, 2008, 12.

legal doctrine – Marshall conceives judicial activism as a "refusal by the Courts to remain within the jurisdictional limits established for the exercise of their powers"[5], and Ramos[6] defines it as the exercise of jurisdictional function beyond the limits imposed by the legal order.

The notions of *excessive* performance of judicial power or the exercise of its function *beyond* legal limits are not connected with the idea of incorrect or wrong decisions, but decisions on matters that are not within the competence of judicial power, i.e., matters under the competence of other public powers (legislative or executive). Thus, judicial activism is here conceived of as *undue judicial interference in the competence of other public power*.

III. JUDICIAL ACTIVISM – IDENTIFICATION CRITERIA

This "excessive judicial performance" or "undue judicial interference" can be analyzed from different perspectives – legal, sociological, political, historical, moral etc. The *reasons* for judicial activism can be sought, for example, in the indication of the judges of Superior Courts by the political powers; in the professional background of each judge; in the composition of the court etc. As *sources* of study to approach judicial activism one can use interviews with judges, newspaper articles, judicial decisions, scientific essays, among others. The *effects* of judicial activism can be checked in Politics, in Economy, in cultural production and so on. This paper analyzes judicial activism from a *legal* perspective and uses *judicial decisions* as sources of study. It seeks to identify whether the criticism of judicial activism by Brazilian judicial power is correct or suitable.

One of the ways to assess the performance of a public power is by analyzing its *institutional acts*. While *administrative acts* are the institutional acts of the executive power in the exercise of its functions, and *statutes* are the institutional acts of the legislative power, the institutional acts of the judicial power are *judicial decisions*. Therefore judicial decisions were chosen as the object of analysis of this study.

[5] W. P. Marshall, *Conservatives and seven sins of judicial activism,* L.Rev. 73, 124 (2002).
[6] E. da Silva Ramos, Ativismo judicial: parâmetros dogmáticos [Judicial activism: dogmatic parameters], São Paulo, 2010, 129.

For the purpose of evaluation, *criteria* are needed. As judicial decisions are *discursive acts*, criteria for *discourse analysis* must necessarily be used. Discourses are made up of *arguments*. Therefore, criteria for assessing arguments were adopted. Thus, the way chosen to assess whether the judiciary is activist or not was the analysis of judicial decisions from a *discursive perspective*. The arguments for the reasoning of judicial decisions were analyzed to verify how judicial power justifies its performance. In other words, the arguments of the judicial decisions were analyzed to check whether or not the judiciary justifies its institutional acts with arguments which demonstrate that its performance is *within its competence* as judicial review.

There is no doubt that the assessment of judicial power's *performance* involves more than the analysis of its *acts* (judicial decisions). Nevertheless, although *discourse analysis* is not a *sufficient* procedure to reach a completely well-founded conclusion about judicial performance, it is certainly a *necessary* procedure to do so, since judicial decisions are *discursive* acts.

Therefore, in order to assess the performance of Brazilian judicial power, the arguments used in the legal reasoning of judicial decisions of the Brazilian Constitutional Court were analyzed to identify the grounds on which judicial power based its decisions regarding the review of executive power's decisions (or omissions) related to one of the issues whose judicial approach most generates the criticism of judicial activism: the fundamental social right to the existential *minimum*. The provision of the existential minimum is originally under the competence of executive power. When this power is omissive, the provision of that right is demanded in court. If the judicial decision orders the provision of the existential minimum, the judiciary is usually criticized for activism, since there would be undue judicial interference in the competence of executive power. In order to have a comparative parameter with other national realities about this issue, the constitutional case law of other countries in Latin America (Argentina and Mexico) and Europe (Germany) was also surveyed.

Speech analysis involves verifying the *arguments* used in speech. The taxonomy of the arguments studied was based on the thoughts of Robert Alexy and Jürgen Habermas. Both authors deal with *discourse theory*, which, in addition to being normative, is analytical, that is, it analyzes the *structure* of speech. Thus, the *argumentative taxonomy* formulated by Alexy and Habermas was used as *objective criteria* to analyze the researched case law and to identify an argument as typically legal or not. If the court decision, which is the institutional act of judicial power, was grounded on typical legal arguments, there is a high probability that

this decision was properly made, under the competence scope of judicial power. Thus, there is a low probability of *undue judicial interference* in the competence of the executive branch, i.e., there is a low probability of *judicial activism* and a high probability of regular *judicial review* of administrative acts or omissions, according to the system of checks and balances.

IV. ARGUMENTATIVE TAXONOMY AS OBJECTIVE CRITERIA

According to Alexy, there are two kinds of discourse: *empirical* and (general) *practical* discourse.[7]

On one hand, empirical discourse *describes the reality*, by arguments that refer to:

a) past, present and/or future *concrete facts*;
b) *scientific data* from natural and social sciences.

On the other hand, practical discourse is a *normative discourse* that raises the *claim to correctness*. Habermas[8] explains that this discourse is composed of:

c) *pragmatic* arguments – arguments related to the choice of techniques and action strategies, especially based on the criteria of *efficiency* and *utility*, according to a *means-end* relationship;
d) *ethical* arguments – related to the tradition that gives identity (cultural and political self-understanding) to a certain individual or society, i.e., arguments by which members of a society seek to clarify the shared way of life and the guiding ideals of their common life projects;
e) *moral* arguments – refer to the "symmetrical interest of all", arguments that have the semantic form of *categorical imperatives* and are related to the *principle of universalization*. A rule is universally fair only when everyone may want it to be complied with by anyone in a similar situation.

Finally, according to Alexy[9], *legal* discourse is a *special case* of general practical discourse. It is committed to *institutional arguments* – *statutes*, *precedents* and (ruling) *doctrine*. Institutional

[7] R. Alexy, *A theory of legal argumentation – The theory of rational discourse as theory of legal justification*, Oxford, 2010, 232.
[8] J. Habermas, *Between facts and norms – Contributions to a discourse theory of law and democracy*, Cambrige, 1996, 159-162.
[9] R. Alexy, *supra*, 16.

arguments are *authoritative reasons* with different *binding intensities*. The binding character of statutes is the highest, followed by precedents, and ruling doctrine, whose binding character is the weakest.[10]

Judicial decisions, as judiciary *institutional* acts, are committed to *institutional* arguments. However, the *necessity* of using institutional arguments does not mean that these arguments are *sufficient* or *exclusive* in legal discourse. On the contrary, since legal discourse is a special case of general practical discourse, the *basis* of legal discourse lies in general practical discourse.[11] General practical discourse is the non-institutional and completely free discourse on practical issues, that is, on what is mandatory, forbidden, and allowed, or on what is good and bad.[12] General practical arguments and legal arguments *complete* one another. This is precisely expressed by the *thesis of integration* between legal argumentation and general practical argumentation, according to which "specifically legal arguments and general practical arguments should be combined at all levels and applied jointly".[13]

Although there is no predetermination of premises in legal discourse and the possibility of different arguments is broad, according to Alexy, institutional arguments have *prima facie precedence* over non-institutional arguments. This is expressed in one of the rules of legal argumentation (rule J.7): "Arguments which express a link to the literal content of the law or to the will of the historical legislator prevail over other arguments, unless rational grounds can be presented which give priority to other arguments".[14]

Some conclusions may be drawn from this rule in relation to judicial activism:

- the greater the number (quantity) and relevance (quality) of *institutional arguments* in the judicial decision, the greater the chance that judicial power is acting *within* its competence – therefore, the lower the probability of judicial activism;
- the greater the number and relevance of *non-institutional arguments* in the *ratio decidendi* of the judicial decision, the greater the chance that judicial power is acting *beyond* its competence, since these are not legal arguments, which are proper of legal discourse – therefore, the greater the probability of judicial activism;
- the greater the *approach* to the issue at stake by *statutes, precedents and doctrine* (institutional arguments), the greater the scope of judicial review and the greater

[10] R. Alexy, *The special case thesis and the dual nature of law*, R.Jur. 31, 256-257 (2018).
[11] R. Alexy, s*upra* note 07, 20.
[12] R. Alexy, *supra* note 10, 255-256.
[13] R.Alexy, supra note 07, 20.
[14] R. Alexy, *supra* note 07, 287.

the chance that judicial power is acting *within* its competence – therefore, the lower the probability of judicial activism.

Thereby judicial activism is not a phenomenon identified according to a binary code "yes" or "no". It presents a *gradual structure*, i.e., undue judicial interference may be lighter or more serious depending on the *factual* and *legal conditions* of the *concrete case*.

V. Paradigmatic Issue Regarding Judicial Activism – Fundamental Social Rights and the Right to the Existential Minimum

Fundamental social rights claimed before the court are a paradigmatic issue in giving rise to the critiscism of judicial activism. Mainly seen as programatic norms in most states in the last century, fundamental social rights have been regarded as *subjective rights* since the 2000s in Brazil. They are fundamental rights to *factual positive state provision* (provision of kinds, services or financial benefits). Therefore, a judicial decision ordering the compliance with these rights means, for example, an order for the state (executive power) to provide medical treatment for a person or the enrollment of a child in public school. On one hand, in these situations, the elected powers usually assure that there is undue judicial interference in the implementation of public policies, i.e., the legislative and executive branches claim that there is *judicial activism*. On the other hand, in the same situations, judicial power asserts that this is the regular compliance with the system of checks and balances, i.e, the judiciary states that this is simply *judicial review*.

Among fundamental social rights, the right to the *existential minimum* is the one whose claim provokes the most criticism of judicial activism. The right to the existential minimum is a fundamental social right that is generally not enacted by the legislator, but *hermeneutically* deduced from positive law by *judicial power* and *doctrine*, and declared in the so-called *derivative fundamental rights norms*.[15] These are norms whose association with or derivation of a directly expressed fundamental rights norm is demonstrated by "correct justification".

[15] Robert Alexy, A theory of constitutional rights 33 (Oxford, 2010b). Although there is no doubt that the directly expressed constitutional provisions of fundamental rights are fundamental rights norms, such norms are not reduced to these provisions – under penalty of going back to the positivist conception previous to the second world war, with all the limitations (and consequences) that characterized it. Hence, fundamental rights norms are divided into two groups: norms directly established in the Constitution and derivative fundamental rights norms. Id. at 35-38.

In other words, derivative fundamental rights norms are justified by case law and legal doctrine arguments, which are possible to ground rationally the derivation of fundamental rights norms from norms that are literally established in the constitutional text.[16]

The right to the existential minimum is composed of *the essential core of the fundamental social rights considered indispensable for the guarantee of an elementary level of human dignity*.[17]

Human dignity is one of the most open issues in law and social sciences in general. Based on the bibliographic research carried out, human dignity is defined as a *a value socially attributed to the human being as an end in itself*.[18] This value has two dimensions: *subjective/individual* dimension, as a value attributed to the person for their mere ontological existence as a human being, and *objective/social* dimension, as a heteronomous value attributed by society to the person.[19] Regarding its legal structure, the value of human dignity is the content of a *principle*.[20]

The definition of the *content* of the existential minimum is controversial, but it is established according to the *socioeconomic reality* (factual conditions) of each country. While the German existential minimum involves all the itens included in the *financial benefit Arbeitslosengeld II*, popularly known as *Hartz IV* (as explained below) – such as foodstuffs, clothing, housing, equipment for the household, healthcare, transport etc. –, Brazilian socioeconomic reality imposes a much shorter existential minimum content: despite the controversy on this issue, two fundamental social rights are peacefully acknowledged by case law and doctrine as included in the Brazilian existential minimum – right to *health* (primary health care demands)[21] and *education* (until high school)[22].

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[16] Id. at 35-38.

[17] Cláudia Toledo et al., Direitos Fundamentais Sociais e Mínimo Existencial na Realidade Latino-Americana – Brasil, Argentina, Colômbia e México [Fundamental Social Rights and Existential Minimum in Latin American Reality – Brazil, Argentina, Colombia and Mexico], Rev.B.D.F. & J., 218 (2019).

[18] Id. at 220.

[19] L. R. Barroso, *A Dignidade da Pessoa Humana no Direito Constitucional Contemporâneo: Natureza Jurídica, Conteúdos Mínimos e Critérios de Aplicação* [Human Dignity in Contemporary Constitutional Law: Legal Nature, Minimum Contents and Application Criteria], (Oct., 10, 2020, 04;16 PM) http://luisrobertobarroso.com.br/wp-content/uploads/2016/06/Dignidade_texto-base_11dez2010.pdf

[20] Robert Alexy, *Human dignity and proportionality analysis*, Joç. 84 (2015).

[21] *Primary health care demands* are the health demands directly necessary for the *maintenance of life*. This is the *essential core* of the right to health. L. Gaspar Melquíades Duarte, Possibilidades e Limites do Controle Judicial sobre as Políticas Públicas de Saúde [Possibilities and limits of judicial control over health public policies] 132 (Belo Horizonte, 2011).

[22] According to art. 208, I of Brazilian Federal Constitution/1988, the provision of basic education is mandatory for the state – baisc education involves pre-school, elementary and high school (in total 14 years).

Existential minimum is the only *definitive right* (object of a *rule*) among all fundamental rights (which are *prima facie* rights, object of *principles*).[23] This means that the right to the existential minimum is immediately enforceable through judicial power and does not depend on a balancing process to be established in concrete cases.

Thus, "existential minimum" was the search expression used in the empirical research on the courts' official websites. In order to assess whether or not judicial performance is activist, it is necessary to carry out a comparative analysis of the decisions of the *same court* on *different dates* and of *different courts* on the *same date*. This is how the empirical research was conducted as explained below.

VI. Empirical Research

For the purpose of assessing Brazilian judicial performance – as activist or not – both the quantitiy and the quality of the *arguments* used in judicial decisions by the Constitutional Court of Brazil (*Supremo Tribunal Federal* – STF), Argentina (*Corte Suprema de Justicia de la Nación Argentina* – CSJN), Mexico (*Suprema Corte de Justicia de la Nación* – SCJN) and Germany (*Bundesverfassungsgericht* – BverfG) were analyzed.

The selection of these countries is based on the similarities among the Latin American countries, whose legal and social problems are very similar, so that the investigation of the three realities may provide scientific contributions. The survey of German constitutional case law is justified by the relevant position that German constitutional law holds in the Brazilian legal scene – many theories and jurists from Germany are intensely studied in Brazil and German law is often used as a regulative parameter to Brazilian law. The German approach to the issue "existential minimum" is an example of regulative parameter for Brazilian legal doctrine, since it is a topic quite developed both by doctrine[24] and case law in Germany (as exposed below).

Only the *collegiate* decisions were analized, since the research looked for the *institutional* position of the courts, and not the position of their individual members in monocratic

[23] R. Alexy, supra note 15, 60.

[24] R. Alexy, supra note 15, 290; 334-350. Volker Neumann, *Menschenwürde und Existenzminimum* [Human dignity and existential minimum], Humboldt-Universität zu Berlin, Juristische Fakultät (Feb. 10, 2020, 02;40 PM) https://doi.org/10.18452/1595.

decisions. The *time methodological cut* is from 2004 to 2017. The selection is justified by the fact that in 2004 there was the first literal reference to the expression *existential minimum* by STF in Brazil, and 2017 was the first year of the research project. Thus, the decisons made during 14 years by the selected Constitutional Courts were studied.

With the help of a table, information from each decision was sought and annotated, regarding the existence of *institutional* (statutes, precedents, doctrine) and *non-institutional* (general practical and/or empirical) *arguments*.

6.1. Brazilian Constitutional Case Law – Supremo Tribunal Federal (STF)

The search for the term " existential minimum" carried out on the official website of STF resulted in 2 decisions of the *First Chamber*, 8 decisions of the *Second Chamber* and 13 decisions of the *Plenary*. There is a clear growing appeal to judicial power for the guarantee of the right to the existential minimum. Whereas the first reference to this right in 2004 was made in a monocratic decision[25], in 2007 there was 1 plenary decision[26] on this issue and in 2017 there were 7 plenary decisions on it[27].

The survey results are shown in the following tables:

Table 1 Brazilian constitutional case law – Institutional arguments

INSTITUTIONAL ARGUMENTS		
	Number of Decisions	%
Statutes	23	100%
Precedents	23	100%
Doctrine	20	87%

The first evident conclusion of these numbers related to institutional arguments used by the Brazilian Constitutional Court is the proximity of the two different legal systems (*civil law* and *common law*) in Brazil. Although it is a country that follows the civil law tradition, whose main legal source are statutes, precedents (typical of common law) were also used in 100% of the decisions.

[25] ADPF 45 MC/DF.
[26] ADI 3768/DF.
[27] ADI 4066/DF, RE 760931/DF, RE 587970/SP, ADI 2028/DF, RE 566622/RS, RE 580252/MS, RE 835558/SP.

As for the reference to *statutes*, of course, the *Federal Constitution/1988* was the most quoted norm by STF, mainly its art. 6º (fundamental social rights), art. 196 (right to health) and art. 205 (right to education).

As for *precedents*, the most quoted one was the monocratic decision *ADPF 45 MC/DF*, which is the *leading case* issued in 2004 with the first literal reference by STF to *existential minimum*.

As for *doctrine*, the most mentioned jurists are Brazilian, except for Holmes and Sunstein, the North American professors whose book *The Cost of Rights* was frequently quoted.

Table 2 Brazilian constitutional case law – Non-institutional arguments

NON-INSTITUTIONAL ARGUMENTS		
General Practical Discourse		
	Number of Decisions	%
Pragmatic Arguments	10	43%
Ethical Arguments	7	30%
Moral Arguments	5	22%
Empirical Discourse		
Concrete Facts	8	35%
Scientific Data	5	22%

All *non-institutional* arguments were used in Brazilian constitutional case law, considering the 23 decisions in total. Most decisions presented more than one non-institutional argument. As examples of non-institutional arguments used in the reasoning of the analyzed judicial decisions, the following ones may be quoted.

In the decision *RE 581.488/RS*, a *pragmatic* argument was used referring to an action strategy based on a means-end reasoning. The patients of the Brazilian public health system (*Sistema Único de Saúde* – SUS) were forbidden to pay extra fees for any special treatment in order to avoid possible social discrimination. The court stated that if these fees were allowed, there would be the risk of directing beds, in private institutions, to care for patients that will complement the amount paid by SUS. If these entities were free to seek profit in their activities, nothing would prevent the preference for this category of

users, a situation that is detrimental to the great majority of the Brazilian population.[28] [Free translation]

This same decision established the following *ethical* argument, referring to a guiding ideal of Brazilian society: "[This is] a proposal completely dissociated from loyalty, good faith and legitimacy, because it proposes, in a country where the Constitution promises a society based on justice and solidarity with eradication of inequalities, an inequality between the poor and the poorest.[29] [Free translation]

Finally, the decision *RE 658.312/SC* approved a different treatment (adding some more minutes for breaks at work) for female employees, based on the *moral* argument that provides for the need to treat unequal situations unevenly:

> The Federal Constitution used some criteria for this different treatment: i) first, it took into account the historical exclusion of women from the regular labor market and imposed on the state the obligation to implement public, administrative or merely legislative policies of a protective nature under the terms of labor law.[30] [Free translation]

Among the *empirical* arguments, there were arguments related to *concrete cases* in 8 decisions (35%) and to *scientific data* in 5 decisions (22%). As an example of empirical argument mentioning *concret facts*, there is the decision *RE 587.970/SP*. The court condemned the National Institute of Social Security (*Instituto Nacional do Seguro Social* – INSS) to provide a social benefit to a foreigner, resident in Brazil for more than 54 years, referring to the following concrete fact: "[...] according to Federal Police data, in March 2015, Brazil had 1,847,274 regular immigrants, of which 1,189,947 had a permanent visa and 595,800 had a temporary visa" [free translation].[31]

In the aforementioned decision *RE 658.312/SC* (which approved a different treatment for female employees), the court also referred to *scientific data* to ground its decision, stating

[28] Brazil, Supremo Tribunal Federal. Recurso extraordinário n. 581.488/RS (Feb. 10, 2020, 02:54 PM) http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=10624184.
[29] Brazil, Supremo Tribunal Federal. Recurso extraordinário n. 581.488/RS (Feb. 10, 2020, 02:54 PM) http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=10624184.
[30] Brazil, Supremo Tribunal Federal, Recurso extraordinário 658.312/SC (Feb. 10, 2020, 03:46 PM) http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/RE658312.pdf.
[31] Brazil, Supremo Tribunal Federal, Recurso extraordinário 587.970/SP http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=13649377 (last accessed on 10 February 2020).

that in fact, there is no way to deny that there are differences in the physical capacity of women in relation to men - including scientific surveys – Jurandir Freire Costa. Homens e Mulheres [Men and Women]**.** In*:* Ordem Médica e Norma Familiar [Medical Order and Family Norm] 235 (Rio de Janeiro: Graal, 1979); Ana Maria Szapiro. Diferença sexual, igualdade de gênero: ainda um debate contemporâneo [Sexual difference, gender equality: still a contemporary debate]. In: Maria Inácia D'Ávila, Rosa Pedro (Eds.). Tecendo o Desenvolvimento: saberes, gênero, ecologia social [Weaving Development: knowledge, gender, social ecology] 83 (Rio de Janeiro: Mauad: Bapera, 2003); James T. Bennett. The Politics of American Feminism: Gender Conflict in Contemporary Society (University Press of America, 2007).[32] [Free translation]

6.2. *Argentinian Constitutional Case Law – Corte Suprema de Justicia de la Nación Argentina (CSJN)*

The expression "existential minimum" is translated into Spanish as "vital minimum" (*mínimo vital*). Thereby the search term used in both Argentinian and Mexican Constitutional Court official website was *mínimo vital.*

Unlike Brazil, where the judicial claim for the right to the existential minimum keeps growing, in the CSJN case law there was only *one* mention of the expression *mínimo vital* during 14 years of the empirical research carried out.

Actually, the official website of CSJN presents 14 results of decisions which mention the search term "*mínimo vital*". However, in 13 decisions the words "*mínimo vital*" are part of the expression "*salario mínimo vital*", that is, the "minimum wage" legally established. As the research project deals with the constitutional issue "existential minimum" and not with the labor issue "minimum wage", those 13 decisions had to be disregarded. Thus, only 1 decision, which referred to "*mínimo vital*" (and not to "salario mínimo vital"), was analyzed. It was related to the demand by the plaintiff for an increased disability pension, so that its amount corresponded to the social assistance benefit, in order to guarantee the vital minimum.

The analysis of this decision showed the sole use of *institutional* arguments with exclusive reference to national and international *statutes*. There was no mention of *precedents* or

[32] Brazil, Supremo Tribunal Federal, Recurso extraordinário 658.312/SC (Feb. 10, 2020, 03:46 PM) http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/RE658312.pdf.

doctrine, nor reference to *non-institutional* arguments. Thus, the table related to Argentinian constitutional case law is basically composed of number zero:

Table 3 Argentinian constitutional case law

INSTITUTIONAL ARGUMENTS		
	Number of Arguments	%
Statutes	1	100%
Precedents	0	0%
Doctrine	0	0%
NON-INSTITUTIONAL ARGUMENTS		
General Practical Discourse		
	Number of Arguments	%
Pragmatic Arguments	0	0%
Ethical Arguments	0	0%
Moral Arguments	0	0%
Empirical Discourse		
Concrete Facts	0	0%
Scientific Data	0	0%

This is an example of international *statutes* quoted:

> [...] many international instruments signed by our country have enshrined the right of every person to enjoy an adequate standard of living when a livelihood can no longer be provided (American Declaration of the Rights and Duties of Man, Chapter 1, art. XVI; Universal Declaration of Human Rights, art. 25; International Covenant on Economic, Social and Cultural Rights, art. 9; Convention on the Rights of Persons with Disabilities, art. 28, paragraph 1, and Convention on the Minimum Social Security

> Standard - ILO Convention 102, arts. 36, subsection 1, and 65).[33] [Free translation]

As only one decision was studied in Argentinian case law, it is not possible to carry out an assessment of Argentinian legal reasoning in general. However, it is feasible to conclude that there is a notable difference between Argentinian and Brazilian argumentation in constitutional case law, since no Brazilian decision was based exclusively on statutes. All of them referred to precedents – actually, the number of precedents mentioned was sometimes even greater than the number of statutes. Another distinction between the two constitutional case laws is the reference to non-institutional arguments in almost 80% of Brazilian decisions, in contrast to Argentinian decisions, that did not mention any non-institutional argument.

6.3. *Mexican Constitutional Case Law – Suprema Corte de Justicia de la Nación (SCJN)*

Countries may be classified, among others, according to geographical and historical-cultural criteria. From the geographical point of view, Mexico is part of North America. According to its historical, social, political, and economic evolution, Mexico belongs to Latin America. As the relevant focus of this article is rather historical-cultural than geographical-natural, Mexico was analyzed here as a Latin American country.

Among the studied countries, Mexico is the one whose constitutional case law *most vaguely* approaches the right to the existential minimum. This right is associated with completely different notions, ranging from the prisoner's right to clothing up to the right of low-income citizens to tax exemption.

The first reference to vital minimum in a decision of the plenary of the SCJN was in 2013. Until 2017, there were 14 decisions that mentioned the right to vital minimum in their reasoning, sometimes more centrally, sometimes more peripherally.[34] The results of Mexican constitutional case law analysis are as follows:

[33] Argentina, Corte Suprema de Justicia de la Nación Argentina, Fallo E. 261 XLVIII. RHE, (Feb. 10, 2020, 04:50 PM) http://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verDocumentoByIdLinksJSP.html?idDocumento=7261052&cache=1581305402296.

[34] N. Gomes, *Direito subjetivo ao mínimo existencial: uma análise comparativa entre Brasil e México* [Subjective right to the existential minimum: a comparative analysis between Brazil and Mexico], Juiz de Fora, 2016, 78-82

Table 4 Mexican constitutional case law

INSTITUTIONAL ARGUMENTS		
	Number of Arguments	%
Statutes	14	100%
Precedents	14	100%
Doctrine	1	7%
NON-INSTITUTIONAL ARGUMENTS		
General Practical Discourse		
	Number of Arguments	%
Pragmatic Arguments	2	14%
Ethical Arguments	0	0%
Moral Arguments	1	7%
Empirical Discourse		
Concrete Facts	2	14%
Scientific Data	0	0%

Although both Brazilian and Mexican constitutional case law refer to the *institutional* arguments *statutes* and *precedents* in 100% of the decisions, doctrine is much more used by the Brazilian Constitutional Court (87%) (Table 1) than by the Mexican one (7%).

In relation to *non-institutional* arguments, the difference between Mexican and Brazilian legal reasoning is clear. The Mexican Constitutional Court hardly ever uses non-institutional arguments, while in Brazilian constitutional case law there were non-intitutional arguments in almost 80% of the decisions (Table 2).

The most mentioned statutes in Mexican case law were the Mexican Constitution, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the General Law of the Professional Teaching Service. The most quoted precedent was the thesis supported by the Second Chamber, p. 1639, Volume XLVI, corresponding to the Fifth Period of the Federal Judicial Weekly.

All the following selected examples of arguments in Mexican case law were used in the same decision, which is a long decision grounded on different kinds of arguments. It is the decision of the *unconstitutionality lawsuit 24/2012*, which declared unconstitutional a statute that created a set of taxes for the maintenance of convicted persons. Taxes would

be calculated on the amount received by prisoners as payment for work done during the period of imprisonment.

Doctrine is quoted in this argument:

> Given that the human condition is under discussion, human dignity is the foundation of any legal and social construction, this is why in the constitutional interpretation the constant and key parameter
> is the justification and solution of the legal conflict, taking into account, all the time, the principle of human dignity, as the basis that builds the entity of the legal system and guides its formation, understanding and execution. (Constitutional Court of Colombia, sentences C-521 of 1998, C-239 of 1997 and T-309 of 1995. César Augusto, Londoño Ayala Bloque de Constitucionalidad [Constitutionality Block], Colombia, Ediciones Nueva Jurídica, 2010, p. 90).[35] [Free translation] [The bibliographic reference was written in the footnote.]

As an example of a *pragmatic argument* based on a means-end reasoning, the following might be quoted:

> [...] to reinsert is understood as to reintegrate into society someone who was criminally convicted or marginalized, then, in the case, reinserting addresses the idea of relocating the prisoner in civil society, an issue that, as recognized by the Constitution, it is not possible without prior instruction, creative or revitalizing skills and work habits and health care, education and sports.[36] [Free translation]

As for the *moral* argument based on the ideal of universality:

[35] Mexico, Suprema Corte de Justicia de la Nación. Ação de inconstitucionalidade 24/2012 (Feb. 10, 2020, 03:28 PM) http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=136457.
[36] Mexico, Suprema Corte de Justicia de la Nación. Ação de inconstitucionalidade 24/2012 (Feb. 10, 2020, 03:28 PM) http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=136457.

> [...] the rights of persons deprived of liberty remain and are limited only with respect to the penalty they purge. The responsible authorities must take into account that persons deprived of liberty have the right to enjoy all fundamental rights, as well as the fulfillment of their obligations, with the exception of those rights that must be limited by the content of the decision, the significance of the punishment and the prison law.[37] [Free translation]

The example of an argument that described an empirical situation and its *concrete facts* is as follows:

> [The prison industry in Mexican is] a mechanism that seeks to consolidate various productive and industrial activities, with the participation of private companies, in federal prisons, in order to generate employment opportunities for imprisoned people, to help with training for work and to develop their labor activities, so that they acquire means to compensate for any damage caused, contribute to the support of their families and create a savings fund.[38] [Free translation]

6.4. *German Constitutional Case Law – Bundesverfassungsgericht (BVerfG)*

The research of German case law was limited to the decisions available in English on the official website of the Federal Constitutional Court (*Bundesverfassugsgericht – BVerfG*). In the period of time surveyed, there were 8 decisions translated into English which refered to the search term *existential minimum.*[39] However, although the search was made by the expression "existential minimum" in quotes, the official site presented 5 decisions that referred to the words "existential" and "minimum" separately. These decisions were

[37] Mexico, Suprema Corte de Justicia de la Nación. Ação de inconstitucionalidade 24/2012 (Feb. 10, 2020, 03:28 PM) http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=136457.

[38] Mexico, Suprema Corte de Justicia de la Nación. Ação de inconstitucionalidade 24/2012, (Feb. 10, 2020, 03:28 PM) http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=136457.

[39] The first literal reference to the term *Existenzminimum* ("existential minimum" in German) by the BVerfG was in 1991 (BVerfGE 84, 133-160). Since 1991 until 2017, there were 10 decisions of the BverfG that mentioned the term *Existenzminimum*.

disregarded, since they did not address the research issue "existential minimum".[40] Therefore, only 3 decisions (in English) of BVerfG regarded the search expression "existential minimum" indeed – BVerfGE 125, 175; BVerfGE 132, 134; and BVerfGE 137, 34. Their analysis presents the following results:

Table 5 German constitutional case law

INSTITUTIONAL ARGUMENTS		
	Number of Arguments	%
Statutes	3	100%
Precedents	3	100%
Doctrine	1	33%
NON-INSTITUTIONAL ARGUMENTS		
General Practical Discourse		
	Number of Arguments	%
Pragmatic Arguments	0	0%
Ethical Arguments	0	0%
Moral Arguments	0	0%
Empirical Discourse		
Concrete Facts	3	100%
Scientific Data	3	100%

The use of *institutional* arguments in the Brazilian and German legal reasoning of constitutional case law is similar: both of them refer to *statutes* and *precedents* in 100% of the decisions, but *doctrine* is much more used in Brazil (87% of the decisions) (Table 1) than in Germany (33%).

In relation to *non-institutional* arguments, there are clear differences between Brazil and Germany. While in Brazilian legal reasoning *general practical* arguments (pragmatic, ethical and moral ones) were used respectively 43%, 30% and 22% of the time (Table 2), in German constitutional case law there is no reference (0%) to general practical arguments.

[40] The disregarded decisions were: BVerfGE 121, 135; BVerfGE 123, 186; BVerfGE 129, 124; BVerfGE 134, 242; BverfGE 144, 20-367.

In contrast, *non-institutional* arguments related to *empirical* discourse (concrete facts and scientific data) are much more used in Germany (both kinds of empirical arguments were mentioned in 100% of the decisions) than in Brazil (concrete facts in 35% of the decisons and scientific data in 22% of them) (Table 2).

In German case law, the most quoted *statutes* were the Basic Law and the Code of Social Law. As for the *precedents*, the German paradigmatic decision on the right to the existential minimum is BVerfGE 125, 175, known as *Hartz IV* decision, made on February 9th, 2010. This decision deals with the constitutional compatibility with the Basic Law of a statute that establishes a standard *benefit* to guarantee the *livelihood* of adults and children up to the age of 14 years. BVerfG decided that, since it is not possible to establish that the standard benefit amount fixed by the statute is *evidently insufficient*, the legislature is not directly obliged to set higher benefits. It must, rather, implement a *procedure* to realistically ascertain the amount of the benefit according to the needs required to guarantee an existential minimum in line with human dignity. The decision stated that because of legislature discretion, BVerG was not empowered to determine an specific amount for the benefit on its own, on the basis of its own evaluations. Thus, the court established a deadline for the legislature to assess all necessary expenditure to assure the existential minimum in a transparent procedure with plausible methods of calculating a monthly benefit. Meanwhile, unconstitutional provisions remained applicable until new provisions were adopted by the legislature.

Hatz IV decision is a very dense and long decision. As an example of *doctrine*, there is following argument in *Hartz IV* decision: "The age group allocation of the OECD scale is only used as a household income to individual household members and to carry out poverty calculations in an international comparison (see Strengmann-Kuhn, Zeitschrift für Sozialreform – ZSR 439, 441 (2006)".[41]

Empirical arguments referred to *concrete facts* and to *scientific data* were mentioned in 100% of the German decisions (Table 5). As an example of reference to *concrete facts* describing a factual situation, the following argument may be quoted. It was used in the decision BVerfGE 132, 134, which is about the compability with the Basic Law of the financial benefit provided for in the Asylum Seekers Benefits Act to guarantee one´s existence:

[41] Germany, Bundesverfassungsgericht, BVerfGE 125, 175 (Feb. 10, 2020, 02:47 PM) https://www.bundesverfassungsgericht.de/e/ls20100209_1bvl000109en.html.

> The burden on the public federal and state budgets caused by benefits of the Asylum Seekers Benefits Act has decreased considerably since the law was introduced in 1993. In 2009, 121,918 persons drew such benefits. […] By contrast, there were almost 500,000 beneficiaries in the early years of the Asylum Seekers Benefits Act. Accordingly, expenditure in this field has dropped from 5.6 billion Deutsche Mark to 0.77 billion Euros.[42]

As for an empirical argument expressing *scientific data*, there is the following example used in Hartz IV decision:

> The new shares of 60 per cent and 80 per cent of the basic standard rate, respectively, are orientated towards a scientific study carried out by the Federal Statistical Office (Ausgaben für Kinder in Deutschland – Berechnungen auf der Grundlage der Einkommens- und Verbrauchsstichprobe 1998 1080 (Federal Statistical Office, Wirtschaft und Statistik, 2002), according to which children aged 14 and older cause roughly one-third higher costs than younger children.[43]

VII. CONCLUDING REMARKS

The central objective of this article was to *scientifically* verify the suitability of the criticism of *judicial activism* frequently attributed to Brazilian judicial power in the national legal debate. In order to do so, concepts were developed and criteria were sought. Thus, *judicial activism* was conceived as the undue interference of judicial power in the competence of the other public powers and *judicial review* was understood as the judicial decision made within the scope of the judiciary competence, in compliance with the system of checks and balances.

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[42] Germany, Bundesverfassungsgericht. BVerfGE 132, 134 (Feb. 10, 2020, 03:31 PM) https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/07/ls20120718_1bvl001010en.html.

[43] Germany, Bundesverfassungsgericht, BVerfGE 125, 175 (Feb. 10, 2020, 02:47 PM) https://www.bundesverfassungsgericht.de/e/ls20100209_1bvl000109en.html.

The institutional acts of the judiciary are judicial decisions. The reasoning given by the judiciary to its institutional acts was analyzed, in order to verify if this public power could justify its decisions as acts within its competence or if, on the contrary, there was undue judicial interference in the competence of the other public branches, which characterizes judicial activism.

An *argumentative taxonomy* was researched in the discourse theory by Jürgen Habermas and in the theory of legal argumentation by Robert Alexy. According to this taxonomy, discourse is divided into *practical* and *empirical*. Both consist of *non-institutional* arguments, which are either pragmatic, ethical or moral arguments (general practical discourse), or refer to concrete facts and/or to scientific data (empirical discourse). *Legal discourse* is a *special case* of general practical discourse, committed to *institutional* arguments (statutes, precedents, ruling doctrine), and is the proper discourse of judicial power.

Therefore, the greater the number (quantity) and relevance (quality) of *institutional arguments* in the judicial decision, the greater the chance that judicial power is acting *within* its competence and the lower the probability of judicial activism. On the other hand, the greater the number and relevance of *non-institutional arguments* in the *ratio decidendi* of the judicial decision, the greater the chance that judicial power is acting *beyond* its competence, since legal discourse must be based on the arguments to which it is committed. Hence, judicial activism is not a phenomenon identified according to a binary code, but presents a *gradual structure*, measurable by *degrees* (light, moderate, serious).

Brazilian constitutional case law was comparatively analyzed with the constitutional case law from Argentina, Mexico and Germany. Similarly to Mexican and German constitutional case law, Brazilian constitutional case law is completely (100%) based on the *institutional* arguments *statutes* and *precedents* – Argentinian constitutional case law is grounded exclusively on statutes.

However, the difference in the use of *non-institutional* arguments by Brazilian case law is impressive in comparison with the case law of all the other Constitutional Courts analyzed. *All the five* kinds of non-institutional arguments were used in Brazilian constitutional case law. Concerning general practical arguments, pragmatic arguments were the most used (43%), followed by ethical ones (30%) and moral ones (22%). Regarding empirical arguments, there was reference to concrete facts in 35% of the decisions and to scientific data in 22% of them. Meanwhile, no kind of non-institutional arguments was mentioned in Argentinian constitutional case law, and only non-institutional empirical arguments were used in German constitutional case law (100% of the decisions mentioned concrete

facts and scientific data). In Mexican constitutional case law there was reference to two kinds of non-institutional general practical arguments (pragmatic ones in 14% of the decisions and moral ones in 7% of them) and just to one kind of non-institutional empirical argument (the ones related to concrete facts in 14% of the time).

Since the use of institutional arguments was extremely high by the Brazilian judiciary – as well as by the Mexican and German ones – and the greater the use of these arguments in legal reasoning, the more weight is to be assigned to the assessment of judicial decisions as regular *judicial review*, there are considerable chances that the performance of Brazilian judicial power is *within the scope of judicial competence* in compliance with the system of checks and balances.

However, legal discourse does not consist *exclusively* of institutional arguments. The use of institutional arguments is a *necessary* aspect to assess judicial performance, but it is not *sufficient*. In other words, although institutional arguments must necessarily be mentioned in legal discourse, non-institutional arguments might also compose this discourse. According to the *integration thesis* by Alexy, institutional arguments have *precedence* over non institutional ones. In short, judicial decisions must be based on institutional arguments, especially their *ratio decidendi*, but non-institutional arguments might integrate legal discourse.

Considering the comparatively high use of non-institutional arguments in the legal reasoning of the Brazilian judicial decisions, the chance of judicial activism on the part of Brazilian judicial power could be understood as greater than that of the judicial power of the other countries studied. However, the importance of non-institutional arguments must be assessed not only *quantitatively*, but also *qualitatively*. Thereby, if many non-institutional arguments are mentioned, but mostly as *obiter dictum*, the weight to be assigned to them is light or, at most, moderate.

In the Brazilian constitutional case law analyzed, non-institutional arguments were used basically to strengthen the institutional arguments mentioned in the *ratio decidendi* of judicial decisions. This means that in Brazilian case law non-institutional arguments were relevant, but *not decisive* in legal reasoning of the judicial decisions studied. The less important the non-institutional arguments, the more weight is to be assigned to judicial performance as within its competence. Thus, the higher the probability of regular judicial review.

Therefore, considering the criteria adopted in this research and that judicial activism is not a binary phenomenon, but presents a gradual structure, *there are not enough reasons that characterize Brazilian judicial power as seriously activist*. Compared to Argentinian, Mexican and German judicial power, the *Brazilian judiciary could be considered to practice activism in light, or at most, in moderate degree*.