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Judicial activism and the separation of powers: a critical analysis of the Brazilian Federal Supreme Court's role

Ativismo judicial e separação dos poderes: uma análise crítica da atuação do Supremo Tribunal Federal no Brasil

Activismo judicial y separación de poderes: un análisis crítico de la actuación del Supremo Tribunal Federal en Brasil

José Cândido Lustosa Bittencourt de Albuquerque* <https://orcid.org/0009-0003-8569-5939>, Federal University of Ceará, Fortaleza, Ceará, Brazil.

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Editores-chefes

Katherine de Macêdo Maciel Mihaliuc
Universidade de Fortaleza, Fortaleza, Ceará,
Brasil
katherine@unifor.br

Sidney Soares Filho

Universidade de Fortaleza, Fortaleza, Ceará,
Brasil
sidney@unifor.br

Editor Responsável

Sidney Soares Filho
Universidade de Fortaleza, Fortaleza, Ceará,
Brasil
sidney@unifor.br

Author

José Cândido Lustosa
Bittencourt de Albuquerque
candido@candidoalbuquerque.adv.br
Contribution: Conceptualization;
methodology; data collection; original
draft preparation; manuscript review and
editing; supervision.

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Abstract

This study critically examines the phenomenon of judicial activism in Brazil, with particular emphasis on the role of the Brazilian Federal Supreme Court (STF) and its implications for the constitutional principle of the separation of powers. It begins with a historical and theoretical reconstruction of the division of governmental powers, tracing its development from Montesquieu's formulation to contemporary constitutionalism, while highlighting the importance of judicial self-restraint in preserving the institutional balance among the branches of government. Drawing on bibliographic and documentary research, the study distinguishes judicialization of politics from judicial activism and analyzes the STF's increasingly prominent role in political, social, and institutional matters. Through the examination of landmark cases, including the Fake News Inquiry and ADO 26, the study identifies the principal concerns associated with judicial activism, namely the erosion of the separation of powers, democratic deficit, legal uncertainty, and the concentration of authority within the Court. The study concludes that clearly defined institutional limits on constitutional adjudication are essential to reconcile the protection of fundamental rights with the preservation of the constitutional allocation of powers and democratic stability.

Keywords: judicial activism; separation of powers; Brazilian Federal Supreme Court; judicial self-restraint; Democratic Rule of Law.

Resumo

O presente trabalho analisa criticamente o fenômeno do ativismo judicial no Brasil, com ênfase na atuação do Supremo Tribunal Federal (STF) e em seus reflexos sobre o princípio da separação dos poderes. Parte-se da reconstrução histórica e teórica da tripartição das funções estatais, de Montesquieu ao constitucionalismo contemporâneo, destacando-se a relevância da autocontenção judicial (judicial self-restraint) para a preservação do equilíbrio institucional. Por meio de pesquisa bibliográfica e documental, distinguem-se os conceitos de judicialização da política e de ativismo judicial e examina-se o crescente protagonismo do STF em questões políticas, sociais e institucionais. A partir de casos emblemáticos, como o "inquérito das fake news" e a ADO 26, identificam-se os principais prejuízos atribuídos ao ativismo: a fragilização da separação dos poderes, o déficit democrático, a insegurança jurídica e a concentração de poder na Corte. Conclui-se pela necessidade de limites institucionais claros à jurisdição constitucional, de modo a conciliar a tutela dos direitos fundamentais com a preservação da repartição de competências e da estabilidade democrática.

Palavras-chave: ativismo judicial; separação dos poderes; Supremo Tribunal Federal; autocontenção judicial; Estado Democrático de Direito.

Resumen

El presente trabajo analiza críticamente el fenómeno del activismo judicial en Brasil, con énfasis en la actuación del Supremo Tribunal Federal (STF) y sus repercusiones sobre el principio de separación de poderes. El estudio parte de la reconstrucción histórica y teórica de la división tripartita de las funciones estatales, desde Montesquieu hasta el constitucionalismo contemporáneo, destacando la relevancia de la autocontención judicial (judicial self-restraint) para la preservación del equilibrio institucional. Mediante investigación bibliográfica y documental, se distinguen los conceptos de judicialización de la política y de activismo judicial, y se examina el creciente protagonismo del STF en cuestiones políticas, sociales e institucionales. A partir del análisis de casos emblemáticos, como la "investigación de las fakenews" y la ADO 26, se identifican los principales perjuicios atribuidos al activismo: el debilitamiento de la separación de poderes, el déficit democrático, la inseguridad jurídica y la concentración de poder en el Tribunal. Se concluye que es necesaria la existencia de límites institucionales claros para la jurisdicción constitucional, a fin de conciliar la tutela de los derechos fundamentales con la preservación de la distribución de competencias y de la estabilidad democrática.

Palabras clave: activismo judicial; separación de poderes; Supremo Tribunal Federal; autocontención judicial; Estado Democrático de Derecho.

* Full Professor of Criminal Law at Federal University of Ceará (UFC), Fortaleza, CE, Brazil). PhD in Legal Education and Master's Degree in Law from UFC. Former President (Rector) of UFC and Former Dean of the UFC Faculty of Law. Former Federal Councillor of the Brazilian Bar Association (OAB) and Former President of the OAB–Ceará Section.



1 Introduction

The modern state is founded upon the principle that political power must be constrained. Historically, the concentration of authority in a single institution or individual has fostered abuses of power and violations of individual rights, prompting the development of constitutional theories designed to safeguard liberty through the distribution of governmental functions among distinct branches with clearly defined institutional responsibilities. Within this framework, the doctrine of the separation of powers emerged and became one of the cornerstones of modern constitutional democracies.

In Brazil, the 1988 Federal Constitution enshrined this doctrine by establishing the independence and harmonious interaction of the Legislative, Executive, and Judicial Branches. Over the past several decades, however, the Judiciary — and particularly the Brazilian Federal Supreme Court (STF) — has assumed an increasingly prominent role in resolving political, social, and institutional disputes. This phenomenon, which encompasses multiple dimensions and manifestations, is commonly referred to as judicial activism and has contributed to a level of judicial prominence that has become the subject of growing scholarly concern and criticism.

Some legal scholars argue that such judicial intervention is necessary to safeguard fundamental rights and address legislative omissions. According to Luís Roberto Barroso, the Judiciary performs a countermajoritarian function by protecting fundamental rights against legislative inaction:

In recent years, a persistent crisis of representativeness, legitimacy, and functionality within the Legislative Branch has fueled the expansion of judicial authority in this sphere, in the name of the Constitution, through decisions that remedy legislative omissions and, at times, innovate the legal order by establishing rules of general normative effect^{1, 2}

In its more developed form, this argument traces back to Alexander Bickel's (1962) classic formulation of the "countermajoritarian difficulty," according to which the tension between judicial review and majority rule is most readily justified when courts act to protect fundamental rights and politically underrepresented minorities. In the Brazilian constitutional debate, Oscar Vilhena Vieira (2008), in coining the term *supremocracy*, argues that part of the STF's institutional prominence results from the constitutional design established by the 1988 Constitution and subsequent constitutional and statutory reforms that expanded its jurisdiction — particularly Constitutional Amendments No. 3/1993 and No. 45/2004 as well as Laws No. 9,868/1999 and No. 9,882/1999 — rather than solely from a voluntarist posture adopted by the Justices themselves. Acknowledging the strength of these arguments, however, does not eliminate the need to define the conditions under which such judicial intervention remains legitimate; otherwise, the protection of rights may become a vehicle for the indefinite expansion of judicial power.

In the Brazilian context, however, many scholars contend that judicial activism may, even in the face of omissions by the political branches, pose a threat to the constitutional principle of the separation of powers and to the institutional balance essential to democratic governance. These concerns are particularly acute where judicial self-restraint is lacking and institutional mechanisms capable of constraining judicial overreach are insufficient or ineffective.

A critical examination of judicial activism in Brazil is therefore warranted. Accordingly, this article first revisits the principal foundations of the doctrine of the separation of powers before examining the institutional consequences of the STF's activist jurisprudence in contemporary Brazil.

This study adopts a qualitative, theoretical-doctrinal research design based on a review of the relevant literature and documentary analysis. It examines landmark STF decisions — particularly the Fake News Inquiry and ADO 26 — as illustrative case studies of the tensions between constitutional adjudication and the democratic principle.

The analysis follows a predominantly deductive approach. It begins with the theoretical foundations of the separation of powers and the doctrine of judicial self-restraint and subsequently contrasts these principles with the STF's institutional practice in order to identify areas of divergence and to support the argument for clearer institutional constraints on constitutional adjudication. The study also recognizes that the concept of judicial activism encompasses multiple meanings — Kmiec (2004), for example, identifies at least five distinct conceptions — and therefore limits its use in this article to situations involving judicial encroachment upon the constitutional competencies of the political branches or departures from the legal and constitutional limits governing judicial authority.

¹ For the purposes of this article, all direct quotations from the original sources have been translated into English.

² BARROSO, Luís Roberto. Judicialização, ativismo judicial e legitimidade democrática. (Syn)Thesis, Rio de Janeiro, v. 5, n. 1, p. 23-32, 2012. p. 9.

Finally, in accordance with principles of research transparency and integrity, the author discloses that generative artificial intelligence (AI) tools were used to assist in preparing this manuscript, specifically in drafting the abstract, keywords, and their English-language counterparts as well as in the linguistic revision and formal organization of the text. The conception of the research topic, development of the arguments, selection of sources, critical analysis, and conclusions are entirely the author's own. All AI-assisted content was thoroughly reviewed by the author, who assumes full responsibility for the accuracy of the information presented and the proper attribution of all cited sources.

2 The separation of powers and the constitutional role of the judiciary

2.1 Historical origins of the doctrine of separation of powers

The modern formulation of the doctrine of the separation of powers is generally attributed to the French philosopher Charles-Louis de Secondat, Baron de Montesquieu, in his seminal work *The Spirit of Laws* (1748). Montesquieu argued that the concentration of political authority in a single institution inevitably leads to tyranny and jeopardizes individual liberty.

According to Montesquieu, political freedom can exist only when governmental authority is distributed among distinct institutions. He maintained that concentrating the functions of government within a single body would inevitably result in the abuse of power: "Everything would be lost if the same man, or the same body of principal men, or of the nobles, or of the people, exercised these three powers."³

This statement reflects Montesquieu's concern that vesting governmental authority in a single individual or institution creates an inherent risk of arbitrary rule. As he famously observed:

[...] it is an eternal experience that every man who has power is led to abuse it; he continues until he finds limits. Who would have thought it? Even virtue itself has need of limits. To prevent the abuse of power, it is necessary that, by the very arrangement of things, power should check power.⁴

As noted by Paulo Bonavides, the constitutional state and classical constitutionalism in their formative phase were founded upon the tripartite division of powers, "which became a fundamental organizing principle under the influence of Locke and Montesquieu."⁵

Montesquieu's theory, in particular, divided governmental functions into three distinct branches (functions): the Legislative Branch, responsible for enacting "laws for a time or forever" and correcting or repealing "those that have been enacted"; the Executive Branch, responsible for "matters dependent on the law of nations," including making peace or war, sending and receiving ambassadors, ensuring public security, and preventing invasions; and the Judiciary, responsible for "punishing crimes" and "adjudicating disputes between private individuals."⁶

Each of these branches was therefore assigned its own distinct and independent constitutional responsibilities, operating within a system designed to preserve institutional equilibrium. According to Paulo Bonavides, Montesquieu's theory of the separation of powers differs from Locke's in that it is not merely theoretical but rather constitutes "an effective and practical distribution of power among distinct officeholders."⁷

According to leading constitutional scholarship, the separation of powers does not imply complete institutional isolation but rather a system of mutual oversight. This model, commonly known as checks and balances, operates within limits established by law, particularly by the Constitution. In Brazil, the independence and harmonious interaction of the three branches are established in Article 2 of the Federal Constitution, which also provides, through various constitutional provisions, specific mechanisms of checks and balances. These include, for example, the powers conferred upon the Legislative Branch to "suspend acts of the Executive Branch that exceed its regulatory authority" (Art. 49(V)); to "annually review the accounts of the President of the Republic" (Art. 49(IX)); to "oversee and supervise acts of the Executive Branch" (Art. 49(X)); and to "safeguard its legislative authority against normative acts issued by the other branches" (Art. 49(XI)). Likewise, the Constitution authorizes the President of the Republic to "veto bills, in whole or in part" (Art. 84(V)); to appoint Justices of the Supreme Federal Court (STF), the Superior Court of

³ MONTESQUIEU, Charles-Louis de Secondat, Baron de. **O Espírito das Leis**. Tradução Cristina Murachco. São Paulo: Martins Fontes, 1996. liv. XI, cap. IV, p. 168.

⁴ MONTESQUIEU, op. cit., p. 167.

⁵ BONAVIDES, Paulo. **Del Estado liberal al Estado social**. Edición castellana. Buenos Aires: Astrea, 2014. p. 16.

⁶ MONTESQUIEU, op. cit., p. 167-168.

⁷ BONAVIDES, op. cit., p. 21.

Justice (STJ), and other judges in the circumstances prescribed by the Constitution (Art. 84(XIV) and (XVI)); and confers upon the Supreme Federal Court (STF) jurisdiction to exercise abstract constitutional review of legislation (Art. 102(I)(a)).

2.2 The separation of powers in contemporary constitutionalism and judicial self-restraint

In contemporary constitutionalism, the separation of powers has become one of the foundational principles of the Democratic Rule of Law. The primary objective of this institutional framework is to prevent the concentration of power, safeguard individual liberties, and establish limits on the exercise of governmental authority.

The theory holds that each branch of government performs its own predominant functions within constitutionally defined institutional boundaries. The Judiciary, for example, is primarily responsible for interpreting and applying the law and may not substitute itself for the legislative function.

Accordingly, institutional equilibrium depends upon respect for the constitutional competencies assigned to each branch. Whenever one branch exceeds the limits established by the Constitution, institutional imbalance may arise, potentially compromising the proper functioning of the democratic system.

With respect to the Judiciary, judicial interventions that encroach upon the constitutional competencies of the other branches have been identified as manifestations of a lack of judicial self-restraint.

Judicial self-restraint on the part of constitutional court judges is an essential element in maintaining the balance among the branches of government. When courts exercise restraint, they avoid undue interference with the constitutional responsibilities of the Legislative and Executive Branches, thereby preserving institutional harmony. Such an approach strengthens the legitimacy of judicial decisions, contributes to political stability, and prevents the Judiciary from exceeding its constitutional role by assuming excessive institutional prominence. Judicial moderation also promotes respect for the democratic choices made by society through its elected representatives. Thus, the responsibility of constitutional judges extends beyond the interpretation of the law to encompass the preservation of the democratic system itself. Ultimately, judicial self-restraint represents a commitment to democracy.

However, the concept of judicial self-restraint is not uniform and has acquired multiple meanings over time. According to Hoenig Leal and Schoenner:

The concept of judicial “self-restraint” originated in 1803 with the United States Supreme Court’s decision in the landmark case *Marbury v. Madison*, because the very decision that conferred the power of judicial review upon the Supreme Court also established its “self-limitation” with respect to the adjudication of political questions, as a means of preserving the Court’s institutional legitimacy and survival amid the complex political dispute between Federalists and Republicans (Grostein, 2020, p. 64). Thus, the political question doctrine is, in fact, historically rooted in the very emergence of judicial self-restraint and judicial review, since, procedurally, the Supreme Court recognized its authority to invalidate legislative acts incompatible with the Constitution but, on the merits, declined to decide the issue because it regarded the matter as inherently political (Lima; Gomes Neto, 2018, p. 224)⁸.

Furthermore, the same authors refer to Richard Posner’s classification, in which he identified and criticized five categories of “self-restrained judges” before arguing that the most important category is that of “the judge who seeks to reduce judicial power in relation to politics,” referring to “a structural restraint imposed upon judges in relation to the political system (understood in the broad sense to include the Executive Branch, federal administrative agencies, and Congress), through greater deference to political decisions (Posner, 1983, p. 12-14).”⁹

In Posner’s own words, “My central concern is with what I shall call ‘separation of powers judicial self-restraint,’ or less clumsily ‘structural restraint’.”¹⁰ This “structural restraint,” therefore, is understood as a form of judicial self-restraint grounded in the doctrine of the separation of powers, whereby judges decide cases in a manner that reduces, rather than expands, judicial interference with political decisions made within the constitutional sphere of the other branches of government.

⁸ HENNIG LEAL, Mônia Clarissa; SCHOENHERR, Mateus Henrique. Três dimensões das posturas autocontidas da jurisdição constitucional: liberdade de conformação, capacidades institucionais e critérios processuais. *Revista de Estudos Institucionais*, Rio de Janeiro, v. 10, n. 3, p. 871-901, set./dez. 2024. p. 875.

⁹ HENNIG LEAL; SCHOENHERR, op. cit., p. 876.

¹⁰ POSNER, Richard A. The Meaning of Judicial Self-Restraint. *Indiana Law Journal*, Indiana, v. 59, n. 1, article 1, 1983. Available from: <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2187&context=ilj>. Accessed on: 24 March 2026.

3 The phenomenon of judicial activism

3.1 The concept of judicial activism

Judicial activism is a phenomenon characterized by an expansive approach adopted by the Judiciary in interpreting and applying the law. In other words, it occurs when the Judiciary exceeds the traditional boundaries of the judicial function and encroaches upon the constitutional competencies of the other branches of government.

According to the American legal scholar Cass R. Sunstein, judicial activism is an ambiguous concept that is frequently used in a critical sense to describe judicial decisions in which courts exceed the limits of their constitutional role. In *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America*, Sunstein observes that: "There are, broadly speaking, two accounts of judicial activism. Some people label a decision 'activist' when they think that the court has departed from the correct approach to the Constitution" (Sunstein, 2005, p. 42)¹¹.

In this sense, the term judicial activism is associated with the idea of interpretive departure, particularly when a court interferes with acts of the political branches or departs from established precedent. Although Sunstein (2005) acknowledges that such approaches may be justified under exceptional circumstances, he warns that an excessively interventionist judiciary may disrupt the institutional balance and weaken democratic legitimacy by replacing political decisions made by elected representatives with the subjective judgments of judges.

From this perspective, judicial activism is problematic because it may undermine representative democracy by transferring political decision-making to unelected institutions. Rather than merely interpreting the Constitution, the Judiciary assumes the role of a policymaker, giving rise to concerns regarding its democratic legitimacy.

3.2 Judicialization of politics and judicial activism

It is important to distinguish between two phenomena that are often conflated: judicial activism, discussed in the previous section, and the judicialization of politics.

The judicialization of politics refers to the increasing number of political issues brought before the courts for adjudication. Judicial activism, by contrast, concerns the manner in which courts decide those issues, adopting broad and innovative interpretations of the Constitution.

Judicialization is often an inevitable feature of complex constitutional systems such as Brazil's. Judicial activism, however, depends upon the interpretive posture adopted by the courts and, in particular, upon the degree of judicial self-restraint exercised by judges serving on constitutional courts.

In this context, for example, criticism directed at the Brazilian Superior Electoral Court with respect to the judicialization of politics has gained prominence where it is argued that certain decisions are based on TSE resolutions that go beyond merely implementing statutory law and instead introduce new legal rules, thereby approximating the exercise of legislative authority.

3.3 The prominence of the Brazilian STF

Over the past several decades, STF has assumed an increasingly central role in Brazil's political and institutional landscape.

Today, it may be said that virtually no major public issue escapes the STF's jurisdiction. A wide range of significant matters — including public policy, social rights, electoral disputes, and institutional conflicts — has increasingly been decided by the Court. This expanded role has in turn been characterized as a manifestation of judicial activism.

Accordingly, the STF's institutional prominence — which has become a widely recognized feature of Brazil's constitutional system — may create a risk of undermining the separation of powers and expanding judicial discretion beyond its constitutionally intended limits.

Addressing this broader concern, economist and political philosopher Thomas Sowell argues that the concentration of authority in institutional elites may produce significant distortions within democratic systems. In *The Vision of the Anointed*, Sowell writes that "The most basic question is not what is best, but who shall decide what is best" (Sowell, 1995, p. 11-13)¹².

¹¹ SUNSTEIN, Cass R. *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America*. Cambridge: Basic Books, 2005. p. 42.

¹² SOWELL, Thomas. *The Vision of the Anointed: Self-Congratulation as a Basis for Social Policy*. Cambridge: Basic Books, 1995. p. 11-13.

This observation underscores that, in a democratic society, the central issue is not merely identifying the correct decision but also determining who possesses the democratic legitimacy to make it.

One of the most frequently advanced criticisms of the STF concerns the possibility that it has exceeded its institutional boundaries, particularly in situations associated with what has been described as judicial activism. From this perspective, certain actions undertaken by the Court have placed significant constitutional principles under strain, including the principle of the natural judge (*juiz natural*), which guarantees both judicial impartiality and the prior determination of the competent judicial authority for each case.

This debate gained particular prominence in connection with the so-called Fake News Inquiry, initiated by the STF pursuant to its Internal Rules of Procedure. In that proceeding, the case was assigned directly to a Justice without the mandatory random allocation process, giving rise — and continuing to give rise — to questions regarding compliance with due process and the constitutional guarantee of the natural judge. This method of appointing the reporting Justice through direct designation by the Chief Justice, rather than random distribution, has been criticized not only as inconsistent with the principle of the natural judge but also as concentrating investigative, prosecutorial, and adjudicative functions within the Court itself, thereby compromising the institutional separation among those functions.

From this perspective, judicial activism ceases to represent merely an expansive interpretive methodology and instead manifests itself through institutional practices that may weaken fundamental constitutional guarantees. The principal concern is that, by expanding its own institutional authority, the Court may ultimately dilute constitutional constraints that are essential to the preservation of the Rule of Law.

Within this framework, the argument that such measures were justified by the need to protect the institution itself and the democratic order against alleged concrete threats is unpersuasive. The applicable legislation provided — and continues to provide — the appropriate legal mechanisms for addressing such situations, yet those mechanisms were deliberately disregarded. Consequently, this episode remains one of the most prominent examples of excessive judicial protagonism, with significant implications for the structural principles of the Constitution, particularly because, in the absence of judicial self-restraint, the reporting Justice effectively assumed the authority to select cases for adjudication based on a broadly defined allegation of attacks against the Supreme Court.

4 The consequences of judicial activism in Brazil

4.1 Weakening of the separation of powers

One of the principal concerns associated with judicial activism is its potential to undermine the constitutional principle of the separation of powers. When the Judiciary begins to perform functions that are constitutionally assigned to the Legislative and Executive Branches, it directly interferes with the competencies allocated to each branch of government, thereby potentially expanding judicial authority into areas not originally entrusted to the judicial function.

In this context, judicial activism may broaden the Judiciary's decision-making authority at the expense of the political branches, resulting in a functional shift that extends beyond the traditional limits of constitutional interpretation. According to Lenio Luiz Streck, this practice may lead to the substitution of politics by law, insofar as it creates room for discretionary decision-making, allowing judges to replace constitutional parameters with their own personal convictions¹³.

As a consequence, this dynamic may weaken the democratic legitimacy of public decision-making by transferring authority from institutions that derive their legitimacy from popular elections to unelected judicial bodies. Such a development tends to disrupt the institutional balance among the branches of government and intensify interinstitutional conflicts, particularly where constitutional competencies overlap and clear institutional boundaries become blurred.

4.2 Democratic deficit

Another important concern associated with judicial activism relates to democratic legitimacy.

In this regard, it should be noted that members of the Judiciary are not elected by popular vote. Consequently, when judicial decisions begin to define public policies or establish broad social norms, questions naturally arise regarding the democratic legitimacy of such decisions.

¹³ STRECK, Lenio Luiz. *Hermenêutica e(em) Crise*. 11. ed. Porto Alegre: Livraria do Advogado, 2013.

Addressing this issue, Thomas Sowell argues that the excessive transfer of decision-making authority to experts or unelected officials may weaken democratic accountability. In *Intellectuals and Society*, he states:

The ignorance, prejudices, and groupthink of an educated elite remain ignorance, prejudice, and groupthink — and it is both dangerous and absurd for those who possess 1 percent of the knowledge in a society to guide or control those who possess the other 99 percent. The distinction between specialized knowledge and mundane knowledge is neither incidental nor merely semantic. Its social implications have profound consequences. For example, it is far easier to concentrate power than to concentrate knowledge. This is one reason why so much social engineering fails and why so many despots have led their countries to disaster¹⁴.

Sowell further argues that one of the troubling consequences of superficial education is the growing inability of individuals to formulate coherent arguments, a phenomenon that, within democratic systems, tends to concentrate decision-making authority in the hands of elites. In essence, this critique highlights the risk of transferring political authority to groups lacking electoral legitimacy.

Accordingly, within a representative democracy, the enactment of generally applicable legal norms should remain the responsibility of the Legislative Branch, which directly represents the will of the electorate. When the Judiciary assumes that role, what some scholars describe as the democratic deficit of judicial power may emerge.

4.3 Legal uncertainty

Judicial activism may also generate legal uncertainty, particularly when courts adopt expansive or innovative interpretations of the Constitution that extend beyond the traditional boundaries of the judicial function. Under such circumstances, judicial activity ceases to be limited to applying existing law to individual cases and instead begins to redefine the substantive content of legal norms, potentially undermining the stability and coherence of the legal system.

This scenario directly reduces the predictability of judicial decisions, which constitutes one of the essential elements of legal certainty. In the absence of stable interpretive standards, citizens and public institutions alike face increasing difficulty in anticipating how the law will be applied in comparable cases, thereby creating uncertainty regarding the legal consequences of particular courses of conduct. As a result, confidence in both the legal system and the Judiciary's role as guarantor of the rule of law may be weakened.

In this context, Thomas Sowell's warning is particularly relevant, as it emphasizes that concentrating decision-making authority in the hands of particular groups may produce outcomes substantially different from those originally intended. Such dynamics tend to generate broader systemic consequences affecting not only individuals but also public and private institutions, ultimately undermining the stability of legal relations and the very solidity of the Rule of Law.

4.4 Concentration of power within the STF

Another significant concern is the increasing concentration of authority within the STF.

In a balanced democratic system, political decisions should emerge from the interaction among the different branches of government, with due consideration given to the formulation and implementation of public policies within their respective constitutional spheres. However, when the STF assumes responsibility for resolving a substantial proportion of the country's most important institutional controversies — including matters involving health care, public security, and social policy — the center of political decision-making is effectively shifted from the political branches to the Judiciary.

This development may create excessive institutional dependence on the Court. Within the confines of an individual judicial proceeding, regardless of its subject matter, the Court is not in a position to assess, in a sufficiently contextualized manner, the structural realities of the State, including budgetary constraints, administrative enforcement capacity, and the interaction between the challenged measure and broader governmental policies in the relevant area. Similar limitations apply to issues directly connected with social policy and the government's overall development agenda across different sectors.

The STF's institutional prominence can be observed in several landmark decisions, including ADPF 54, in which the Court authorized the termination of pregnancy in cases involving anencephalic fetuses (decided on April 12, 2012); ADI 4277 and ADPF 132, which recognized stable unions between same-sex couples (decided on May

¹⁴ SOWELL, Thomas. *Intellectuals e a Sociedade*. Tradução: Fábio Alberti. São Paulo: Faro Editorial, 2025. p. 512.

5, 2011); RE 566471, concerning the State's obligation to provide medications (General Repercussion Theme No. 6, decided on September 20, 2024); and ADO 26, concerning the criminalization of homophobia and transphobia (decided on June 13, 2019).

These decisions illustrate the Court's active involvement in matters of profound social and political significance. Through an expansive interpretive approach, the Court went so far as to invoke the alleged omission of the National Congress as a basis for treating acts of homophobia and transphobia as equivalent to the crime of racism under Article 20 of Law No. 7,716/1989, employing — albeit without expressly acknowledging it — analogical reasoning in criminal law despite the constitutional principle of legality (ADO 26, decided on June 13, 2019).

5 The need for limits on judicial activism

Although the Judiciary plays an essential role in safeguarding the Constitution and protecting fundamental rights, it must operate within clearly defined institutional limits. Constitutional interpretation, therefore, cannot serve as a substitute for the democratic lawmaking process. Respect for the separation of powers is indispensable to preserving institutional equilibrium, democratic stability, and the legitimacy of public decision-making.

In this context, one of the principal challenges of contemporary constitutionalism is to reconcile the protection of fundamental rights with the preservation of the constitutional allocation of powers among the branches of government. In the Brazilian context, this requires judicial interpretations that remain closely aligned with the text of the law and, in specific circumstances — such as violations of the constitutional principle of the natural judge — that judicial action be constrained by the applicable legal provisions themselves.

Furthermore, as discussed above, contemporary constitutional scholarship has increasingly emphasized the importance of the principle of judicial self-restraint, according to which courts should exercise prudence and refrain from substituting policy choices that have been legitimately made by the democratically elected branches of government. Such an approach does not entail judicial omission in the protection of fundamental rights. Rather, it recognizes that constitutional adjudication is subject to institutional limits that must be respected in order to preserve democracy and the separation of powers.

6 Final considerations

The doctrine of the separation of powers constitutes one of the fundamental pillars of the Democratic Rule of Law. By allocating governmental authority among the Legislative, Executive, and Judicial Branches, it seeks to prevent the concentration of power and safeguard individual liberties. In Brazil, the 1988 Federal Constitution enshrined this principle as a foundational element of the country's constitutional order.

Nevertheless, the increasing institutional prominence of the STF has given rise to intense debate regarding the limits of judicial authority. As previously discussed, although judicial activism is sometimes justified on the grounds of protecting fundamental rights, it may also produce adverse consequences for the institutional balance of the constitutional system.

Among the principal concerns identified in the literature are the erosion of the separation of powers, the democratic deficit associated with judicial decision-making, legal uncertainty, and the increasing concentration of power within the Judiciary. This concentration of authority may, not infrequently, foster authoritarian practices that are incompatible with the Democratic Rule of Law.

Accordingly, continued reflection on the appropriate limits of judicial authority within a democratic constitutional order is essential. Preserving the separation of powers does not entail weakening the Judiciary; rather, it requires ensuring that each branch exercises its constitutional functions within the limits established by the Constitution. Only in this manner can Brazil's institutional equilibrium and democratic stability be effectively preserved.

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