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JUDICIAL ACTIVISM AS AN UNWRITTEN SOURCE OF LAW? A NORMATIVE APPROACH

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Abstract: *The article examines the criteria for recognising judicial decisions as an unwritten source of law. These criteria are considered from a normative perspective, focusing on the question of legitimate judicial activism. The author identifies activism as a situation in which, for an individual familiar with the legal culture and engaged in good-faith interpretation, it becomes clear that the judge has exceeded the institutional role assigned to him or her within that culture. The article outlines types of activism that are not legitimate from the point of view of communicative ethics and established criteria of political legitimacy. It is argued that such illegitimate activism consists, in particular, of employing language that articulates fundamental rights in a sense divergent from that traditionally accepted, and in introducing changes to the institutional structure and symbolic identity of a given political community. By contrast, reliance on the moral values and established legal principles recognized within a given community is presented as a form of necessary activism, particularly in the face of contemporary hyperinflation and the internal contradictions of the discourse on fundamental rights discourse.*

Key words: *Judicial Activism; Rule of Law; Constitutionalism; Unwritten Sources of Law; Philosophy of Law*

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1. INTRODUCTION

This article examines the criteria by which judicial decisions may be regarded as unwritten sources of law. These criteria are analysed from a normative perspective, with particular attention to the issue of justified judicial activism.[1] Although contemporary court rulings are invariably issued in written form, the essence of activism lies in moving beyond established interpretations of legal texts and articulating principles that, in the judge's view, are implicitly contained within them. Consequently, the issue of judicial activism falls within the broader question of the legitimacy of unwritten sources of law.

I adopt a methodological perspective informed by the philosophy of ordinary language, assuming that the established meanings of words, including those used in ordinary legal language, have normative significance as a condition for fulfilling the principles of communicative ethics. I combine this perspective with a hermeneutic approach, recognising that interpretative tradition shapes both the current meaning of a term and the permissible scope of deviation from it. This tradition also provides a criterion for selecting the appropriate meaning when a word is used with more than one possible interpretation. In this view, the established meanings of terms found in legal provisions constitute an important benchmark for evaluating judicial activism. Therefore,

[1] On the differing identification of the subject matter of judicial activism, see Gromski (2009, pp. 11-23).

I argue that judicial activism exceeds legitimate limits when it departs from established usage without communicating this departure to the addressee of the decision, thereby generating a form of error akin to *ignoratio elenchi* (Aristotle, 1955, pp. 37-43). However, the criteria for evaluating judicial activism are not limited to the domain of communicative ethics; they also include standards concerning the legitimacy of political and institutional change. On this basis, I maintain that such criteria exclude political or constitutional changes, whether formal, legal, or symbolic, that are enacted without explicit sovereign consent.[2]

The issue under consideration pertains both to legal systems rooted in the Continental European tradition, where judicial decisions are generally not regarded as sources of law, and to common law systems, where it arises in questions concerning judicial lawmaking as a source of law at the constitutional level. A further important dimension concerns the decisions of international and supranational courts, particularly where such rulings go beyond the express content of the legal instruments that serve as the basis for their authority or the object of their interpretation.

2. THE CONCEPT OF ACTIVISM

The term *judicial activism* is used either descriptively or—more commonly—in a normative sense. It is typically defined in contrast to judicial restraint. The expression first entered scholarly discourse in 1947 (Schlesinger, 1947, passim; Green, 2009, pp. 1201-1208; Kmiec, 2004, p. 1446). Activism may manifest itself at all stages of adjudication, that is, at the stage of interpretation, the evaluation of evidence, and the decision-making process. The adjudicative stage is, of course, of particular significance, for it is there that the judge may remain within the confines of law-application or move into the domain of judicial law-making. In delineating an activist orientation, scholars distinguish between 'hard' activism—where courts generate wholly novel legal rules—and 'soft' activism, characterised by doctrinally inventive interpretation, particularly by setting aside the rule of linguistic priority in statutory construction. (Morawski, 2006, pp. 9–10). However, given the significance of the issue, it must be acknowledged that activism cannot be reduced to a specific interpretative method (such as broad or pro-constitutional interpretation). Furthermore, if judicial lawmaking is broadly understood as occurring whenever a judge departs from the literal wording of a legal text, then activism cannot simply be identified with lawmaking thus defined. Departing from the text is, after all, an inherent part of adjudication in both Common law and Continental systems (Wróblewski, 1988, p. 403), especially in the current era of legislative hyperinflation and pronounced normative inconsistency.

The term *activism* connotes a mode of judicial reasoning that introduces a certain novelty. This raises the question of what constitutes the essence of that novelty: for example, is it defined by a departure from the legal text and the issuance of a decision not determined by the legislator (Morawski, 2014, p. 266), or by a break with prior interpretations of that text (Marmor, 2005, p. 168; Kmiec, 2004, pp. 1473-1475). This leads to the question what is the subject matter of activism (Sowell, 1989, pp. 1-2; Green, 2009, passim).

In analysing the concept of activism, it is useful to return to an account of judicial lawmaking that allows an interpretative process to be classified as non-lawmaking, provided that its outcome falls within the range of interpretations that an observer acting

[2] On the political significance of arbitrarily altering the meaning of words, see de Bonald (1875, p. 82 et seq.); de Maistre (1873, p. 77, 81 et seq.); Habermas (1976, p. 61).

in good faith, and guided by the interpretative canons of a given legal culture, could accept as an instance of legal application (Gizbert-Studnicki, 1998, p. 82). A similar criterion can be used to distinguish between judicial restraint and activism. In this view, activism occurs when it becomes clear to an interpreter acting in good faith that the judge has exceeded the constitutional role assigned to him or her. In Continental systems, this means going beyond the application of law in a way that inevitably entails a lawmaking function; in common law systems, it involves assuming the role of the constitutional legislator.

Judicial activism may be justified by the judge on legal, moral, or political grounds, but internal and external perspectives may lead to different assessments. From an external standpoint, activism may appear as an expression of judicial arbitrariness, or even of a kind of nonchalance. It is thus possible for a judge to overstep their role by employing forms of argument that are unorthodox within the framework of a particular legal culture; this gives rise to what may be called *argumentative activism* (Gromski, 2009, p. 19).

The following analysis focusses primarily on the negative consequences associated with all forms of judicial activism. The most pressing concern, however, is activism of a political nature, that is, cases in which judicial decisions have a direct impact on the political and economic system of the state, as well as on the cultural self-identification of the political community (Banaszak, 2009, p. 75).

3. JUSTIFICATIONS FOR JUDICIAL ACTIVISM AS A SOURCE OF LAW

Arguments presented in support of judicial activism can be categorised into moral-systemic and moral-political types. The former type of argument appeals to the condition of contemporary law—specifically to its inflation, internal contradictions, and domination by a managerial paradigm. One such argument is advanced by Adrian Vermeule, who contends that the early diagnoses by Roscoe Pound, as well as the concerns expressed by Carl Schmitt regarding the displacement of law by administrative governance, failed to materialise because administrative law has evolved to be deeply infused with principles, particularly in the context of judicial review of agency action (Vermeule, 2022, pp. 149–151). According to advocates for the expanded role of the judiciary, courts currently embody demands for transparency and for closing the gap between rulers and the ruled, thus fulfilling, at least in popular perception, the same societal function that universally elected parliaments performed in the nineteenth century (Raynaud, 2010, pp. 169–70). Even when subject to criticism, courts are said to benefit from a kind of minimal moral legitimacy. Habermas argues that judicial procedures serve to "relieve" social relations of the burden of ethical determinations grounded in comprehensive visions of the good life (Habermas, 1992, pp. 319-324). Also relevant is Artur Kozak's view of law—and thus of the judiciary—as the last socially legitimised institution in a society perceived as inescapably particularised (Kozak, 2008, p. 5355). The legitimacy of judicial activism has also been linked to the repudiation of the myth of scientific objectivity (Sulikowski, 2008, pp. 81–87).

However, more significant for the issue of activist judicial decision-making as an unwritten source of law is the justification that views it as a vehicle for advancing political, cultural and constitutional transformations that have not yet secured broader institutional endorsement. This approach is grounded in the liberal idea of the court as a guardian of individual rights against the "majoritarian distortion" of democracy (Morawski, 2006, p. 16). However, in the present context, this idea functions less as a defence of specific subjective rights and more as an instrument for reshaping political

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culture and constitutional order. The most prominent example is the support that parts of the American left have extended to judicial activism since the Warren Court's decisions in the 1950s (Herngren, 1997, pp. 111–114; Barut, 2010, pp. 267–284). According to Robert Bork, an activist court can claim legitimacy only insofar as it serves as an agent of political and cultural change—exemplified by its abandonment of constitutional text in favour of arbitrarily articulating principles said to be implicitly contained therein. [3] Critics of this aspect of judicial activism point to its consequences: the consolidation of arbitrariness in the interpretation of fundamental rights, institutional disorder, and the erosion of the stabilising role of legal culture. These consequences will be examined in turn.

4. JUDICIAL ACTIVISM AS A DECONSTRUCTION OF FUNDAMENTAL RIGHTS

Undoubtedly, not every shift in the interpretation or scope of protection of fundamental rights should be regarded as an abuse. The extension of the application of norms articulating such rights may be justified by new empirical insights resulting from changes in natural or technological conditions—for example, the inclusion of newly threatened animal species[4] within the category of endangered species, or the interpretation of the Fourth Amendment to the U.S. Constitution (protecting the inviolability of the home) as prohibiting thermal imaging surveillance (Bork, 2003, p. 108). Changes in the understanding of fundamental rights may also arise from deeply rooted transformations in moral evaluations—transformations that, if one accepts that human beings are social creatures guided by practical reason, cannot be ignored. One such example is the now uncontested recognition of corporal punishment as a violation of human dignity. To reject these developments would entail the wholesale repudiation of the contemporary social imaginary—an act that would be utopian in character (Pokol, 2019; Stawecki, 2003, pp. 360–361).[5]

Nevertheless, certain judicially driven changes in the content of fundamental rights remain difficult to accept. The most common justification today for such changes is the claim to have discerned the true or, alternatively, the contemporary meaning of a given right—thus warranting a reformulation of its content.

This rationale is invoked to support the adoption of the principle of *evolutionary interpretation* (often termed *evolutive interpretation* in European jurisprudence). Problems arise, however, when this principle is used to discard previously accepted interpretative outcomes, regardless of whether those outcomes emerged from textual or functional interpretation. Evolutionary interpretation represents a dominant tendency in contemporary adjudication (Pokol, 2019; Stawecki, 2003, pp. 360–361), yet it is considered especially justified in the context of human rights instruments.[6] It is widely

[3] Bork argues that contemporary judges belong to the 'New Class', a group of people concerned with disseminating ideas (although not necessarily analysing them or even understanding their historically entrenched meaning) (Bork, 2003, p. 9). Members of the 'New Class' are naturally inclined towards adopting a left-wing stance, as it favours reliance on general ideas and rejects the conservative demand to consider the specificity of particular cases. Judges thereby remain in antagonism with the majority of society, and for this reason seek to achieve institutional power (Bork, 2003, pp. 2–8).

[4] As Antonin Scalia pointed out in response to Ronald Dworkin (Scalia, 1997, p. 146), who formulated an openly sophistic argument in favour of judicial activism by appealing to changes in the scope of statutory language due to factual developments (Dworkin, 1997, p. 121).

[5] See Scalia (2017, pp. 213–214) on an evolutionary interpretation that does not have a political character, that is, one that does not alter relations of power.

[6] Evolutionary interpretation, insofar as it is adapted to the general character of the provisions of the ECHR, should not constitute a departure from its linguistic interpretation (Liżewski, 2011, p. 116).

employed in the jurisprudence of the U.S. Supreme Court (under the notion of a *living constitution*), the Supreme Court of Canada (the metaphor of the constitution as a *living tree*), and is explicitly recognised as a guiding interpretative principle by both the European Court of Human Rights.[7] The principal argument in support of evolutionary interpretation is the demand for the effective protection of human rights. It is grounded in the necessity of adapting jurisprudence to cultural change and evolving moral judgments, as well as in the conviction that the substantive protection of rights enshrined in human rights instruments would not be possible if interpretation were restricted to the text itself, the historical intent of its framers, or the prevailing views at the time of drafting.[8]

However, the question arises as to what might constitute an intersubjectively valid method for identifying cultural change. This issue is exemplified by the European Court of Human Rights' interpretation of the criterion of an "established international trend" as a justification for applying evolutive interpretation in the 2002 case of *Goodwin v. the United Kingdom*, where the Court arbitrarily asserted the existence of a public consensus recognising transsexualism, doing so in a manner almost entirely divorced from empirical evidence.[9] In response to such concerns, scholars and jurists have emphasised the role of cultural and institutional constraints (Jabłoński and Kaczmarek, 2019, p. 17-18, 19-20), reflected most notably in Dworkin's notion of coherence, captured by his metaphor of the "chain novel" (Dworkin, 1986, pp. 238–239). Yet, this raises a further question: which canon of culture is to serve as the standard for coherence? Should it be general legal culture of a society, the professional culture of the legal community, or the personal convictions of the judges themselves? Some responses to this dilemma propose decoupling judicial decision-making from prevailing social consciousness. In particular, it has been argued that entrenched conceptions of social institutions encode existing power relations and may therefore be legitimately reconfigured in pursuit of moral and political aims (e.g., Haslanger, 2012, pp. 190-198, Guala, 2016, p.187 et seq.).[10] Consequently, there arises the risk of concluding that such changes should encounter no limits, with resistance posed by existing legal frameworks regarded not so much as an obstacle to be overcome, but rather dismissed as irrelevant by activist judges.

There is no space here for a comprehensive inquiry into whether evolutionary interpretation strengthens or weakens the protection of fundamental rights—a question that ultimately hinges on determining which rights are more, and which less,

[7] The ECtHR first explicitly applied the principle of evolutionary interpretation (treating the Convention as a s'living instrument') in the case of *Tyrer v. the United Kingdom* (ECtHR, Tyrer v. the United Kingdom, app. no. 5856/72, 25 April 1978, para. 31).

[8] The case of *Goodwin*, as well as, for example, *Soering v. United Kingdom* (ECtHR, Soering v. the United Kingdom, app. no. 14038/88, 07 July 1989), see Liżewski (2011, pp. 121–122).

[9] See ECtHR, Christine Goodwin v. the United Kingdom, app. no. 28957/95, 11 July 2002, paras 84–85 (relying only subsidiarily on the position of a supporting NGO and the practice of courts in Australia and New Zealand, without citing specific judgments). In this case, the applicant was a person who had undergone gender reassignment surgery (to female). She claimed to suffer numerous difficulties because her biological sex remained recorded in the civil registry. Representatives of the United Kingdom argued, inter alia, that civil registry records in the United Kingdom serve primarily a historical function and are not necessary for ongoing legal transactions. They also warned that permitting amendments to these records would cause upheaval in the British legal system, including in the law of persons and inheritance law, potentially infringing the rights of third parties (Barut, 2018, pp. 314–15).

[10] It is argued, for instance, that the judge's role is not to determine what a given institution, such as marriage, is in a social sense, but rather what its name signifies in a legal sense, defined solely by the legal—indeed, moral-political—context (Guala, 2016, p. 200 et seq.).

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fundamental, or even on distinguishing genuine rights from merely apparent ones. Yet it can scarcely be denied that evolutionary interpretation may diminish the protection of rights that have already been recognised (Scalia, 1997, p. 43 et seq.).[11] This is because the protection of rights often takes the form of a zero-sum game—affecting not only the balance between fundamental rights and public interest considerations, but also the relationship among rights themselves (Waldron, 2006, p. 1376). A case in point is the European Court of Human Rights' articulation of a purported right to abortion under the European Convention on Human Rights, which significantly curtailed the scope of the right to life (Banasiuk, 2013, pp. 84–86; Barber and Fleming, 2007, p. 155 et seq.). Thus, appeals to evolutionary interpretation may be used to legitimate shifts in the understanding of fundamental rights that appear to contravene both the ethics of public justification and the principles of political legitimacy.

This tension becomes particularly acute when a right that is less firmly grounded in legal culture and collective consciousness—that is, a right with weaker legitimating potential—is substituted for a right that enjoys broader cultural and institutional anchoring. A paradigmatic example is the landmark U.S. Supreme Court ruling in *Roe v. Wade* (1973), in which the Court grounded the right to abortion in a right to privacy not explicitly stated in the U.S. Constitution, invoking particularly the Fourteenth Amendment's due process clause.[12] Similarly illustrative is the aforementioned ECtHR judgment in *Goodwin*, where the Court construed Article 8(1) of the European Convention on Human Rights—"Everyone has the right to respect for his private and family life, his home and his correspondence"—as containing an implicit right to personal autonomy, which was then taken to justify institutional restructuring at the level of the state. A further example is *P. and S. v. POLAND* in which the ECtHR again inferred a putative right to abortion from the right to privacy, despite this right being neither articulated in the Convention nor, contrary to the Court's claims, recognised in Polish domestic law. In that case, judge de Gaetano submitted a dissenting opinion, emphasising that the Convention contains no right to abortion and that the majority's reasoning distorted the proper meaning of the right to privacy.[13]

In the judgments discussed above, the right to privacy—traditionally understood as protection against interference by the state or other individuals in matters of family life, intimacy, and personal preferences, and long regarded as a foundational principle of Western legal culture, enshrined in all major human rights instruments—was invoked to justify claims far less embedded in legal tradition or social consciousness. Specifically, these include claims to political and institutional recognition of intimate choices (*Goodwin*) and to largely unrestricted access to abortion (*Roe*). In this way, the courts effected a fundamental transformation of the prevailing conception of a basic right: the right to privacy, once seen as a paradigmatically protective right, came to be reinterpreted

[11] The fact that the protection of rights guaranteed by the European Convention on Human Rights may simultaneously violate the constitutional rights of another individual is noted by the German Federal Constitutional Court (see, e.g., Germany, Federal Constitutional Court, 2 BvR 1481/04 (14 October 2004), available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2004/10/rs20041014_2bvr148104.html (accessed on 18.12.2025); and Germany, Federal Constitutional Court, 2 BvR 2365/09 (4 May 2011), available at: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2011/bvg11-031.html (accessed on 18.12.2025).

[12] Legal Information Institute. (2025). *Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)*. In: Cornell Law School, Available at: https://www.law.cornell.edu/supremecourt/text/505/833 (accessed on 27.04.2025).

[13] ECtHR, P. and S. v. Poland, app. no. 57375/08, 30 October 2012. On the fact that under Polish law there is no right to abortion, see the judgments of the Constitutional Tribunal of 28 May 1997 (K. 26/96), of 27 January 2004 (K 14/03), and of 22 October 2020 (K 1/20).

as encompassing activities with distinct public consequences. Furthermore, in the American context, the right to equal legal protection—historically associated with the fight against racial segregation and thus central to the constitutional identity forged by the Fourteenth Amendment, adopted after the Civil War to prevent the political disenfranchisement of formerly enslaved persons—was interpreted as encompassing a putative right to abortion, despite the deep and enduring divisions over this issue within American society. In judicial rulings, this practice of substituting, or more accurately, creating new rights is particularly problematic from the perspective of communicative ethics insofar as courts are still widely perceived as bodies that apply rather than generate law. Judicial activism, in this respect, transforms—and arguably deconstructs—the very notion of what a judicial ruling is.[14] As Judge Egbert Myjer observed in his dissenting opinion to the ECtHR's judgment in *Muñoz Díaz v. Spain* (8 December 2009), by engaging in the creation of new rights, the Court jeopardises its credibility among the States Parties to the Convention as a judicial, rather than a political, institution (Banasiuk, 2013, p. 66).

5. JUDICIAL ACTIVISM AS A DECONSTRUCTION OF THE INSTITUTIONAL AND POLITICAL ORDER

Regardless of the specific content of activist rulings or the constitutional politics deliberately pursued by courts, the mere fact of a court stepping beyond its designated role as the third branch of government can itself appear as a threat to constitutional order and to the status of law as an institutional form.

It is worth recalling here the concept of the "trashing" of law. Nicola Lacey uses this term to describe the practices of political actors she classifies as populists—practices which, while formally compliant with the letter of the law, disregard or directly contravene established political conventions and interpretative traditions that have hitherto expressed the spirit of legislation (Lacey, 2019, pp. 15-17). Yet the activist judgments discussed above, along with certain types of arguments offered in their support, may also be perceived as forms of "trashing" the constitutional order. A striking illustration is the identification of judicial constitutional law-making with popular rule, though exercised by means distinct from those of "ordinary" politics grounded in universal elections. This line of thinking informs such concepts as Charles Eisgruber's *constitutional self-government*, Bruce Ackerman's *popular constitutionalism*, Ronald Dworkin's *partnership democracy*, and, beyond the American context, Pierre Rosanvallon's idea of *counter-democracy*. Within such frameworks, society as a collective political subject is equated with the political process of advancing successive human rights claims; civic activism is identified with the activity of non-governmental organisations initiating constitutional processes; and political agency is tied to the belief that positive law is worthy of obedience—an idea particularly central to Dworkin's theory.

Nevertheless, the concept of democracy, at least in its legitimating function, continues to imply the political empowerment of broad social groups, understood as real

[14] The European Court of Human Rights, in the reasoning of its judgment in *Johnston and Others v. Ireland*, app. no. 9697/82, 18 December 1986, stated that the principle of evolutive interpretation of the Convention cannot justify introducing rights that were not originally articulated in it. In light of the rulings cited here, however, it appears that a different position has ultimately prevailed.

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and effective influence on political processes.[15] Such empowerment cannot be reduced to judicial authority acting, as Habermas phrased it, as the "regent" of the people. Although it is certainly possible—and has been argued at various historical moments, from classical Athenian democracy to nineteenth-century liberalism and the present day—that citizen influence through parliamentary elections is often more illusory than real, such critiques do not negate the fact that the principle of national sovereignty, rather than the sovereignty of historical or procedural processes, remains a foundational element of the constitutional culture of any society that identifies itself as democratic. Thus, its deconstruction amounts to dismantling one of the most significant components of law as an institution.

An example of this problematic logic is found in Ronald Dworkin's sophistical response to the charge that judicial activism violates the principle of separation of powers. Dworkin begins by noting, rather trivially, that the U.S. Constitution defines the operation of the central government, while fundamental rights are dealt with in the Bill of Rights, appended through constitutional amendments. Since the Bill does not specify who has the authority to interpret these rights, Dworkin concludes that such authority cannot be presumed to lie within the judiciary (Dworkin, 1997, p. 121). This conclusion may be coherent within Dworkin's conception of rights as "trump cards", overriding considerations of public utility and, potentially, constitutional identity. Nevertheless, this line of reasoning neglects the institutional and political reality of the United States, where the promotion of rights is not the sole constitutional value.[16] The separation of powers possesses an intrinsic value of its own, shaping the constitution both as a legal structure and as a symbolic-political institution.

Should this deconstructed understanding of democracy become firmly established, even while the criteria of popular sovereignty and the principle of the separation of powers are formally retained, judicial activism may lead to institutional anarchy.[17] Such anarchy can manifest itself in various ways: through the acceptance by certain citizens of departures from the constitutional foundations of the state in the name of higher political objectives; through the unreflective acceptance of shifts in the constitutional paradigm; or, finally, through a general institutional and political anomie, in which the concept of the constitutional identity of a political community loses its coherence. A likely casualty of these developments would be the certainty of law as an institution.

Critics of judicial activism also argue that legal institutions at the sub-constitutional level are placed at risk, regardless of whether their basis lies in legal texts or in the shared consciousness of the legal profession. Commentators writing within the American context, in particular, have observed that the content of fundamental rights allegedly promoted by the courts through constitutional law-making tends to become as simplistic as political slogans, and similarly volatile and ephemeral. In times of radical political change, such rights may be rejected as political slogans of a bygone regime. According to Robert Bork, once one of the most essential constitutional ideas—the

[15] This is expressed, for instance, in Article 4(2) of the Constitution of the Republic of Poland (of 02 April 1997, as published in Dziennik Ustaw No. 78, item 483), according to which "The Nation shall exercise such power directly or through their representatives."

[16] In particular, understood in the way Dworkin conceives of them—namely, not as concretely defined rights, but as a single right to equal concern and respect from the government, with the pursuit of particular ways of life left to be specified by the authorities, and especially by the courts.

[17] It may, of course, occur that the idea of democracy is understood quite differently by institutional legal elites—who, for example, may regard the possibility of lodging a constitutional complaint as sufficient for the empowerment of society—than it is within other groups; however, such a situation in itself constitutes an expression of pathological phenomena.

conception of democracy as the will of the majority—is deconstructed, law loses its primary point of reference, which had been its expression in textual form. What is then recognised as law consists of arbitrary and unpredictable judicial decisions, no longer governed by the canons of legal reasoning. Moreover, professional legal conventions prove incapable of crystallising into stable institutional rules (Bork, 1997, pp. 188-199, 216-217). Bork further contends that when political disputes are reframed in the language of judicial contestation over fundamental rights—disputes that, by their nature, are structured as zero-sum games—and when the resulting judgments are endowed with the appearance of legal objectivity, conflicts are not resolved but rather transformed into entrenched societal antagonisms that are extremely difficult to remove (Bork, 2003, pp.108–109). Similar concerns have been articulated by Mary Ann Glendon. She argues that the ineffectiveness of rights asserted in judicial proceedings—including constitutional rights—as instruments for the protection of individuals stems from their removal from the mechanisms of the political sphere, understood as a rational space for discourse allowing compromise, and from legal traditions viewed as stabilising forces for such practices (Glendon, 1993, pp. 171-183).

Certain authors regard judicial activism as undermining the protective function of legal doctrine, an institution particularly characteristic of statute law systems. Bela Pokol's concept of "juristocracy" exemplifies this view Pokol highlights the significance of legal doctrine for the institutional character of law, especially within the Continental European legal tradition. He argues that, following the Second World War and particularly towards the end of the twentieth century, constitutional courts began to usurp legislative functions) Their decisions, according to him, increasingly relied on criteria derived from arbitrarily interpreted fundamental rights, rendering judicial reasoning unpredictable (Pokol, 2021, p.7-12, 46-53). Moreover, Pokol points to a dual development: not only the duplication of the constitutional-political system, exemplified by the emergence of various NGOs and semi-public, semi-private advisory and consultative bodies participating in constitutional processes, but also the duplication of the legal system itself. Courts, he argues, began to create a form of "constitutional law" addressing issues that had previously been considered non-political and regulated by the doctrines of particular fields of law. Pokol stresses that there are important differences between civil or criminal law and the distortions produced when constitutional law is applied to matters traditionally governed by private or criminal law. He thus highlights the distinctions between ordinary law and constitutional law applied to non-political issues. In the latter, the role of the text is reduced, there is no commonly accepted hierarchy of provisions within constitutional acts, and judges are free to base their decisions either on declaratory and programmatic provisions or on provisions articulating specific rights, or to assign such characteristics arbitrarily. There is also no binding framework regulating respect for jurisprudential precedent. In Pokol's view, constitutional legal doctrine based on activist judgments remains comparatively shallow and politically entangled when measured against the doctrines of non-political branches of law. Often, the role of doctrinal authorities is assumed by individuals affiliated with NGOs promoting particular judicial outcomes. He also highlights the extreme elitism of the decision-making bodies, which results in a lack of broader deliberation, even of the limited kind that typically occurs through appellate judicial procedures (Pokol, 2021, pp. 91-100). From an American perspective, Pokol's diagnosis is confirmed finds confirmation in the work of Mary Ann Glendon. Referring to American debates over originalism and textualism in legal interpretation, Glendon emphasises that the certainty of subjective rights depends not only on strict doctrinal frameworks but also on the consolidation of a stable legal culture (Glendon,1997, pp. 112–113).

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6. THE POTENTIAL OF JUDICIAL ACTIVISM AS A SOURCE OF LAW

The question of whether legal texts, legal doctrine, professional legal culture, and broader societal legal culture genuinely ensure the stability of judicial decisions—and thus the legal security of individuals—or whether, as proponents of Critical Legal Studies suggest, they merely constitute a myth concealing judicial arbitrariness, cannot be definitively resolved here. The argument that constitutional adjudication necessarily involves a political dimension—understood as the endorsement of a particular vision of the socio-political order—appears relatively self-evident. When judicial decisions extend to matters previously deemed beyond political debate, political considerations inevitably enter the law and its various branches. Yet the political—understood as the choice of fundamental values that define a community[18]—does not necessarily entail instability (although there always remains the risk that procedural politics, in the sense of power struggles, may subsequently penetrate the law). In order to distinguish the legal from the political without lapsing into a pretence of apolitical neutrality, a judge must, however, exhibit humility toward constitutional and cultural realities.

A balanced position regarding judicial activism is offered by Lech Morawski. He argues that although any issue can potentially be regarded as political, it remains necessary to distinguish between systemic politics, concerned with finding comprehensive solutions to social, economic and political problems, and ad hoc politics, concerned with resolving specific issues. According to Morawski, courts should restrict themselves to the latter form of political engagement. Given that they lack direct democratic legitimacy, possess no autonomous means of enforcing their decisions, and bear neither political nor financial responsibility for them, courts are institutionally unsuited to systemic political decision-making. Morawski further contends that courts should observe the principle of subsidiarity, engaging in political activism only where other institutional mechanisms have failed (Morawski, 2006, pp. 19–21; Kavanagh, 2009, pp. 28–29). Based on such premises, a judge should act, where necessary, to constrain political power infringing upon fundamental rights, but should refrain from issuing judgments that transform the cultural identity of the political community, alter the constitutional structure of the state, or disrupt the prevailing balance of political forces.

A similar conviction, although expressed within a different conceptual framework, is evident in American legal discourse. Antonin Scalia, when addressing the problem of evolutionary interpretation, identifies common sense, respect for values that are self-evident within a given community, and fidelity to the essential constitutional order as fundamental principles of proper legal interpretation. He observes that the American constitutional system assigns distinct functions: textual interpretation is required for constitutional provisions, whereas statutes and judicial precedents permit functional methods of interpretation (Scalia, 1997, pp. 14-18, 37-41). According to Scalia, adherence to the original meaning of the constitutional text at the time of its adoption safeguards individual rights from the arbitrary will of the majority as well as from shifts in societal consciousness and cultural norms, within which the meaning of rights may otherwise be eroded or lost. As he notes with reference to the Eighth Amendment's prohibition of cruel punishments, it is by no means certain that the moral standards of subsequent generations will prove superior (Scalia, 1997, p. 145).[19] He maintains that defining the

[18] See, e.g., Lefort (1988, p. 9) and Ricœur (1957, pp. 724-736).

[19] Referring to Dworkin's argument that we should distinguish the semantic intent of the historical legislator, that is, what abstract principles the legislator intended to express in the text, from the way the historical

scope and methods of protecting fundamental rights within a concrete historical context—taking into account specific threats and the available means of addressing them—is more effective than seeking to articulate allegedly abstract (but in fact historically contingent) and timeless standards (Scalia, 1997, p. 148).

A different but related solution is proposed by Adrian Vermeule, who advocates an orientation toward the common good as a stable foundation for judicial interpretation. He describes this approach as "Common Good Constitutionalism". Vermeule opposes progressive judicial activism by endorsing what he terms "developing constitutionalism", a properly understood form of dynamic interpretation. Although Common Good Constitutionalism is founded on principles,[20] its interpretation is intended to be politically and communicatively honest, avoiding the pursuit of political revolution under the guise of judicial reasoning. Vermeule illustrates the difference between progressivism and Common Good Constitutionalism by examining the reasoning behind the U.S. Supreme Court's recognition of same-sex unions as marriages. The majority decision relied on an alleged analogy between the historical prohibition of interracial marriage and the refusal to recognise same-sex marriage. In doing so, it ignored the traditional understanding of marriage as a union between a man and a woman, whose essential function—the possibility of procreation—is not dependent on racial similarity between spouses. Although it is always possible to deconstruct the traditional concept of marriage, Vermeule argues that historical experience provides an essential guide that judges cannot disregard (Vermeule, 2022, pp. 131-133).

Thus, both Scalia and Vermeule reject mechanical solutions, whether through blind fidelity to textual literalism (Scalia) or blind trust in the Dworkinian figure of the judge as Hercules. In Scalia's view, the protective function of constitutional interpretation is fulfilled through conceptual self-limitation, an approach that has certain affinities with legal positivism. In Vermeule's approach, the same function is achieved through teleological reasoning in the Aristotelian sense.

7. CONCLUSION

The core issue concerning the limits of legitimate judicial activism as an unwritten source of law ultimately hinges on whether the authority exercised by activist judges is subject to institutional control. To provide an adequate response, it is necessary to combine an external perspective—evaluating the effects of judicial decisions according to the criterion of protecting fundamental values—with an internal perspective, assessing whether judges remain within the established canons of legal culture and professional legal norms. Such an assessment is only possible if society—or at least a segment broader than the narrow institutional legal elite—adopts a posture that, following Hart, can be described as critically reflective.

From this perspective, the first critical instrument is the conviction that legal provisions possess an established (though not necessarily correct) meaning. Although contemporary linguistics may argue for the inevitability of interpretation, it remains possible to distinguish a clear functional meaning of a provision. What may appear at a theoretical level as the historically contingent product of interpretation often presents itself at a practical level as an obvious meaning, even if not strictly derived from linguistic

legislator identified the consequences of their application at a given historical moment, it is pointed out that the textualism promoted by Scalia also seeks norms of an abstract nature, but according to evaluations from the given historical moment (Scalia, 1997, p. 144 et seq.).

[20] Vermeule accepts Dworkin's position regarding their significance for the legal system.

analysis. What matters, therefore, is not whether such an established meaning can be identified with scientific precision, but whether belief in such meaning enables judicial decisions to be subjected to critical scrutiny. Thus, a precondition for legitimate judicial activism—and for recognising its outcomes as sources of law—is humility toward the legal text. This humility, clearly distinguished from mechanical adherence to a supposedly obvious meaning, entails a duty to interpret the law in good faith, with respect for the fundamental values that are self-evident within a given community. It also requires abstaining from constitutional-level legal subterfuge—made possible precisely by the absence of direct oversight over judges—or from advancing legal absurdities that would be apparent even to non-specialist observers. In this respect, the acculturation of judges should involve internalising the criterion of the relative objectivity of law: the conviction that even the criteria for resolving difficult cases must be sufficiently clear to allow for the scrutiny of judicial decisions.

Secondly, it is essential that judges respect the basic moral-political consensus prevailing within their society. While it may be argued that values such as liberty, dignity, and justice function as *floating signifiers* or even *empty signifiers*—terms that highlight their appropriation by various political doctrines in practice—the regulative principle governing judicial conduct should nonetheless presuppose that such values possess, at minimum, a socially objective character. Judges must recognise that, at the constitutional level, they are not selecting values but realising them.

Thirdly, judges should recognise as fundamental the existence of a specific political community and its constitutional identity. They must remain aware that the legitimacy of their activism—and the recognition of their judgments as sources of law—derives not from abstract principles of law but from a concrete institutional and symbolic order. Without such awareness, judges risk becoming political actors, and their authority would ultimately become subject to the contingencies of political fortune. In such a case, law itself would not escape a similar fate.

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