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Juristocracy of audience*

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Abstract: In this paper, I present the concept of juristocracy of audience as a political category that indicates a disfiguration concerning the normative ideals of democracy and the rule of law. On the one hand, the category of juristocracy of audience is developed from Hirschl's analysis and research on what he calls juristocracy, on the other hand, it is also developed from Urbinati's concept of plebiscitary democracy. I argue that this category helps us to understand some of the political problems happening in Brazil over the past decade.

Keywords: Juristocracy of audience; democracy; rule of law; disfigurations

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This paper proposes the political-philosophical category of juristocracy of audience to understand and assess a current Brazilian political phenomenon. As usually happens with political-philosophical concepts, this is also not an entirely new one but is rooted in political categories already employed to indicate two different political pathologies or disfigurations. On the one hand, I adopt here the category of *juristocracy* as presented and criticized by Hirschl (2004); in the first part, I briefly reconstruct his arguments. The second part recovers Urbinati's category of *plebiscitary democracy* as one of the disfigurations of contemporary democracy. The third part presents the original conceptual contribution of the paper, namely, the construction of the category of *juristocracy of audience* as a double political pathology or disfiguration that threatens both democratic and rule of law values. I intend to show the main characteristics of the concept by also drawing on what has occurred in Brazilian recent political history. In conclusion, I make some brief remarks to draw attention to the vicinity between the juristocracy of audience and some features of early 20th-century fascism.

I. Juristocracy

In his book *Towards juristocracy* (2004), Ran Hitschl defines juristocracy as the outcome of a *broad process of transferring political power from representative institutions to the judiciary*. Such a phenomenon would still be in progress, having a global scale, and can be seen in more than eighty countries and in several supranational institutions (HIRSCHL, 2004, 1) As the terminology indicates, this is the establishment of a government of the judiciary.

Hirschl's meticulous study, based on four constitutionalization cases (Canada, Israel, South Africa, and New Zealand), shows how there is a big gap between the prevailing benevolent discourse that the process of constitutionalization of rights is natural and progressive in democracies and the daily reality of the court activity in these countries. The phenomenon of constitutionalization of rights and the transfer of power to the judiciary actually presents itself as a way of withdrawing important political decisions from the political arena, especially those which interfere with society's status quo, moving them to a "safer" place, away from the political scope of the people.

> Judicial empowerment through constitutionalization may provide an efficient institutional solution for influential groups who seek to preserve their hegemony and who, given an erosion in their popular support, may find strategic drawbacks in adhering to majoritarian policy-making processes. [...] The constitutionalization of rights is therefore often not a reflection of a genuinely progressive revolution in a polity; rather, it is evidence that the rhetoric of rights and judicial review has been appropriated by threatened elites to bolster their own position in the polity. (HIRSCHL, 2004, 12)

In other words, the phenomenon of juristocracy is a "global trend toward judicial empowerment through constitutionalization", which

> should be understood as part and parcel of a large-scale process whereby policy-making authority is increasingly transferred by hegemonic elites from majoritarian policy-making arenas to semiautonomous, professional policy-making bodies primarily in order to insulate their policy preferences from the vicissitudes of democratic politics. (HIRSCHL, 2004, 16)

Or rather, what the hegemonic elites consider to be a vicissitude.

According to Hirschl (2004, 12, 49, 213ff), three groups promote and uphold the juristocracy model. *The first group is constituted by political elites threatened by the democratic process*. Accordingly, they pursue in juristocracy a way of preserving or improving their political hegemony by insulating the political decision-making process in general and their particular political preferences from the democratic process, while they might still engage rhetorically in favor of democracy. *The second group is constituted of economic elites* that see the constitutionalization of rights—especially property, mobility, and professional rights—both

as a means to limit government activity and promote a free-market-friendly agenda. Finally, *the third group consists of judicial elites and supreme courts* that strive to increase their political influence within the State and their international reputation.

Despite the rhetoric of a democratic revolution, Hirschl notes in all four cases examined (Canada, Israel, South Africa, and New Zealand) that *there has been no improvement in the protection of social rights or the quality of life of the population* with the constitutionalization of rights and the empowerment of the courts. "In fact, constitutionalization has more often served as effective means for shielding the economic sphere from attempts to reduce socioeconomic disparity through regulatory and redistributive means" (HITSCHL, 2004, 218). Furthermore:

> Channeling pressures for social justice to courts has a considerable potential to harm reformist social movements by pacifying activists with the illusion of change and by luring resources away from political processes and lobbying strategies through which more substantial change might be achieved. The institutional, pro-status-quo and inherently pacifying nature of the legal system is especially significant when claims for restorative justice that have potentially revolutionary implications for the redistribution of wealth and power (such as the reconstruction of post-apartheid South Africa or the struggle over indigenous peoples' rights in settler societies) are transferred from the potentially open-ended political sphere to the inherently more conservative judicial sphere. (HIRSCHL, 2004, 198)

Juristocracy has consequences, to say the least, disturbing—even from a normative political theory perspective. First,

> When contentious political questions are transformed into legal questions, however, the bulk of the citizenry (who are neither judges nor lawyers) are deprived of the opportunity to shape public policy outcomes in a meaningful way and are forced to relinquish their responsibility for working out reasonable and mutually acceptable resolutions of the issues that divide them. (HIRSCHL, 2004, 186)

This makes it necessary to say, in an analogy with the American constitution, "They, the Jurists" instead of "We, the People". Secondly, the process of juristocracy indicates also a problem concerning the legislative power, because by "transferring political decision-making authority to the judiciary, these legislatures take advantage of (or worse, actively support the establishment and maintenance of) a strong judiciary to avoid difficult, unpopular, or unwanted outcomes" (HIRSCHL, 2004, 187). Thirdly, democracy requires that choices over substantial political values should be made by elected representatives and not by unelected judges. Substantial political decisions should be left to officials who can be evaluated and held accountable electorally (HIRSCHL, 2004, 189). After all, there is no concrete empirical evidence that the judiciary power does bring together a set of individuals who have a more refined moral intuition about the good of society. Thus, in juristocracy "democracy is relegated to the existence of some sort of electoral routine" (HIRSCHL, 2004, 221).

The belief that courts would reach ideologically neutral decisions which would naturally tend toward an objective common good is nothing but an illusion. Politics has its own substance and cannot be destructed. What may happen is its displacement to another sphere and its misrecognition as such. This is stressed by Ferrejohn:

> When courts can reach decisions with more or less final political consequences, anyone with an interest in those decisions has the motive to try to express those interests in the form of persuasive legal arguments. And those interested in judicial decisions have a motive to seek to influence and, if possible, control appointments to courts and other legal institutions. In this sense, the "judicialization" of politics tends to lead to the politicization of courts. Consequently, judicial decision-making tends to become politics conducted by other means. (FERREJOHN, 2012, 91)

But that being the case, then one can raise the question about the legitimacy of the judiciary power as an independent "power" and not simply a branch of the executive in the enforcement of laws, as was the case in modern times. In other words, the justification of the judiciary as an independent power beside both the legislative and executive depended—if not exclusively, at least to a large extent—on the assumption that such a power should not interfere in legislative and executive affairs, or that it should be a counter-majoritarian power that enforces laws equally to all in an impartial way, even when it is against the interests of the majority.

We must now make an extremely important consideration about the debate around constitutionalization and a political model in which the judiciary is seen as the main protagonist, namely that sometimes in these debates a crass argumentative mistake occurs.[1] The argumentation in the literature around this issue seems to oscillate between two levels; one normative and the other descriptive, or, to use modern terminology, there is an unwarranted oscillation between an argumentation that develops in the level of "what ought be" and another that develops in the level of "what is". Often a transition from one level to the other is made without clarification of its implications and, therefore, without observing the proper criteria of each sphere. This happens in the following way. Frequently, arguments that seek to legitimize the political protagonism of the judiciary assume the perspective of how jurists or judges should behave and compare this to how legislators behave in parliament. In this case, there is no doubt that juristocracy presents itself in an attractive form. But if we compare the legislative as it ought be with the judiciary performance as it is, then there would be a situation even more favorable than the previous one, but now concerning the legislative power. However, this kind of comparison implies a fundamental mistake. If anyone wishes to make a logically coherent argumentative comparison, then one must compare the judiciary as it "ought be" with the legislature as it "ought be" and, on the other hand, the judiciary as it "is" with the legislature as it "is". The failure to observe this distinction of scopes leads to an untenable and fallacious argument.

Another important argument to remove political power from courts is presented by Urbinati (2014). According to her, it can be said that the normative essence of what ought constitute judicial judgment is *impartiality* in assessing the facts and data involved. *The judges* ought not take part in cases under analysis but have to be external to them. They have the legal duty to argue and act on behalf of the institutions, thereby setting aside their values and *personal preferences*. Furthermore, judges are not required to be political representatives. On the contrary, they should act apolitically precisely because they ought represent the will consubstantiated in law. The power vested in the judicial judgment is negative or of control and supervision, since it depends on the will of the sovereign (the law) and not on the sovereign's opinion (cf. URBINATI, 2014, p. 123f).

On the other hand, political judgment is distinguished by *generality*, not impartiality. In this case, the criterion of politics should be the general interest of the political community. Generality is an assumption regarding the equal distribution of political power in society. Both voters and elected representatives are not external to the case under analysis, as are judges when weighing a case. Precisely for that reason, there is no requirement for impartiality in the political sphere. Although there is no requirement for impartiality, political actors should act with legitimacy and responsibility, taking into account the public interest and not only the particular ones. *Political judgment occurs in a context of a plurality of opinions and thus produces valid (not true or false) laws*. The expectation of accountable performance on the part of political actors (citizens and representatives) lies on elements such as moral and constitutional principles, prudent reasoning, ethics of participation, political culture, and also political calculation (the calculation concerning the consequences of adopting a certain position). Urbinati emphasizes that political judgment only takes shape within a pragmatic context. In other words, in a context of political disagreement, each of the dissenting parties has

[1] I thank Cristina Foroni Consani for helping me develop this argument.

reasons to defend its position. It is not a matter of maintaining that one position is true and another false, in the sense that the political judgment could only produce a single result (cf. URBINATI, 2014, 123ff). However, this perspective of a correct judgment is expected from the judge, since his decision should be based on the subsumption of a case to the law, which in turn is already defined by the code.

Thus, Urbinati points out that the search for truth in the sphere of democratic practices brings political and judicial judgment closer together, trying to bring impartiality and consensus rather than generality and disagreement into politics. Such proposals depoliticize democracy precisely because they rely more on experts or technicians than on political actors and, thus, compromise political freedom and the right of equal participation of citizens in the decision of relevant political issues, since they transfer to non-representative institutions and not subject to popular control (such as the judiciary) the decision of controversial issues of great relevance to social life.

In short, from both a theoretical and practical perspective, juristocracy does not find proper legitimation. *From a normative theoretical perspective* (normative justification of politics and State Theory), bringing politics into the courts implies the following: 1) The theory of the division of powers is called into question; 2) The justification of the judiciary as a counter-majoritarian power is undermined; 3) It depoliticizes democracy insofar as it deprives the democratic process of legitimacy; 4) It confuses issues that require arguments of generality with issues that require arguments of impartiality; 5) It prevents the learning that the democratic process brings to its actors; 6) It generates a kind of indirect despotism[2] since the actors (judges and courts) are not politically accountable. Whereas *from a practical perspective* (of the consequences of the implementation of juristocracy over the last three decades) it follows that: 1) There is a disregard for social rights since the judiciary is acting as a kind of barrier to prevent democratic reforms that allow a better distribution of wealth and power; 2) Courts generally act conservatively insofar as they defend the interests of the hegemonic elites, whether political or economic.

II. Plebiscitary democracy

In her book *Democracy disfigured: opinion, truth and the people*[3], Urbinati maintains that there are currently three forms of *disfiguring* democracy: epistemic or technocratic democracy, populism, and plebiscitary democracy. I focus next exclusively on the third disfiguration.

Plebiscitary democracy can be described as possessing three characteristics. *The first characteristic* is that in plebiscitary democracy *the ideal of publicity* is understood as *a visual transparency of power mediated by the media*. In this case, the media presents and constructs a vision of reality without necessarily informing the citizen, because it presents him or her with selective information *elaborated and directed in order to impress people with images that end up arousing compassion or anger. What the author considers to be the aesthetic or theatrical aspect of plebiscitary democracy then takes place*. In this model, the role of the public forum is restricted to the functions of approval and transparency. "*Approval* is the core theme of the plebiscite as a sign of investiture and confidence" (URBINATI, 2014, p. 173-4). Transparency, for its part, rises as a requirement in exchange for approval, because "if the leader goes to the people for approval, the people are entitled to ask for the leader's public exposure" (URBINATI, 2014, p. 174). However, this does not refer to the demand for publicity and transparency mediated by institutions whose responsibility is to oversee and hold rulers accountable, in constant interaction with citizens' public opinion. Rather, it is a *visual transparency of power*, mediated by the media. This is fostered by "the decline of traditional parties,

[2] On the concept of indirect despotism, see Condorcet's (2012) very instructive essay.

[3] For a more detailed analysis of this book, see Consani (2017).

the role of television in constructing political consent, and the increasing weight of the executive as a result of the economic and financial emergency" (URBINATI, 2014, p. 172).

The second characteristic is that the *primary* function of the people and the citizen is to *watch*, i.e., it is up to the people to make a kind of *visual judgment*, while only a few have decision power (will), usually those individuals who are associated with the media. The role of the media is active, while that of the citizen is passive. In other words, *citizens act and judge mainly by what they watch, not by what they talk about in a debate with their fellow citizens and representatives*. It is a post-representative model of democracy because, on the one hand, it rejects popular participation and the idea of citizenship as autonomy and, on the other hand, it highly exalts "the role of mass media as an extraconstitutional factor of surveillance" (URBINATI, 2014, p. 172). In contrast to epistemic democracy, which seeks to substitute opinion for truth, and also in contrast to populism, which makes the opinion of the majority the will of the people as a whole and the central element of the political power of the State, plebiscitary democracy accepts the representative structure and defends democratic procedures, *but keeps the decision function (will) with the few and the visual judgment (opinion) with the people*. It is not exactly a matter of abdicating democracy that is based on political parties, but rather the affirmation of parties "as an oligarchic body that ceases to be an intermediary to become a direct occupant and by its own interest of the represented politics" (URBINATI, 2013, p. 89). Therefore, the media perspective "declares the end of the idea that politics is a mix of decision and judgment and makes politics a work of visual attendance by an audience in relation to which the basic question is about the quality of communication between the government and the citizens [...]" (URBINATI, 2014, p. 172). Thus, *the media's role is active while the citizen's role is passive*. In a sense, advertisement and marketing are elements that contradict the aspirations for political autonomy and freedom. It is a matter of "absence of transparency in transparency". The media *ends up feeding the public with selective information, crafted and directed with the intent of impressing people with images that come to arouse compassion or anger, and here lies the aesthetic or theatrical moment of this model*. However, such images and data are far from providing people with information about the most relevant political issues (cf. URBINATI, 2014, p. 210).

The third characteristic is that the "freedom of the public" is passive and not active. *We then have a public of spectators guided by the media, propaganda, advertising, and not a public of citizens guided by procedures*. This is an unleashed freedom, unattached and uncommitted to the procedure of debate and evaluation of information, therefore, it does not concern the freedom of an autonomous people. "The difference between a plebiscitarian gathering and a democratic citizenry resides essentially in the character and function of speech" (URBINATI, 2014, p. 225-26). While in a democratic assembly the discourse is a public right that each "person exercises together with others in the view of influencing, proposing, and evaluating decisions", in a plebiscitarian gathering the discourse is, on the contrary, "the prerogative of the crowd that is made of private persons who react to what they see [...], and is not for the sake of forming a political view or taking part in a debate but observing the doers act" (URBINATI, 2014, p. 226). In this sense, there is a shift in the value attributed to speech to what is seen and citizens start to act more based on what they watch passively than based on a speech or a debate conducted in good faith. In this regard, street, internet, or television rule is the rule of the crowd, unleashed freedom. What follows from that is the paradoxical phenomenon of contemporary democracies in which emerge protest movements that are so strong in their appearance, yet weak and impotent in their political impact to produce policies.[4]

[4] This is exactly why the so-called "springs" of the early 21st century, which in the case of Brazil was identified in the 2013 demonstrations, did not result in any relevant and lasting political achievement. Quite the contrary, they resulted in a democratic regression. It is important to remember that the trigger for the explosion of anger and indignation of the population was at the time the increase in bus fares, but one of the most substantial causes was the dissatisfaction provoked and, I would even say, manipulated by the "mensalão" process—a case of vote buying in the Brazilian

III. Juristocracy of audience

Despite being a phenomenon poorly studied in Brazil, juristocracy can be identified as an ongoing process in Brazilian courts since the early 21st century. As shown by Hirschl's study in the international context, Andrade's brief study, entitled "O Superior Tribunal de Justiça e os ricos: a cartilha neoliberal" ["The Superior Court of Justice and the rich: the neoliberal primer"], published in 2016, shows that also in Brazil the hegemonic elites, once they had been defeated at the ballot box, began to use the courts, in this case the Superior Court of Justice, to guarantee their interests, even if in breach of the constitution and its protective character of social rights.

The very phenomenon of a plebiscitary democracy has deeper roots in Brazil. The strength of the media's political action was decisive in the 1964 coup, in maintaining the military dictatorship, in the *Diretas Já* movement, in the election of Collor in 1989[5], and several other decisive political moments in Brazilian politics.[6] It is interesting to note that Urbinati is influenced by the analysis of the model of Berlusconi's Italy in the creation of the category of plebiscitary democracy. In the case of Brazil, besides the mainstream media being concentrated in the power of only five families, in recent years it is also necessary to consider the phenomenon of a media conglomerate [Record network] linked to evangelical churches.

However, what is here called juristocracy of audience presents itself as a more recent and complex phenomenon, which can be traced back to the last decade. The concept of juristocracy of audience brings together central aspects of Hirschl's concept of juristocracy and Urbinati's concept of plebiscitarian democracy. Nonetheless, it is not just a simple juxtaposition of conceptual characteristics, but the formation of a new amalgam with its own characteristics. Still, juristocracy of audience must entail if not all, at least most of the problems indicated by both categories. The following analysis is divided into four aspects.

1) *The performance of the media and the judiciary*: In a juristocracy of audience, there is a quite peculiar *modus operandi* in the relationship between media and judiciary power. On the one hand, the media strives to portray certain judges and judiciary officials as heroes or public personalities. They go on television shows, are invited to participate in award ceremonies, are interviewed on general political and moral issues, become headlines in magazines, characters in biographies, carnival puppets, characters in movies and television series, etc. In this context, the media acts very selectively in disseminating information and creating the image of these characters. This is done to the extent that it is keen to present information that is politically irrelevant, partial or distorted, but that assumes the force of truth, which is always linked to the personality of a judge in question. For their part, judicial officials assume their theatrical role and make their appearance in the media a daily element of their self-propaganda as heroes. Their work takes place under the light of the cameras, which is always edited according to hegemonic interests.[7] A symbiosis is

parliament that broke out in 2005—and a certain way of linking it to the mainstream media. A skeptical and pessimistic analysis of the 2013 demonstrations and the reason for their failure was developed in Klein (2015b).

[5] On how the Globo Television Network interfered in the 1989 election there is a documentary produced by Chanel 4 and directed by Simon Hartog entitled Beyond Citizen Kane (1993).

[6] The book *O quarto poder* [*The Fourth Power*] (2015), by journalist Paulo Henrique Amorim, proposes to report the political actions of the Rede Globo network in Brazilian politics.

[7] The *Mensalão* process can be appointed as the very beginning of the juristocracy of audience in Brazil. "With fifty-three sessions and four months of duration, the *Ação Penal 470* led to one of the longest trials in the history of the [Brazilian] Supreme Court. It was the most media-driven trial since the invention of TV—in Brazil, and possibly in the world, surpassing even the case of O. J. Simpson, the American TV celebrity accused of murdering his own wife. Three times a week, always starting at 2 pm, its sessions were broadcast live and in full by TV Justiça, the Judiciary Branch's TV channel, and by Globo News network. At night, a selection of strong statements and comments illustrated the news. In the next day, the subject was on the front page of the newspapers and, by the weekend, on the covers of the weekly magazines. Joaquim Barbosa, rapporteur of the case, became a well-known character in the streets. Masks of

established between the media and some representative figures of the judiciary, and from the combined action of both, the figure of the hero or justice figure emerges. This symbiosis is established and lasts to the extent that both have a similar agenda. If this agenda changes, the media shifts its attention to another judge who is willing to play this role.

2*) The way political and legal decisions are made*. In the juristocracy of audience there is a confusion between the criteria of political judgment and legal judgment. While political issues are decided according to alleged standards of impartiality, legal issues are viewed from the perspective of generality, all of which end up involving teleological, calculative, and prudential considerations. This inversion is often hidden under the veil of technical jargon, which means that political decisions of great impact cannot be understood by the ordinary citizen in their real political meaning and their profound implications. About this inversion, it is worth pointing out that not even Dworkin, whose theory acts as a bastion of judicial review and the constitutionalization of rights, would defend juristocracy in the strict sense, much less juristocracy of audience. It is remarkable that in Brazil one of the central aspects of his theory seems to be completely disregarded by those who intend to use it to justify judicial activism, namely, the meaningful distinction between "principles" and "policies". According to Dworkin (2002), the law deals with questions of principle, while politics involves questions of goals.[8] According to him, *it is not up to the judiciary to decide questions of goals, much less submit a principle to a goal*.[9] In this case, for example, the judiciary could never set itself the goal of fighting corruption, since this would be the prerogative of the legislative and executive branches, much less could it relativize a right (such as the right to due legal process or the right to the presumption of innocence) in order to achieve a goal. Moreover, and if this were not enough, because of the way the media gets involved in these issues, in the way they present news and disseminate information, the judiciary not only starts making political decisions, which is not its place, but *also casuistry and arbitrariness* become a constant in its actions, whether in legal or political issues. This judicial casuistry can be observed in the convenience with which the Brazilian Supreme Court has been making use of the principle of judicial self-restraint, i.e., it is not only a question of evaluating when the Supreme Court acts but also when it conveniently decides not to act, even though the cases in question are legally the same. This casuistic action could also be considered a form of lawfare, which is sustained by media hype and the way information is edited and presented to the public, or even hidden by scandals and the theatrics in the presentation of news or interviews. In trial process, scandals replace the trial, PowerPoint presentations take the place of evidence, and convictions have more force than legal reasoningin short, the legal procedure itself is transformed into a staging to function as a political tool. Actually, juristocracy of audience is not and cannot be sustained as a theory (in the normative sense), because for it to be so, it should at least be coherent. Recapturing here one of Kant's considerations, it could be said that juristocracy of audience can only be considered as a pseudo-practice because for it to be

his face were launched for the 2013 carnival. In the final weeks of the trial, journalists from various outlets speculated about the hypothesis of Joaquim Barbosa running for President of the Republic—in a country where the opposition to the Lula government has suffered three consecutive defeats since 2002." (LEITE, 2013, p. 9) The other phase of the development of the audience juristocracy occurred with the *Lava Jato* operation, whose main character was the judge Sérgio Moro. It is impossible to understand the directions of politics in Brazil without the media-emphasized political performance of the two main characters of these two processes, Supreme Court Justice judge Jair Barbosa and judge Sérgio Moro. Both figures received countless media appearances and awards. As for their judicial performances, technically considered, both were strongly criticized by important and renowned constitutionalists.

[8] "Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal. Principles are propositions that describe rights; policies are propositions that describe goals" (DWORKIN, 1977, p. 90).

[9] "I propose, nevertheless, the thesis that judicial decisions in civil cases, even in hard cases […], characteristically are and should be generated by principles not policy" (DWORKIN, 1977, p. 84).

considered as a practice (praxis) it should be founded on a theory, the first condition of which is coherence.[10] In this sense, juristocracy of audience is only a pseudo-practice that is sustained *in the juridical sphere* by a *fetishism of interpretation*, i.e., by the assumption that the judge is the main and legitimate interpreter of the law and that he possesses hermeneutical elements that guarantee that he goes beyond the written law; but actually what occurs is only a discretionary decision making that "his conscience" deems necessary, and, on the other hand, *in the political sphere*, by an excess of noisy information on facts and political issues and by the precariousness of the political debate.

3) *The role of the citizen in the juristocracy of audience*. In juristocracy of audience, the major political decisions are taken by the judiciary or are protected by it, in the sense that they occur according to its interests or under its protection. These same decisions are edited by the media and disseminated as moral and legitimate decisions. In this case, on the one hand, the choice of representatives who will decide on controversial and relevant political issues is taken away from the citizen; the citizen does not participate in the debate nor in the construction of proposals. The citizen is left to watch a performance that does not inform him or her about the real issues and implications of political decisions. The citizen loses his political autonomy to the extent that it is the judges or prosecutors who make the decisions, who in turn cannot be held politically accountable. Thus, political autonomy is replaced by the *passivity of the spectator* or, at most, by *the visual demonstration of the masses in the street*. The citizen becomes a viewer, a "follower" or a "fan" of judiciary political agents' profiles, or simply a marcher in demonstrations, so that he can only "support" or "show dissatisfaction" with what is decided by the judiciary in coordination with the mainstream media. All these acts vanish into themselves. There is no space and no institutional means for the citizen to deliberate and decide.

4) *Democracy and rule of law. From the perspective of the theory of democracy*, juristocracy of audience is not a development or a deepening, but a double pathology or a double disfiguration that causes democratic procedures and decisions to be increasingly insulated in technical cabinets to protect the interests of the hegemonic elite, at the same time that this occurs under the *staging* of superior caution and moral consideration for the interests of the people. *From the perspective of the rule of law*, the juristocracy of audience presents itself as a double disfigurement. On the one hand, the actions of the judiciary are no longer tied to the obligation of political neutrality but are allied to a political elite that, threatened by democratic procedures, finds in the judiciary a way to block and guarantee, under the "democratic staging" of progressive reforms, conservative reforms. In this context, it is also important to note that officials of the judiciary use their discretion and casuistry to blackmail the other branches power when contradicted by their decisions, especially when it comes to matters concerning the increase of their power or salaries and privileges. In Brazil, it has not become uncommon that the denial of some request from the judiciary is followed by the launching of a new investigative operation or the progress of some process that until now was conveniently "stalled". On the other hand, the juristocracy of audience undermines the legitimacy of the judiciary as an independent and counter-majoritarian power, a power whose function is to oversee and control the legislative and executive branches with the central objective of protecting individual rights and legal security. However, once the juristocracy becomes media-driven, the very officials of the judiciary begin to use the media to give them support and the appearance of legitimacy, even when they make decisions that violate basic constitutional guarantees or the procedural criteria of a fair and impartial legal process. From the perspective of the rule of law theory, the juristocracy of audience leads to the state of exception and barbarism.[11]

[10] On the concept of theory and practice and their intrinsic relationship, see Kant (2002, 57f / TP AA 08: 275ff).

[11] By barbarism I understand here the concept of barbaric state as defined by Kant, namely, of a state where there is no law, only power exercised by norms. On this see Kant (2006, 224f. /Anth. AA 07:330f)

The juristocracy of audience began in Brazil with the case of the *Mensalão* trial and deepened with Operation *Lava Jato*. The *Mensalão* trial profoundly disrupted both democracy and the foundations of the rule of law. *From the perspective of democracy,* there was the use of a legal structure as an instrument of political propaganda for the parties representing the hegemonic elite. The use of technical discourse as a political instrument assaulted the realm of politics, causing a kind of contamination that prevented the real political issues from being presented, debated, and decided. The juristocracy of audience has introduced a "virus" into democracy that destroys its host, since democracy is a political model that no longer deals with political issues, much less in a political way. This means that decisions that have a great impact on the lives of individuals are now covered up and passed over for much less relevant issues. In this sense, for months and years the focus of political debate shifted from questions of economic growth and income distribution, the guarantee of social rights, cultural and scientific development policies, the promotion of greater decentralization of investments among the states, and even the question of the guarantee of individual rights and due process to a discussion about the legal question of whether Lula knew or did not know about the *Mensalão* scheme. Well, this was an irrelevant question for politics. In the context of the *Mensalão* trial, this was a legal question that needed evidence to be answered. Since there was no evidence, the legal answer to this question should be "no", since it is a principle of the rule of law that everyone should be considered innocent until proven guilty. To bring the discussion about whether former President Lula knew or did not know about the alleged scheme to the center of political debate in the context of the arena of a legal process was like throwing a smoke bomb to cover up the issues that really matter in politics.

From the perspective of the *rule of law*, the *Mensalão* case has provoked a fissure in the basis of Brazilian constitutional law, which continues to widen and may come to a complete collapse. To the extent that a thesis such as the "dominion of the fact" thesis was introduced *ad hoc* into Brazilian criminal law, and in the context of a trial to incriminate individuals, specifically individuals from a particular party, a legal assault was committed that eroded the authority of law. The "dominion of the fact" thesis was strongly criticized by several important jurists who pointed out that, in the context of Brazilian law, it implied aggression against the principle of the due legal process. To challenge this principle does not just mean disregarding some element of the system, but it implies undermining the foundation of the whole notion of legal legitimacy and legal right. The fact that a judge may make mistakes in his or her judgment is part of the human administration of justice, but that a judge or a panel of judges should decide to suspend one of the fundamental principles on which the authority of law rests under the justification of a supposed "fight against corruption", that is something morally and institutionally unacceptable. A fault that tarnishes the entire moral integrity of the institution.

Lava Jato continued this process of corrosion of democracy and the rule of law. Just as Operation *Mani pulite* in Italy left the legacy of Silvio Berlusconi's corrupt and immoral government for a decade, it remains to be seen what similar course Brazil will have to take. For the rule of law, the *Lava Jato* operation is synonymous with misrepresentation, neglect, and violation. In short, it has introduced into the Brazilian State elements of a "state of exception" and eroded the moral foundations of the Brazilian judiciary. The germ of judge Moro's performance can be found in an article of his from 2004, in which he defends that it is *legitimate* for the judiciary to make a "wide use of the press", because otherwise, it would not be possible to condemn those who are investigated in the courts. Thus, according to him, "public opinion can constitute a salutary substitute, having better conditions to impose some kind of punishment to corrupt public agents, condemning them to ostracism" (MORO, 2004, 60). Note that this justification distorts and corrupts any legitimacy of the judiciary as a counter-majoritarian institution and guarantor of individual rights and due process of law. It is an anomaly in the rule of law theory. An exhaustive list of all the aggressions committed during the *Lava Jato* operation exceeds the objectives of this article. As the interest here is only to present the general characteristics and indicate examples of how this has been occurring, we will only make a small

sampling of the best-known cases: 1. Illegal recording and criminal disclosure of telephone calls involving the then President Dilma Rousseff; 2. Illegal recording and disclosure of the lawyers' office of those under investigation, directly attacking the principle of privacy between defendant and defense; 3. Unnecessary and inordinate use of the principle of coercive conduct; 4. Filming and illegal disclosure of images of the coercive conduct of former President Lula; 5. Misuse of the principle of preventive detention; 6. Selective leaking of delations to the media; 7. Lack of due respect for the right to defense; 8. Subversion of the principle of innocence; 9. End of legal security; 10. Last but not least, as exposed by the journalist Glenn Greenwald, the role of the judge himself as conductor of the investigation and prosecution process—therefore, the destruction of the judge's impartiality principle. It is important to emphasize that since Moro was only a first-instance judge, he was subordinated to higher bodies. The Federal Regional Court of the 4th Region dismissed a representation of abuse of authority directed against Moro under the following argument: *Lava Jato* deals with "unprecedented problems [which] require unprecedented solutions".[12] Translation: the higher instances of the Brazilian judiciary legitimized Moro to use means that were not established in law, i.e., he could act as if he were in a state of exception. In Brazil, *Lava Jato* introduced elements of a state of exception that culminated in the 2016 parliamentary coup of Dilma Rousseff and continued to have repercussions in the 2018 elections. Hence, all the reforms that are occurring and will occur in the coming years in Brazil, which repeal, if not in form at least in fact, the so-called citizen constitution of 1988, can be interpreted as consequences of the juristocracy of audience—the association of members of the judiciary with the mainstream media to enforce their political agenda.

4. Closing remarks

Juristocracy of audience can be considered a disfigurement of the democratic rule of law that has reached its peak. With the popular support created by the media, together with the illusion of impartiality and morality of the judiciary, not only democracy, but the rule of law itself is put in jeopardy. Juristocracy of audience shares at least three central characteristics with the fascist movements of the early 20th century: 1) The process of political isolation of individuals; 2) The extensive use of propaganda through the means of communication[13]; 3) The collaboration of the judiciary.[14]

[12] See http://justificando.cartacapital.com.br/2016/09/24/unico-votar-pela-representacao-contra-moro-desembargador-aponta-abusos-e-partidarismo/.

[13] Regarding the first two elements see Arendt (1967).

[14] Here it is worth considering the important article by Ingeborg Maus: "The primary anti-positivism and anti-formalism of Nazi doctrine corresponds to the logic of such functional descriptions. The correct application of the newly created Nazi law—assuming that it still contained 'directives' applicable to the judiciary—would have represented only a minor obstacle to the development of the judicial terror of the Nazi system. Politically motivated discriminations in the treatment of each individual case, such as those that were then demanded, are not compatible with the binding to any one 'law' that is in force for a minimum period of time. Thus in the National Socialist 'Letters to the Judges' the personality of the judges appears with great consistency as an important guarantee for 'correct' jurisprudence, whose tasks 'could only be performed by free, worthy human beings, endowed with inner clarity, bearing at the same time a great sense of responsibility and satisfaction in its execution'; the judiciary was supposed to represent the 'elite of the nation'. In the legal literature of the Nazi era this belief appears in a lapidary way: the ''king-judge' of Adolf Hitler's people must free himself from the bondage of the literalness of positive law'. The 'Letters to the Judges' also had the judicial elite in mind when they warned against slavishly using 'the crutches of the law', also stating that the judge was seen as a ''direct helper of the State". In reality, the link between legislation and judicial independence is revealed here in the form of its complete destruction. A Justice that does not need to derive the legitimation of its decisions from the laws in force becomes, at the very least, dependent on the political needs of the moment, degrading itself to a mere instrument of the administrative apparatus. This process was directed through a problematic moralization of the concept of law. In this way, in 1942, in the midst of the extreme perversion of German justice, the beautiful phrase appears: 'The judge represents the embodiment of the living conscience of the nation'" (MAUS, 2000, 197).

Political isolation occurs exactly because political debates have lost space[15] and individuals no longer follow and evaluate arguments or participate themselves in good faith in debates, but watch reenactments, become followers and likers of profiles and posts on social media, or simply serve as a means to spread offenses and lies (which are now called fake news). The propaganda effect, on the other hand, causes facts to be apprehended in a distorted way, in the sense of that Nazi motto that a lie told over and over again becomes the truth. At this point is important to distinguish party political propaganda, which is part of every democratic process, from political propaganda that is insidiously inserted in what purports to be an information medium, in what purports to be journalism. Finally, a strong political action of the judiciary for the implementation of "morality", which in the case of Nazism was the so-called morality of the German people. In this sense, it is also important to remember that the Weimar constitution was never formally repealed, it simply ceased to be followed to give way to the "will of the German people" expressed in the voice of the *Führer*, but which was also interpreted and carried out by the judges. To enforce this, the German judiciary clearly adopted an anti-positivist bias, that is, it subordinated the formality of the principles and rules of due process of law to allegedly moral ends.

Overcoming the juristocracy of audience and its social, political, and juridical consequences is no simple undertaking, since it necessarily requires at least three major reforms: 1) A reevaluation and development of democratic procedures so that democracy is not reduced to a routine electoral turnout held sporadically; 2) The substitution of a liberal conception of freedom of the press for a republican one;[16] 3) A strict circumscription and external evaluation of the powers and performance of the judiciary, which means, in my view, a resumption and development of the ideals of legal positivism, as established by the modern enlightenment. However, explaining and defending the importance of each of these reforms is beyond the scope of this article, and will be left it for another occasion.

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[15] As much as the presidential debates in Brazil were flawed and insufficient (due to the way they are organized), they still constituted an important moment of judgment formation and evaluation of proposals and competencies. In the 2018 election, the juristocracy of audience managed to elect a candidate who refused to participate in all the debates. Again here it is important to note: the elected candidate received public and notorious support from the same judge who used all legal and non-legal means to prevent the then main political opponent of the presidential candidate from being able to run in the election. Finally, and if this were not already enough to signal the veracity of the thesis that the juristocracy of audience is a real phenomenon underway in Brazil, the same judge was immediately invited to occupy a position in the government.

[16] On the concept of a republican freedom of the press, see my article Klein (2015a).

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