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Substantive constitutionalism, judicial empowerment, and judicial activism: an analysis from the brazilian perspective[1]

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Abstract

Contemporary constitutionalism is characterized by several distinctive features, including a clearer affirmation of constitutional supremacy, an expanded catalog of protected fundamental rights, and a redefined dynamic in the relationship among the constituted powers. This significant historical transformation of constitutionalism was consolidated in Brazil with the promulgation of the 1988 Federal Constitution. At that point, Brazil aligned itself with the model of substantive constitutionalism, materialized through the adoption of the Democratic Rule of Law. Within this framework, the Judiciary experienced an expansion of its powers and a remarkable increase in its presence within the Brazilian public sphere. The outcomes of this process are manifold and give rise to specific theoretical formulations. The present study aims to analyze this framework, particularly through the lens of the moral dimension reintroduced as a method of legal interpretation by the so-called Neoconstitutionalism, its relationship with judicial discretion, and its influence on the legitimization of judicial activism. The findings of the research reveal the existence of a genuine paradox within the contemporary legal order, driven by the expansion of the Judiciary's powers under substantive constitutionalism. The methodological approach employed was the hypothetical-deductive method, and the research technique consisted of a bibliographic review based on books and scholarly articles addressing the topic.

Keywords: Democratic Rule of Law; Judicial Activism; Judicial Empowerment; Neoconstitutionalism; Separation of Powers.

1 Introduction

Modern constitutionalism has undergone a long and complex trajectory marked by significant transformations. Among these changes, the most noteworthy occurred in the aftermath of the Second World War, directly linked to the principles of constitutional supremacy and rigidity. Prior to that period, constitutions were generally regarded as fundamental laws, yet they lacked the elevated normative status and the substantive limitations that are now clearly established in most contemporary constitutional frameworks.

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In this historical context, there was a discernible shift from a formalist, legalistic model of constitutionalism to one characterized by guarantees and substantive commitments. This transition positioned the protection of fundamental rights and the consolidation of democratic regimes as central elements of the respective legal orders (Ferrajoli, 2022).

The transformation in question took place in Brazil with the enactment of the 1988 Federal Constitution. This was clearly demonstrated when the Constitution came to be known as the "Citizen Constitution" and when Article 60 of its text established a set of substantive limits on constitutional amendments. Moreover, this shift was explicitly affirmed in Article 1, which defined the model of the state adopted by the Constitution as a Democratic Rule of Law State, rather than merely a Legal Rule of Law State.[2]

Understanding this specificity is essential to the central theme of this article, given that with the rise of the post–World War II substantive or rights-based constitutionalism, the Judiciary can no longer be regarded as a silent branch of government, as originally conceived by Baron de Montesquieu (1982). On the contrary, within this new constitutional framework, the Judiciary has come to be recognized as the branch that holds the final word.[3]

It is within this context that the so-called judicialization of politics (the expansion of demands brought before the Judiciary) and judicial activism (the use of the Judiciary as a means of shaping public policy) gain prominence. These phenomena are further driven by a new theoretical framework—referred to as Neoconstitutionalism, by reinforcing the role of constitutional principles, reintroduced morality as a central element in legal interpretation. This shift marked a departure from the long-standing dominance of normativist positivism in legal thought, positioning moral reasoning as one of the prevailing approaches to understanding the law.

In this regard, the present study aims to analyze this framework, particularly through the revival of morality as a method of legal interpretation under the paradigm of Neoconstitutionalism, its relationship with judicial discretion, and its influence on the legitimization of judicial activism. This analysis is conducted within the broader defense of constitutional democracy and a rights-based, protective vision of the law. (Ferrajoli, 2022). In this context, the central question of this research is whether the emergence of

[2] This distinction is fundamental between the legal constitutionalism that preceded World War II and the substantive constitutionalism that emerged in its aftermath. With respect to the concept of the Democratic Rule of Law State, further insights can be found in the work of Gilmar Antonio Bedin on the subject (2023).

[3] What propelled this transformation was the ease with which the leaders of totalitarian movements were able to amend the constitutions of their countries and, as a result, cloak many of the atrocities committed before and during World War II with a veil of legality (Ferrajoli, 2022).

Neoconstitutionalism contributed to the expansion and legitimization of judicial activism in Brazil. The answer is affirmative and indicates that substantive constitutionalism has produced ambivalent outcomes: it was instrumental in empowering the Judiciary while simultaneously reinforcing the role of morality in legal interpretation and strengthening the rise of judicial activism.

The methodology adopted for this analysis was the hypothetical-deductive approach, and the research technique employed was bibliographic research, based on the examination of scholarly articles and books on the subject. The paper is structured into three main sections. The first section demonstrates that, in contemporary legal theory, jurists—particularly through the lens of Neoconstitutionalism—have revived the influence of moral reasoning in the law. The second section highlights how this movement has elevated the importance of legal principles, which, through the application of balancing techniques, has allowed for a certain degree of relativization of other legal rules within the legal system. Finally, the third section draws attention to the connections between Neoconstitutionalism and judicial activism, as well as the risks this phenomenon poses to the current Brazilian constitutional order.

2 The Revival of Moral Influence in Law and Neoconstitutionalism

The separation between law and morality has been a recurring theme in legal theory since the onset of the modern era, reaching its peak with the leading proponents of legal positivism. Although positivism encompasses a wide range of doctrines, with various branches and theorists offering distinct perspectives, a core element that distinguishes it from the natural law tradition is articulated by H. L. A. Hart. He argues that law does not necessarily need to conform to moral or justice-based criteria in order to be considered valid law (2009, p. 240).

In addition to the position advanced by Herbert Hart, another prominent figure in this debate is Hans Kelsen. In his renowned work *Teoria Pura do Direito*, Kelsen established the specificity of the legal phenomenon as a system composed of valid norms (Kelsen, 2006)[4]. In distinguishing law from morality, Kelsen asserts that law is an autonomous and self-sufficient normative order, and therefore is not subject to the value judgments of an alleged ideal

[4] A great explanation of Hans Kelsen's positivist proposal can be found in his text *What Is Legal Positivism?* (Kelsen, 2023).

law—whether derived from the cosmos, as in cosmological natural law typical of the ancient world; from God, as in theological natural law characteristic of the Middle Ages; or from human nature, as in anthropological natural law emerging in the early modern era (Bedin; Lucas, 2015).

Thus, law is not only independent of morality, but it also possesses its own criterion for determining the validity of its norms. This criterion is their conformity with the so-called basic norm (which may be the first historical constitution of a country or a presupposed or hypothetical norm) within the respective legal system (Kelsen, 1986). The object of legal science is, therefore, valid law—law that is in force—not an ideal law, nor law that ought to be considered as such merely because its content is just. In this sense, the only law that truly exists is positive law.

In other words, Kelsen (2006) argues that the legal scholar must, in the execution of their scientific (descriptive) work on law, distance themselves from anything that is not strictly legal and regard only valid law as relevant—without making any value judgments about it. From this standpoint, the legal scientist will, according to Hans Kelsen, be able to construct a science free from political considerations and the moral projections of existing social groups, thereby ensuring its accuracy and rigor. The focus, then, is solely on the formal elements of the legal experience—its universal aspects and, in a certain sense, the enduring components of its long historical trajectory.

It thus becomes clear that the role of the legal scientist is fundamentally different from that of the politician or the legal philosopher. The latter are expected to question the law in force and examine its underlying values; the former is not. The task of the legal scientist is to describe the existing law—that is, the valid law. In contrast, the politician or the legal philosopher must ask of the law: Is this law democratic? Is this law just? These are critically important questions for legal positivism's broader context, yet they are not pertinent to legal science in its strict sense. Therefore, it is evident that, for Kelsen, the core of legal positivism is, in short, that legal science must be an exact, descriptive, and rigorous science of law, and its sole object is valid positive law (Bedin; Lucas, 2015).

Is this perspective still acceptable today? It is difficult to offer a definitive answer. What is certain, however, is that these ideas occupied a significant place in legal science and contributed to the development of constitutional democracy (Ferrajoli, 2022). This, of course, did not imply the formation of a consensus. On the contrary, many prominent jurists, such as Miguel Reale (2006), challenged such assumptions. The aforementioned Brazilian scholar

defended the so-called "theory of the ethical minimum," which asserts that law represents only a minimal portion of morality that has been declared obligatory—standing in opposition to Hans Kelsen's thesis on the separation between law and morality. This position does not imply a conflation of law and morality, but rather affirms that legislation, as the primary formal source of law, necessarily incorporates axiological demands arising from social processes (Reale, 2006).

Thus, it becomes evident that positivist ideas, such as those advanced by Kelsen, have always faced significant criticism. However, it was only more recently, with the emergence of the so-called Neoconstitutionalism[5], that the rapprochement between law and morality was reinforced within broader legal spaces. This new theoretical framework, by strengthening the role of principles—as noted by Sarmento (2007)—created significant room for the influence of morality within the legal domain. This shift occurred because principles came to be regarded as the primary sources guiding judicial decisions, establishing a new foundation for the interpretation and application of legal norms and, as a result, incorporating moral reasoning into the legal sphere[6]. Consequently, a substantial debate has emerged, given the absence of consensus or universally accepted criteria on how these newly incorporated legal values under the new constitutionalism should be applied—and, more importantly, to what extent these precepts can be distinguished from mere moral judgments.

Despite this divergence, it seems evident that what is commonly referred to as Neoconstitutionalism establishes a clear distinction between traditional constitutionalism—which is more focused on constitutional rules—and a new model of constitutionalism that is more grounded in principles. This view is shared, for example, by Luís Alberto Barroso (2005). For this reason, the author supports such a distinction and argues that the difference between the old and the new models of constitutionalism lies not only in the role of legal norms but also in the role of the judge. According to Barroso, abstract norms are no longer sufficient to resolve all legal disputes satisfactorily, as in many cases "[…] the constitutionally appropriate answer can only be produced in light of the specific problem and the relevant facts, analyzed topically" (p. 1). Furthermore, with regard to the

[5]Neoconstitutionalism may be defined, in brief, as a mode of legal interpretation that prioritizes principles and seeks to construct more substantive legal solutions within a legal context commonly referred to as post-positivist. In Brazil, as Barroso notes, its development is closely associated with the country's redemocratization process, the promulgation of the 1988 Federal Constitution, and the effort to ensure greater effectiveness of fundamental rights (2006). With regard to Neoconstitutionalism more broadly, reference may be made to the volume edited by Miguel Carbonell (2003).

[6] This does not mean, however, that the boundaries between law and morality are abolished. Rather, it makes clear the existence of a connection, "to the extent that the legal system itself incorporates, at its highest level, principles of justice, and the legal culture begins to 'take them seriously.'" (Sarmento, 2015, p. 5.

judge's function, it is understood that the judge must take part in the creation of law by delivering case-specific solutions, thereby complementing the role of the legislator, rather than merely performing a task of technical interpretation.

This represents a significant shift that clearly signals a departure from the legal framework traditionally associated with legal positivism. This raises an important question: What is the origin of this movement? According to Luís Roberto Barroso (2006, p. 3), this movement developed in Europe,

> [...] throughout the second half of the twentieth century, and in Brazil, following the enactment of the 1988 Constitution. The philosophical environment in which it emerged was that of post-positivism, marked by several key paradigm shifts at the theoretical level: the recognition of the Constitution's normative force, the expansion of constitutional jurisdiction, and the development of new categories of constitutional interpretation. As a result of this process, the constitutionalization of law entails the diffusion of the values enshrined in the principles and rules of the Constitution throughout the entire legal system—primarily through constitutional adjudication at various levels.

Thus, it is clearly asserted that the direct applicability of the Constitution to various situations may lead to the recognition that several norms can be declared unconstitutional for violating fundamental constitutional principles. In Brazil, this historical shift is even more significant. As Luís Roberto Barroso notes, the demand for justice on the part of:

> [...] Brazilian society and the institutional rise of the Judiciary have triggered an intense judicialization of political and social relations. This development amplifies the relevance of the constitutional theory debate concerning the necessary balance between constitutional supremacy, judicial interpretation of the Constitution, and the functioning of the majoritarian political process (Barroso, 2006, p. 3).

In this sense, it becomes evident that, in the author's view, the current Brazilian Constitution and the new societal demands have inaugurated a new movement in the country—one that introduced a fresh perspective contributing to the institutionalization of the Democratic Rule of Law State and to an emancipatory framework for the Judiciary's role. This perspective led a group of prominent jurists to formulate the theory of Neoconstitutionalism, which advocates for the realization of fundamental rights through judicial adjudication and aims primarily at the promotion of democracy. This objective is to be achieved through a hermeneutic approach grounded in fundamental principles and, consequently, through the active role of the Judiciary.

Thus, alongside the emphasis on the role of law and the Constitution, particular attention is given to legal actors in the application and interpretation of the law and,

consequently, to the functions of the Judiciary within a Democratic Rule of Law State. From the standpoint of this theoretical perspective, the notion of law as a self-sufficient and autonomous system no longer holds the same persuasive force within legal thought. On the contrary, it may be said that the author reveals an underlying assumption of legal insufficiency—one that requires supplementation through extra-normative and, arguably, even extra-legal resources.

It is within this context that a new theoretical framework emerges - post-positivism -which, as Barroso notes, promotes an axiological reading of the law. In other words, it enables a value-based interpretation of legal norms by the adjudicator, clearly reestablishing the connection between law and morality, and bringing legal science closer to legal philosophy. This shift is significant and, unsurprisingly, not universally accepted among jurists. On the contrary, such ideas have sparked intense debate, both in Brazil and abroad. However, this debate does not carry the same intensity internationally. For this reason, Dimoulis emphasizes that, in contrast

> unlike the positions taken by Professor Barroso and other Brazilian scholars, the international debate does not consider the (alleged) rupture between an old and a new constitutionalism to be decisive. What is regarded as truly significant is each constitutional interpreter's stance on the thesis of the connection between law and morality—an idea that, in contemporary thought, is supported by reference to constitutional principles and values, and is embodied by "activist" constitutional courts that apply balancing techniques. From this perspective, those who may be deemed "constitutionalists" (or "neoconstitutionalists") are the moral theorists who view the connection between law and morality as present, necessary, and operative within modern constitutional states (Dimoulis, 2009, p. 12).

Thus, it may be said that, although a series of changes within the constitutional movement can be identified, the debate remains unresolved. For this reason, Dimoulis (2009) emphasizes that, even though the thesis of Neoconstitutionalism embraces the idea of constitutional supremacy and the need to develop mechanisms to safeguard it, the central point of contention lies in the use of morality as a legitimate foundation for achieving such aims—what he refers to as "legal moralism" (2009, p. 13). Accordingly, the author stresses the importance of reflecting on this matter, as the interpretative practices associated with Neoconstitutionalism may, in fact, be reviving outdated forms of constitutional adjudication.

In addition to Dimoulis (2009), another prominent jurist who voices opposition to Neoconstitutionalism is Lenio Luiz Streck (2011). In his view, the position adopted by the proponents of so-called Neoconstitutionalism introduces no real innovation; rather, it represents a clear manifestation of the weakening of law's autonomy. Thus, it becomes evident that Neoconstitutionalism is a controversial movement, yet one that reflects a more

complex constitutional landscape and the increasing presence of the Judiciary within society. Moreover, it highlights the growing importance of principles and, as a consequence, points to the expansion of judicial discretion and the legitimization of judicial activism.

3 The Current Preference of Jurists for Principles and the Risks Inherent in the Idea of Balancing

As previously noted, the constitutionalism that emerged after the Second World War is both more substantive and more rigid than its predecessor. This means that constitutions characteristic of this movement tend to be denser and more detailed. One consequence of adopting this profile is that they are also more principle-based. In other words, they rest more explicitly on fundamental value choices concerning collective life, hence the concept of Neoconstitutionalism, which holds that principles should prevail over rules. This, however, remains an interpretative choice (Ávila, 2006).

In reality, the constitutions in question contain both principles and rules within their text, and contrary to the claims of Neoconstitutionalism proponents, there is a greater presence of rules than principles in their body. In this regard, it can be said, for example, that the 1988 Brazilian Federal Constitution possesses both a principled and a regulatory character, and this constitutional configuration may reflect the original constituent power's desire for a balanced structure. In other words, it is a text grounded in fundamental values of human coexistence while simultaneously providing a set of norms that offer precise, predictable, and secure formulations—thereby limiting the possibility of discretion or arbitrariness on the part of legal practitioners due to the more objective nature of its provisions.

Hence, Humberto Ávila's assertion that a careful reading of the Constitution does not allow for the categorical conclusion that

> [...] principles are not quantitatively or qualitatively more expressive than rules in the current Brazilian constitutional order. It can only be affirmed that the legal system is composed of both rules and principles, each with distinct and complementary effectiveness. Thus, the assertion—made abruptly and without qualification—that the normative paradigm has shifted or should shift "from rule to principle," and the methodological shift from "subsumption to balancing" that follows, finds no support in the Brazilian constitutional framework (Ávila, 2009, p. 6).

In other words, it can be said, in summary, that "the strictly universal statement that all post-war constitutions are principle-based, and the numerically universal statement that the norms of the 1988 Brazilian Constitution are principle-based or have a principle-based matrix, find no referential support in the Brazilian legal system" (Ávila, 2009, p. 6). It should thus be recalled that the emphatic defense by so-called Neoconstitutionalism of the supremacy of principles—and consequently the strong principled reading of post-war constitutions—is a consequence, albeit not an exclusive one, of its most important political, legal, and axiological assumptions (namely, a more progressive vision of social life). These assumptions promote a legal vision closer to certain significant sectors of society, while simultaneously distancing it from other important sectors. Moreover, they give rise to a series of significant legal issues. Among the most prominent is the idea of balancing as a method to resolve conflicts between fundamental rights.

The idea of balancing is a central subject of study in the work of the German jurist Robert Alexy [7]. Indeed, the author develops a set of reflections on the possibility of conflicts between fundamental rights and the metaphor that, in such cases, they must carry different weights, taking proportionality into account. However, this exercise must be undertaken with caution, as "the more intensive the interference with a fundamental right, the more serious the reasons justifying it must be" (p. 78). Accordingly, balancing must follow three distinct stages: "in the first stage, the intensity of the interference must be determined. The second stage then concerns the importance of the reasons justifying the interference. Only in the third stage does the balancing proper and strict occur" (Alexy, 1999, p. 77).

Building on this theoretical framework, so-called Neoconstitutionalism began to advocate for a broad application of balancing rights. This stance has sparked various criticisms, among which the one formulated by Humberto Ávila (2009) stands out. According to Ávila, the form of balancing employed by Neoconstitutional Theory is overly broad, as it has also been applied in conflicts between constitutional principles and constitutional rules. In the first case, difficulties arise due to the abstract nature and broad scope of principles. In the second case, the situation is even more complex, as the procedure allows the judge, when faced with an applicable infraconstitutional norm, to invoke a constitutional principle to assert its supremacy over that norm (Ávila, 2009). This expands the interpreter's discretion and permits the replacement of the traditional subsumptive process with the judge's subjective will.

[7] The author has several books translated into Portuguese in Brazil. One of his most important translated works is *Theory of Fundamental Rights* (2008).

Thus, it can be said that Neoconstitutionalism effectively elevates constitutional principles to become virtually the sole relevant legal references, causing significant detriment to other norms. As Ávila cautions, principles and rules perform different functions within the normative system (2009). While it is the characteristic function of rules to conclusively resolve potential conflicts, this does not hold true for principles, which are subject to varying interpretations. In the words of the author:

> It should be reiterated that rules and principles perform different functions, and therefore it is inappropriate to speak of the primacy of one norm over another. Nonetheless, following the reasoning here criticized, one might argue that principles, from a qualitative standpoint, hold greater importance than rules—that is, even though there are more rules than principles, principles, due to their effectiveness functions, would still possess a relatively higher significance compared to rules (2009, p. 5)

However, this is highly debatable. In this regard, the author asserts that the aforementioned scenario could only occur in two ways:

> In the case of constitutional rules, constitutional principles would operate either by displacing immediately applicable constitutional rules or by modifying their hypotheses through teleological extension or restriction, even beyond the minimal semantic meaning of the words; in the case of infraconstitutional rules, constitutional principles would act through interpretative, blocking, and integrative functions with respect to existing infraconstitutional rules [...] (2009, p. 5).

However, from a qualitative standpoint, this does not lead, in the author's view, to the prevalence of principles over rules (2009). In other words, Humberto Ávila warns that despite the undeniable importance of principles, infraconstitutional norms cannot be undervalued, as they play a central role in regulating collective life and are legitimate products of legislative action. Therefore, only in exceptional cases (such as unconstitutionality) may rules be set aside, since they too derive from the same democratic constitutional order. As it stands, the risk is an accumulation of judicial decisions based solely on the norms at the apex of the legal system, potentially disrupting the integral structure of law.

Thus, the central thesis is that Neoconstitutionalism, by excessively strengthening principles and balancing, may lead to judicial subjectivism, thereby undermining the hetero-limiting character of law. For this reason, the fundamental issue the author emphasizes, is not to deny the existence and importance of principles, but to highlight that they should not always be the primary basis for judicial decisions, to the exclusion of other applicable norms. Accordingly, he argues that,

> Without adherence to these requirements or stages, balancing becomes merely a non-legal technique that explains everything but guides nothing. In this sense, it

> represents nothing more than a "black box" that legitimizes "decisionism" and formalizes "moral intuitionism." It should be clarified that defending balancing without simultaneously and upfront presenting intersubjectively controllable criteria for its application doctrinally legitimizes its excessive and arbitrary use, rendering any subsequent recognition of its distortion worthless (p. 12).

From the foregoing, it can be said that this is an important warning, as the criteria adopted by so-called Neoconstitutionalism may weaken the application of law and foster judicial discretion, ultimately leading to excessive subjectivism and the denial of the very content of the Constitution. Consequently, the absence of such caution allows judges to invoke various pretexts to justify their decisions, revealing a manifestly discretionary and subjective character in their rulings. The relevant criticism here is that the use of any principle by the adjudicator, without proper reasoning and combined with an excessive attribution of its meaning, may constitute an overly subjective tool, permeated by moral values.

In addition to Ávila, several other jurists have also criticized the use of the balancing concept. Lenio Luiz Streck (2020), for example, argues that the mode of balancing advocated by Neoconstitutionalism may represent a misinterpretation of the ideas formulated by Robert Alexy, losing much of its hermeneutic rigor due to an excessive subjective bias and the incorporation of numerous moral values (2020).

Thirdly, one can also recall the views of Daniel Sarmento and Cláudio Pereira de Souza Neto. According to these authors, many judges, "[...] dazzled by principles and the possibility of seeking justice—or what they understand as justice—through them, have begun to neglect their duty to provide rational foundations for their judgments. This 'euphoria' with principles has opened much greater space for judicial decisionism" (2007, p. 144). Clearly, this decisionism is disguised under the guise of "political correctness, proud of its grandiloquent jargon and fiery rhetoric, but always decisionism" (2007, p. 144). Thus, a new legal trend is taking shape.

This new legal trend carries significant consequences for the traditional way of conceptualizing the legal world. Most importantly, legal rules are increasingly relegated to a secondary position, while constitutional principles have become veritable "magic wands." Indeed, with them,

> [...] the judge on duty can effectively do almost anything they wish. This practice is profoundly harmful to values that are fundamental to the Democratic Rule of Law. It is detrimental to democracy because it allows unelected judges to impose their own preferences and values on the governed, often overriding the deliberations of the legislature. It undermines the separation of powers by blurring the boundary between judicial and legislative functions. Moreover, it threatens legal certainty by making the law far less predictable, rendering it dependent on the idiosyncrasies of

> the judge on duty and thereby impairing the citizen's ability to plan their life in advance based on prior knowledge of the legal system (Sarmento; Souza Neto, 2007, p. 144).

Thus, one of the main impacts identified by Sarmento and Souza Neto (2007) is the direct weakening of legislation and its role as the primary normative source of law. This poses a significant problem, as it is expected that within the public sphere, the legislator—as an elected representative—utilizes a wide array of criteria in making political decisions. Indeed, this prerogative is a constitutive element of deliberative democracy and integral to the legitimacy of the legislative process, but it cannot be tolerated in the same manner when it comes to the Judiciary. Accordingly, the Judiciary, as the holder of primacy in constitutional review, must exercise its countermajoritarian function with restraint, respecting the prerogatives of the Legislature under the risk of substituting democratic choices with the personal interpretations of judges.

Furthermore, this normative "expansion" can create new precedents and thereby establish new decision-making standards. The more such decisions are encouraged, the more legitimacy they gain from the courts. Both the legal reasoning and the resulting decisions serve as important legal sources and often assist in controversial and complex cases. Therefore, it is always necessary to exercise special caution in situations requiring more complex legal interpretations.

However, it is important to remember, as Samuel Sales Fonteles (2025) points out, that there is not necessarily a "hierarchy" among normative interpretative methods for resolving conflicts. On the contrary, the interpreter is free to select the most appropriate approach in relation to the specific case. Nonetheless, it is equally important that decisions are accompanied by coherent and robust reasoning, not only presenting the justifying rationale but also explicating the inadequacy of alternative interpretations. As Dworkin (2014) reminds us, law possesses integrity, and "legal propositions are only true if they are contained in or derived from principles of justice, fairness, and due process that offer the best constructive interpretation of the community's legal practice" (2014, p. 272).

Understanding the aforementioned idea is fundamental. The existence of discretionary decisions typically leads to a sense of legal uncertainty and, consequently, may contribute to a legitimacy crisis for the Judiciary. Thus, the Judiciary faces the challenge of consistently providing society with clear and robust arguments demonstrating that the decision rendered best realizes the values embedded within the legal order—even when confronted with vague legislation. Accordingly, the Judiciary must always demonstrate that it is concretizing,

through its decisions, the values contained in the norms, thereby reducing legal uncertainty. This explains some of the most forceful criticisms leveled against so-called Neoconstitutionalism, as certain assumptions underpinning it possess significant potential to expand judicial discretion and, as a result, in some situations, reinforce the legitimacy of judicial activism.

4 Neoconstitutionalism, Judicial Activism, and the Judicialization of Politics

The presence of judicial activism in Brazil is driven by several factors. Among these, this text has chosen to highlight the contributions of so-called Neoconstitutionalism. Hence, the previous section's focus on critiques of this movement. However, before proceeding with this analysis, it is important to distinguish the practice of judicial activism itself from the phenomenon of the judicialization of politics. The latter is largely the result of a factual situation experienced by contemporary Brazilian society in response to state inefficiency, rather than a deliberate choice by the Judiciary. Thus, judicialization of politics often arises from the inability or even omission of the other branches of government to adequately and promptly respond to certain societal demands, which then fall to the Judiciary because it has no alternative when called upon[8].

Therefore, the judicialization of politics is a circumstance arising from the adopted constitutional model and the complexity of modern societies, rather than a deliberate exercise of political will by the Judiciary (Barroso, 2011). The case of judicial activism, however, is quite different. In this scenario, reality shows that the Judiciary deliberately chooses to expand constitutional interpretation and its scope for political reasons. Thus, Barroso asserts that activism is an intentional form of judicial participation in the pursuit of constitutional effectiveness, resulting in interference within the domain of the other branches of government.

For this reason, Barroso (2011) notes that the activist posture of the Judiciary may manifest itself

> [...] through various behaviors, including: (i) the direct application of the Constitution to situations not expressly contemplated in its text and independently of any action by the ordinary legislature; (ii) the declaration of unconstitutionality of normative acts issued by the legislature based on criteria less stringent than clear and

[8]For this reason, its reduction, as Lenio Luiz Streck notes, "[...] therefore does not depend solely on measures taken by the Judiciary, but rather on a myriad of actions involving the commitment of all constituted powers" (Streck, Tassinari, Lepper, 2015, p. 10).

> manifest violations of the Constitution; and (iii) the imposition of conduct or abstentions upon public authorities, particularly in matters of public policy (Barroso, 2011, p. 6).

Thus, it is clear, as highlighted by Streck, Tassinari, and Lepper (2015), that judicial activism arises from behaviors adopted by judicial bodies in the exercise of their regular institutional functions. Although such actions may appear lawful and appropriate, they ultimately exceed their proper functions and produce consequences for the other branches of government. By presenting a response purportedly embraced by democratic constitutionalism, they in fact reflect the will of the adjudicator[9]. As the author states, "[...] one encounters a conception of activism that can be summarized as the configuration of a Judiciary vested with supremacy, possessing competencies not constitutionally recognized" (2015, pp. 10–11). It is precisely through the defense of this exaggerated protagonism and supremacy of the Judiciary that judicial activism manifests. Therefore, judicial activism presupposes a volitional element.

Thus, it becomes clear that the role of the Judiciary is markedly different from the phenomenon of judicialization of politics, which—as previously mentioned—has positive aspects. Judicial activism, on the other hand, is invariably negative because it undermines the principle of separation of powers and weakens the principle of the Democratic Rule of Law[10]. In this regard, Streck reminds us that in times of unchecked judicial activism, "[...] a kind of empire of the will is established. Activism takes root in supposedly moral utilitarianism and the will to power of those who practice it, which is highly dangerous to the democratic regime. Violation of the Constitution is always a threat to democracy" (2015, p. 59).

Thus, reflecting on judicial activism and combating its manifestation is a fundamental task. Therefore, the following question becomes important: What is the origin of this practice? Clarissa Tassinari argues that the judicial activism currently present in Brazil has been strongly influenced by the law practiced in the United States of America (2013). The author notes that, unlike Brazil, the United States has been discussing the problem of judicial

[9] Therefore, the authors argue that, even in situations involving democratic crises—such as those recently experienced in Brazil—the increased participation of the Judiciary must be approached with caution (Streck; Motta, 2020).

[10] In contrast, Barroso (2011) argues that the practice of judicial activism can contribute to progress. In this regard, he acknowledges that the Judiciary has, in certain instances, adopted an explicitly activist posture in recent years, and that such practices have, at times, formed part of the solution to societal challenges. However, he also recognizes the potential risks involved, since it is not within the judges' institutional mandate to implement political reforms or to rectify governmental inefficiency. To support the notion that an activist stance may yield certain benefits, Barroso cites examples of cases decided by the Federal Supreme Court in which the Court fulfilled its role as guardian of the Constitution. These cases include, among others: ADI 3.510/DF (constitutionality of therapeutic research involving embryonic stem cells), Habeas Corpus 91.952/SP (restrictions on the use of handcuffs), ADI 2.649/DF (free public transportation for individuals with disabilities), and Habeas Corpus 87.585/TO (possibility of imprisonment for nonpayment of child support).

activism since the early 19th century but also points out that the U.S. legal system (common law) is very different from the Brazilian legal system (civil law). She further emphasizes that the importation of judicial practices from the U.S. Judiciary into Brazil following the promulgation of the 1988 Constitution was a significant mistake, as it was assumed that the enforcement of the Constitution depends almost exclusively on the decisions of the Judiciary.

The decisions in question are important, but the effectiveness of the Constitution depends on various initiatives and involves all branches of government and all sectors of society. Therefore, it is mistaken to believe that the Constitution can be enforced, as many activists argue, solely through the mere will of judges. In this regard, the aforementioned author (Tassinari, 2013) links the phenomenon of judicial activism to so-called Neoconstitutionalism and its advocacy for the Judiciary's prominent role in the realization of fundamental rights. While this initiative may be significant in specific cases, it generally serves only to legitimize activist practices.

Next, Tassinari (2013) recalls some examples. One of them involves the judgment of Direct Action of Unconstitutionality No. 4277 (originally ADPF No. 178), an attempt by the Office of the Attorney General to regulate same-sex unions and guarantee them the same rights as heterosexual unions through a decision by the Judiciary. The issue raised by the author is that the constitutional text and the Civil Code are clear when addressing the matter, specifically referring to a man and a woman. Therefore, the Judiciary, through the Supreme Federal Court, cannot usurp the powers of the Legislative Branch by attributing a different meaning to what is explicitly provided in the already clearly established norms.

In this case, the jurist argues that, although such matters should have legal support and be recognized as a relevant cause subject to regulation, the Judiciary could not have ruled contrary to what is established in the constitutional text. Therefore, the author holds that,

> In addressing this case, the focus is not on debating, as the Supreme Court did through its justices' votes, the sociological, biological, and psychological factors surrounding the existence of same-sex unions or whether they deserve legal protection. The objective is to demonstrate that the means employed to this end are inadequate, and to critically observe, from a legal standpoint, how judges and courts behave when confronted with such controversial issues. The final question, therefore, is as follows: what if the Supreme Court had ruled against recognition? It is along these lines that, regardless of the outcome, judicial activism—even when progressive—cannot be considered a suitable means to realize rights, simply because it leaves society at the mercy of fluctuating opinions upon which the guarantee of rights comes to depend (2013, p. 87).

Thus, the author's emphasis was not on the important aspects of analyzing political convenience or good intentions, but rather on the form, procedure, and potential impacts. In

other words, the concern was whether such a right was established by legislation—not whether the decision contributed to advancing an important political cause—since this does not fall within the Judiciary's institutional competencies. The author's focus on this case was solely to draw attention to the fact that a judicial creation of law, beyond being a notorious precedent.

A second important example is mentioned by Lenio Luiz Streck. This case concerns the judgment by the Supreme Federal Court of Writ of Mandamus No. 32,326. The situation involved the judicial conviction of federal deputy Natan Donadon for the crimes of embezzlement and criminal association. The jurist argues that, in the writ of mandamus subsequently filed by deputy Carlos Henrique Sampaio, the Supreme Court ignored the explicit constitutional provision that the determination to revoke the mandate of a parliamentarian convicted by the judiciary is an exclusive prerogative of the respective legislative chamber, not the Judiciary (Article 55, §2 of the 1988 Federal Constitution). This was completely disregarded by the Supreme Federal Court, as Minister Luís Roberto Barroso, the rapporteur of the case, opted to suspend the effects of the legislative decision provisionally—even though the Chamber of Deputies had expressed its intention to maintain the deputy's mandate. This is yet another case that can be recorded as an instance of judicial activism (2015).

A third important example is provided by Ruy Nestor Bastos Mello (2021). This case concerns Resolution No. 22,610/2007 of the Superior Electoral Court (TSE) and involves the issue of loss of mandate due to party infidelity. The resolution innovatively established that the mandate belongs to the political party rather than the individual parliamentarian, in cases where the parliamentarian changes party affiliation without just cause. Thus, the party may, in such cases, request the loss of mandate before the Electoral Court[11]. However, as Mello observes, although the Supreme Federal Court recognized the legitimacy of loss of mandate due to party infidelity in decisions on Writs of Mandamus filed in individual cases, these were diffuse control judgments without binding effect on other important judicial decisions. Nevertheless, based on these rulings, the Superior Electoral Court issued a significant regulation regarding the ownership of the elective mandate, without any involvement of the Legislative Branch, which, as Mello points out, may constitute judicial activism.

[11] The resolution was enacted following the judgments of Writs of Mandamus Nos. 26,602, 26,603, and 26,604, constitutional remedies that sought to invalidate the actions of the President of the Chamber of Deputies, who denied requests for the swearing-in of substitutes for deputies who had abandoned their parties.

This situation, of course, does not mean that the Legislative Branch cannot, as Fonteles (2025) observes, revisit and legislate differently. On the contrary, this is possible, and legislators possess such prerogative. However, what is being highlighted is the activism of the Superior Electoral Court and the expansion of its power. This is problematic because it would be essential to envision a more plural deliberation on the matter, involving genuine dialogue and more intense collaboration among the branches of government[12]. Still, activism may ultimately hinder the predictability and stability of norms by appropriating functions that do not fall within its immediate competence. Therefore, it remains necessary to raise questions about this phenomenon and its potential impacts.

In any case, it is clear from the examples cited that judicial activism cannot be accepted, regardless of moral or political justifications. The reason is that respect for the principle of separation of powers—and therefore the principles of the Democratic Rule of Law and the current constitutional order—is fundamental. Why this defense? Because the current Constitution is one of the most significant achievements of recent decades, and among its advances is the protection of fundamental rights. Thus, accepting the inclusion of meta-legal elements—that is, elements not belonging to the law—to support decisions rendered by any judicial body, especially the Supreme Federal Court, poses a serious risk. It must be recognized that there is a clear relationship between means and ends.

5 Conclusion

Rigid or substantive constitutionalism established after the Second World War empowered the Judiciary and had a profound impact on the functioning of the legal and institutional order as a whole. The first consequence is that the separation of powers became more complex, as the prerogatives of the Judiciary more prominently reached into the political sphere, serving in various situations as a system of checks on the Executive and Legislative branches. Hence, the current accusations of alleged excesses by the Judiciary and the consequent need to establish a system of self-restraint.

This movement reached Brazil with the 1988 Federal Constitution and was strengthened by the increased presence within the legal community of various important theoretical formulations. Among these, the so-called Neoconstitutionalism stands out, advocating for the

[12] For further details, see the dissertation Fundamental Rights, Separation of Powers, and Deliberation by Conrado Hübner Mendes (2008).

Judiciary's leading role as the best means to achieve the realization of fundamental rights by promoting them as the primary constitutional legal norms in force in the country. This emphasis is significant but also reinforces a moral reinterpretation of such rights and permits the introduction of the idea of balancing. While this strengthens the role of the Judiciary, it simultaneously legitimizes judicial activism.

In this regard, based on the analysis presented here, it is possible to observe that Neoconstitutionalism may expand judicial discretion by overvaluing normative principles at the expense of valid rules, thereby fostering judicial activism through its advocacy for a more proactive stance by the Constitutional Court in pursuing constitutional enforcement. This critical perspective on its formulations serves to guide us regarding the possible origins of such phenomena and, consequently, offers a set of theoretical contributions for a better understanding of the limits of the neoconstitutional model and its potential harm to the current Brazilian constitutional order, and by extension, to the principle of separation of powers and the Democratic Rule of Law.

In conclusion, it can be said that Brazilian society is clearly facing a paradox. The advances of post–World War II constitutionalism were significant for strengthening the Democratic Rule of Law and its respective institutional structures. However, the convergence of this profound change with so-called Neoconstitutionalism also created a set of possibilities that have led to some excesses, generating a growing conflict among the constituted powers. This situation may lead to the destabilization of the constitutional order. Therefore, addressing this issue is an immense challenge today, and jurists cannot afford to ignore the topic.

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