Defining and Defying Judicial Activism: Why proceedings based on Judicial Activism should always be illegitimate

Manenschijn, Jorieke

Defining and Defying Judicial Activism

Why proceedings based on Judicial Activism should always be illegitimate.

Name: Jorieke Manenschijn

Date of submission: 07-06-2021

Supervisor: Tim Meijers

Word count: 17236 (excluding footnotes & bibliography)

Table of contents

Introduction

On 23 October 2019, the highest administrative court of the Netherlands made two significant rulings in what is now called the Dutch childcare benefits scandal. In October 2019, the court decided that they could no longer follow the 'all-or-nothing' line that had been set out by the legislator and followed by the judiciary. They used a legal 'emergency toolkit' to turn around this line of interpretation and decide that the consequences of this all-or-nothing line were unjust.[1] The Dutch childcare benefits scandal has triggered a debate on the role of the judiciary and its relation to the legislator. The papers have been full of people who said that our constitutional democracy was violated, and that the judiciary has failed in offering protection towards individuals. It has even been said that only one judge could have prevented this whole debacle.[2] However, when the court itself reflected upon their role in this scandal, they also argued that they were legally not able, or not allowed to use this 'emergency toolkit'. That is why it took the judiciary so long before they did use the emergency toolkit. [3] It was after all the legislator who had demanded this all or nothing line, and shouldn't the judiciary follow the law?

The relationship between the judiciary and the legislator remains a difficult topic for constitutional democracies throughout the world. The debate on this relation is fuelled by the growing usage of the term 'judicial activism'.[4] In the Netherlands, this has even triggered a major political party to propose far-reaching constitutional reforms.[5] The alleged reason for this proposal was a court case from 2019 in which the Dutch supreme court obliged the Dutch state to reduce CO_2 emissions.[6] This so-called Urgenda case has been labelled 'activistic' by legal scholars and the media. Some even spoke of the rise of a 'juristocratie', a society ruled by the judiciary. It led to the VVD's proposal to restrict the power of the judiciary and strengthen that of the legislator.[7]

The fundamental questions underlying these discussions are: who ought to have the last word on the law, and what is the basis for such authority? These questions shift the conversation on judicial activism from legal questions towards more political questions. Scholars have provided many different answers on these political questions. Some argue that the judiciary should only apply the letter of the law, and the meaning as intended by the legislator. Others argue that the

[1] van Ettekoven, "'Tussen Wet En Recht'".
[2] Eijsbouts, 'Rechter zat opzichtig te slapen in toeslagenaffaire'.
[3] van Ettekoven, "'Tussen Wet En Recht'".
[4] Kmiec, 'The Origin and Current Meaning of "'Judicial Activism'"', 1441–42.
[5] Boersema, 'VVD herschrijft verkiezingsprogramma na kritiek van leden op passages over de rechtsstaat'.
[6] Urgenda.
[7] Gestel and Loth, 'Urgenda: Roekeloze Rechtspraak of Rechtsvinding 3.0'; Sommer, 'Met Het Urgenda-Arrest Doet de Hoge Raad Aan Juridisch Activisme.'

judiciary ought to function as a check on the legislator and should not apply laws that are contrary to the more fundamental principles of our society. There is no consensus on how to form the relation between the judiciary and the legislator. This is also seen in the usage of the term judicial activism. The debate on how to deal with judicial activism is alive, but the debate on what exactly is judicial activism seems less lively.[8] Because of the broad usage of the term judicial activism, the conversation and debate on how to deal with this phenomenon is impeded. If we do not know what we are talking about, then how are we supposed to 'fix' it, or determine whether it even is something we need to fix?

The aim of this thesis is to provide a clear conception of judicial activism and argue that judicial activism should lead to illegitimacy. In the current (academic) debate, a decent definition of judicial activism has not been proposed.[9] It is necessary to have such a definition, to bring clarity into the debate about the relation between the judiciary and the legislator. The term activism or judicial activism is often used as an argument against the role of the judiciary, but when using this term is it not clear what people are referring to.[10] There is an apparent consensus, but it is undermined by a substantial disagreement on the core of judicial activism. This makes it hard to determine whether judicial activism is present in an underlying case. Additionally, because of the cluttered use of the term judicial activism the debate keeps circling around what the judiciary did in certain cases instead of moving towards the more fundamental question what the judiciary ought to do. Simply stating that the judiciary must refrain from being activistic does not mean anything if the term activism is not clear. Furthermore, the term judicial activism does seem to have a negative connotation in the media and therefore the wrong usage of this term is an unnecessary harm towards legitimacy of the court and their rulings.[11] It is therefore important to get a clear and workable definition of judicial activism. Once this is established, we can focus on the discussion whether judicial activism should be allowed. This triggers the puzzle of unjust laws. Can we successfully argue that judicial activism should always be condemned, even if that means that the judiciary must apply unjust laws? In this thesis I will argue, based on my proposed definition of judicial activism, that we can indeed argue this.

In the first chapter I will describe which components a good definition of judicial activism must entail (1.1). Then I will set out our current intuitions about judicial activism (1.2) and show that

[8] Green, 'An Intellectual History of Judicial Activism', 1195; Kmiec, 'The Origin and Current Meaning of "'Judicial Activism"", 1442; Cross and Lindquist, 'The Scientific Study', 1755.
[9] Kmiec, 'The Origin and Current Meaning of "'Judicial Activism"", 1475–77.
[10] Green, 'An Intellectual History of Judicial Activism', 1197–99.
[11] Green, 1209.

judicial activism is more than illegitimacy and thus a valuable concept (1.3). I will discuss some common definitions (1.4) and introduce my proposed definition of judicial activism as an act of the judiciary which exceeds the boundaries of their authority to reach a ruling that is contrary to written legislation or the spirit of the law (1.5).

In the second chapter I will discuss the question of the authority of the judiciary (2.1) and set out the view that the authority of the judiciary is based upon consensus among legal scholars and government officials based on the theory of Hart (2.2). Furthermore, I will investigate if we can apply the theory of Hart on cases of alleged Judicial Review[12] and argue that even though the definition is not applicable in all situations, it will still provide useful information (2.3).

In the final chapter, I will address the question whether Judicial Activism could be justified from a legal point of view. I will address the puzzle of unjust laws that poses a problem for defying Judicial Activism (3.1) and set out two arguments to show that even in the case of unjust laws, we should not allow for judicial activism. Firstly, I will argue that justifying Judicial Activism will lead to unclarity on fundamental principles, legal uncertainty, and diminishment of the legitimacy of the judiciary (3.2). Secondly, I will argue that Judicial Activism is not a solution towards the problem of unjust law. On the contrary, it only relocates the problem of injustice towards the judiciary itself. (3.3.) Based on these two lines of reasoning, we should always condemn Judicial Activism, and declare court rulings based on Judicial Activism illegitimate (3.4).

I will conclude with a brief reflection on this new view on Judicial Activism and pledge for a more constructive and clear debate on the justification of Judicial Activism. Further research should be done to investigate fruitful options for answers to the unavoidable question who ought to decide when a court case fits the criteria of Judicial Activism. This could for example be a trial by jury in the form of a panel of legal scholars, legislators, and judges.

[12] I will write judicial activism with capital letters when referring to my proposed definition of judicial activism.

Chapter one

1.1 Criteria for a good definition

To create clarity in the debate on the relation between the judiciary and the legislator we need a clear and good definition of judicial activism. The aim of the definition is to be able to determine when a court case should be labelled as judicial activism or activistic.[13] It must be able to appoint specific judicial actions, judicial non-actions or reasoning that are activistic. Therefore, the criteria that flow from the definition must be formulated in such way that we can apply them on the rulings of the judiciary, mostly in the form of written court cases. An advantage would be if these criteria are universally applicable. A definition with criteria that cannot be used to see if an object (the court ruling) meets such conditions is not useful. This is important to be able to discuss the consequences of judicial activism.

In her article on terrorism, Allison Jaggar formulated four criteria that can be used to measure the value of a definition, on which I will build four criteria for determining what constitutes a good definition of judicial activism. The criteria Jaggar proposed are conservatism, consistency and non-arbitrariness, precision, and impartiality.[14] I will shorty discuss these four criteria. The criterium of conservatism requires that a good definition disturbs existing usage as little as possible. If a new definition does disturb common usage, there must be a plausible and appropriate rationale for changing the definition. One must show why the common usage is not correct or is not sufficient to serve as a definition for the concept. Because the meaning of the term judicial activism is cluttered, this criterium is not very useful. There is not one common usage of the term to diverge from. Furthermore, I do not desire to capture all these different usages of the term in my definition. Not only is this impossible, but the goal of proposing a clear definition would be undermined if the definition would be made so broad in order to capture all the common usages of the term. Therefore, I will not use this criterium of Jagger as a criterium to research and test new definitions with. However, I will look at the existing definitions, and the underlying critiques that people utter when using the term judicial activism. From this, a core meaning of judicial activism will be distilled. If at a certain point an often-used definition or critique at the judiciary will be eliminated, this will be argued for as required by this criterium of conservatism.

[13] The terms judicial activism and activistic/activism can be read as synonyms.
[14] Jaggar, 'What Is Terrorism, Why Is It Wrong, and Could It Ever Be Morally Permissible?', 205.

The criterium of consistency and non-arbitrariness requires that the new definition will improve the consistency of the usage of the term. Are people that are using the term, also referring to the same judicial behaviour? Is the meaning of the term the same for all the people using it? If a definition is amended, it must improve consistency amongst people using the term. Therefore, the meaning of the term must fit with the term's central and generally accepted meaning. The latter is important for the definition of judicial activism. Even though there does not seem to be a generally accepted meaning, the aim is to provide one. For this to succeed, the definition must fit with the most fundamental critiques that people utter when speaking of judicial activism. Therefore, this criterium will be used to test whether the definition fits with the core intuitions and usage of the term. However, since I want the definition to provide more clarity on what judicial activism is, and what is not, I do not aim to formulate a definition that fits with all the intuitions and all the current usage of the term. I want the term to be narrower. Consequently, the new definition will also exclude the shallower ways in which the term is used now.

I will amend the criterium of consistency and non-arbitrariness and use it to test not whether the definitions fit the current usage of the term, but if they fit the more fundamental charge that is being made when talking about judicial activism. For example, when the US Supreme Court decides a case and the charge of judicial activism is being made because they allegedly used their own political views to stir the case in a certain direction, it is actually said that the US Supreme Court did not use the right interpretation methods. The definition only must address the latter concern, and not the former. The new definition of judicial activism will thus limit the occasions in which the term is used, and I will therefore test whether the definition fits with the core meaning and rationale of the critique that is uttered when people use the term judicial activism. I will thus use the criterium in a slightly different way and call this the criterium of correspondence with core intuitions and usage of the term.

The third criterium is precision. The definition must improve precision and be able to distinguish the phenomenon from other phenomena. However, it is not necessary to remove all uncertainties. Concepts, and especially morally laden concepts can never have fully rigid boundaries. For the definition of judicial activism, it is important that a definition can tell us whether a court case is activistic or not compared to other cases. However, it does not have to apply to all court cases where 'something went wrong' on the side of the judiciary. The definition must catch the essence of the critique that underlies judicial activism and thus be able to point

towards court cases that are in the core activists. It does not matter if a few shadow cases slip through.

The last criterium is impartiality. The basis of the definition should not be based on controversial moral and political questions but leave these open to be debated.[15] This criterium is also important with regards to judicial activism. Since this concept has been used mostly to criticize the actions of the judiciary it has gotten a negative connotation.[16] People put the label judicial activism on court rulings from which they believe that the outcome is merely the consequence of an activistic judge. Meaning that if another judge would have been there that day, it could have turned out differently. Since the judiciary is supposed to be independent, and rule based on the law, it is a negative thing to argue that the judges themselves can steer the outcome in such a way. This happened for example in the Urgenda case, in which the judiciary told the Dutch government to reduce CO2 production. This outcome was controversial, and often labelled as activistic. The judiciary should not have taken such a politically loaden decision, the judiciary went too far in interpreting the EVRM, the judiciary should have declared the case inadmissible. In all cases, it is about something that the judiciary did wrong, and the outcome should have been different. The term judicial activism shows this disapproval.[17] However, to have a fair discussion on whether judicial activism should be allowed, the term itself should not have a negative or positive connotation. It should be value neutral.[18] It is therefore important that the definition itself does not contain a value judgement on whether judicial activism should be allowed.

I propose the following criteria to analyse and measure the value of definitions of judicial activism:

1) Applicability on court rulings; is the definition able to determine if a court ruling is activistic? Does the definition provide clear criteria, that can be universally applied?
2) Correspondence with core intuitions & usage; does the definition fit our core intuitions about judicial activism and the way in which the term is currently used? If not, this deviation should be justified. Since the current use of the term is cluttered, a definition will probably have to diverge from common use to create clarity about what judicial activism is. This is necessary to develop clarity on the concept and enable a meaningful discussion on the consequences of judicial activism.

[15] Jaggar, 205.
[16] Kmiec, 'The Origin and Current Meaning of "'Judicial Activism"", 1444.
[17] Sommer, 'Met Het Urgenda-Arrest Doet de Hoge Raad Aan Juridisch Activisme.'; Gestel and Loth, 'Urgenda: Roekeloze Rechtspraak of Rechtsvinding 3.0'.
[18] Jaggar, 'What Is Terrorism, Why Is It Wrong, and Could It Ever Be Morally Permissible?', 205.

3) Precision; is the definition precise enough to capture only the core of judicial activism, without including all other sorts of judicial mistakes or being so narrow that it excludes forms of judicial activism.
4) Impartiality; the definition must not contain a value judgement on judicial activism.

I have used the criterium of precision and impartiality of Jagger. I have transformed the second criterium of Jagger into the criterium of core correspondence with intuitions and usage, since I want the definition to capture the more fundamental critique that often lies beyond the charge of judicial activism and not necessarily the way the term is used now. I added the criterium of applicability, because I want the definition to be able to label court cases as activistic. Before we analyse current definitions and meaning of judicial activism according to those criteria, we must look at our intuitions and the way the term is currently used. This is necessary for the application of the fourth criteria.

1.2 Our intuitions about judicial activism

The term judicial activism was first introduced by a historian named Arthur Schlesinger in 1947 in a Fortune magazine article. In this article he divided the Supreme Court justices of America into activist judges and more restrained judges. He connects activism with the knowledge that law and politics are inseparable: '*a wise judge knows that political choice is inevitable; he makes no false pretence of objectivity and consciously exercises the judicial power with an eye to social results"*[19] However, he does seem to detest activism and prefers judicial restraint. Schlesinger also made the fallacy of not clearly determining what he means with judicial activism. He describes the relation of activism with politics and result-oriented judgements but never mentioned what criteria he used to determine what judicial activism is.[20] Thus when the term was introduced to a broad audience in 1947 the meaning was already cluttered.

Since this introduction, the use of the term judicial activism has been on an enormous rise. Almost all use of the term judicial activism concerns the way judges decide their court cases. It is often said in the context of 'creative' judges, judges that allegedly go against the intention of the legislator, new interpretations of the law or judges who use their own morality in deciding cases. Most people utter a negative critique towards the decision-making process or the outcome.[21]

[19] Kmiec, 'The Origin and Current Meaning of "'Judicial Activism"", 1447.
[20] Kmiec, 1450.
[21] Green, 'An Intellectual History of Judicial Activism'.

Some see judicial activism as the right way to decide cases.[22] A few scholars argue that the term judicial activism is useless, and that the only meaning of the term is to express a negative attitude towards the outcome of a court case. Since a negative attitude towards an outcome of a case is a subjective observation, the term judicial activism does not actually say something about the case itself. Therefore, the term judicial activism defined this way is useless for academic purposes.[23]

We can distinguish a few different critiques, that are often linked to judicial activism:

- Declaring a law or executive actions of government invalid due to contradictions with the constitution or other individual rights (judicial review).
- Outcome based ruling of a case.
- Failure to adhere to precedent.
- Judicial law making (creating or extending rules through extensive interpretation).
- Using non-accepted interpretive methodology.
- Judicial decisions that interfere with the separation of powers.
- Squashing or disapplying a law because of interference with general principles of law or the common law. [24]

There is no doubt that there are even more aspects of the judiciary that have been criticized using the term judicial activism. It is not necessary to name them all if we discuss the most important. A good definition must contain the core, but it does not have to be so precise that it also catches all the grey area's surrounding judicial activism.

What makes defining judicial activism problematic is that some of the mentioned critiques do not lead to judicial activism in all legal systems. The first critique is based on judicial review. Judicial review is the practice of court's ruling new laws or statues invalid due to being in contrast with the constitution or other laws of a higher order. Judicial review is closely linked to judicial activism, and in some definitions judicial activism is defined as the stance of the judge towards judicial review.[25] The underlying critique is that the court, that is not democratically chosen, can overrule laws made by the democratically chosen legislature.[26] Not only is this possible due to inconsistency with the constitution, European and international law comes into play as well. However, not all legal systems allow judicial review.[27] Furthermore, in some countries such as the

[22] Dworkin, *Law's Empire*.
[23] Roosevelt, *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions*.
[24] Kmiec, 'The Origin and Current Meaning of "'Judicial Activism"', 1444.
[25] Spitzer, 'What Is Judicial Activism'.
[26] Kmiec, 'The Origin and Current Meaning of "'Judicial Activism"', 1463–64.
[27] Kmiec, 1466.

United States, judicial review is a core element of the legal system, whereas in the UK judicial review based on the UK constitutional would be considered activistic because it is not something the judiciary is allowed do.

The same can be said about the failure to adhere to precedent. Precedent is something that is only binding in common law systems, and not in civil law systems. Whether leaving precedent constitutes an activistic judge or not, depends upon the legal system. In some systems this is normal practice for the judiciary.

These two examples do show a common factor. In both, the criterium for the act of the judiciary to constitute judicial activism is whether the judge is allowed to perform this act or exceeds its power. What the judiciary ought to do, is based on the authority of the judiciary. How this authority is determined, is based on the legal system of that judiciary. Thus, these critiques can be summarised as a normative view on the authority of the judiciary, and the exceeding of this authority. The power of the judiciary, or their authority seems to be an important aspect of the concept of judicial activism. This criterium can also be applied to the critique of non-accepted interpretative methods.

Some of the other critiques such as outcome-based ruling of a case, judicial law making, and quashing laws because it is contrary to common law principles or general principles of law are also based on the situation where the judge uses their powers to reach a certain outcome that was not offered by the legislator. This is clear-cut in outcome-based ruling of a case, where a judge decides what the outcome ought to be, and then window dresses this as a legal reasoning. When it comes to judicial law making, the judiciary makes a law or new rule because there is a gap in the current legislation, unforeseen circumstances or the legislator is considered 'wrong' in making its legislation. Those forms of judicial law making, besides the latter situation, are quite common.

Based on these new judicial rules, that are often called general principles of law, the judiciary can interpret or bend written laws to comply with these general principles. Sometimes these general principles come from the legislator, but they are always very broad and vague and thus are given form by the interpretation of the judiciary. The core of this critique is that the judiciary makes or bends the rules which results in court rulings that could be contrary to the will of the legislator.

The last critique is that the judiciary should not interfere with the separation of powers. This builds upon the traditional view of the separation of powers, in which the legislator makes the laws, and the judiciary merely applies the law. The judge is nothing more than the mouthpiece of

the legislator.[28] Almost half of the intuitions about judicial activism refer to the fact that the judiciary ought not to go against the legislator to reach a certain conclusion. This criterium also depends on the legal system's specifics since every system incorporated Montesquieu's idea of the trias politica differently.

In conclusion, we can distil two core objections/intuitions when people speak of judicial activism:

- The judiciary ought not to exceed its authority.
- The judiciary is not allowed to strive for a certain result that goes against the will of the legislator.

These two intuitions show what behaviour people regard as the core of judicial activism: the judiciary that overstepped their authority to strive for a certain result that is contrary to the law as made by the legislator.

1.3 The necessity of clearly defining judicial activism

As mentioned before, some scholars argue that we should not focus on defining judicial activism but should merely focus on whether court rulings are legitimate. According to Roosevelt legitimacy offers us insight in which cases we should accept (legitimate outcomes) and which cases we should not accept (illegitimate outcomes). The concept of judicial activism is also used to point out cases that we should not accept. Roosevelt sees judicial activism as a term merely used to utter disapproval with the outcome of a case. When one disagrees with the outcome, the allegation of judicial activism is made to diminish the authority of the case. The concept of judicial activism also tries to point out which cases are illegitimate and thus tries to make the same claim as the concept of illegitimacy. However, because of the subjective definition of judicial activism this claim fails. Consequently, the concept of judicial activism does not have an added value compared to the concept of legitimacy.[29]

I find his definition of judicial activism shaky. Roosevelt's definition does not fit the criteria of precision. Judicial activism is more specified than merely disagreeing with the outcome of a case. There are many cases in which at least one person (probably the losing party) disagrees with the outcome of the case, but we do not speak of judicial activism because there was not a problem with exceeding authority or result-based judgements that go against the will of the legislator.

[28] Cohler, Miller, and Stone, *Montesquieu: The Spirits of Law*, 156–60.
[29] Roosevelt, *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions.*, 36.

Take for example Brown V. Board of education. In this landmark case the US Supreme Court ruled that state laws establishing racial segregation in public schools are unconstitutional, even if the segregated schools were of equal quality. This case has been celebrated by many people, including legal scholars. However, this case is also addressed as being an example of judicial activism.[30] Judicial activism can also lead to outcomes people perceive as positive. Furthermore, the way the outcome of a case is perceived can change. It seems odd that this would also lead to the case not being activistic anymore. There is a more fundamental aspect about judicial activism than Roosevelt accredits.

Furthermore, his definition is clearly not value neutral since his definition is based upon a value judgement on the specific content of the court ruling. Additionally, it does not provide an applicable criterium since the definition is based on the subjective stance of the observer towards the definition. Lastly, the definition also does not fit with our current usage of the term, as the example of Brown V Board of education showed. Not all cases that we disagree with are cases of judicial activism and visa versa.

The idea of using legitimacy instead of judicial activism is also not workable. There is a clear distinction between judicial activism and illegitimate cases, and the intuitions people hold on both concepts. If a judge allows for a piece of evidence that should not have been allowed, and it turns out to be crucial for deciding the case, do we speak of judicial activism? The outcome is illegitimate since the legal rules of admitting evidence have not been followed. Thus, the judge acted in contrary to its authority. This decision would most likely be overruled by a higher court. Judicial activism points towards a more fundamental critique than a purely illegitimate outcome. Judicial activism is mostly connected to cases of high courts. It can also appear in lower courts, but it is expected that the losing party will challenge the outcome on the activistic part. Therefore, cases of judicial activism are more likely to reach a supreme court and are often a contested ruling of the highest court. Judicial activism points to something more fundamental then simply a judge who did not follow the procedural rules. It is the combination of exceeding authority and the result that seems to go against the legislator that constitutes judicial activism, not merely authority.

There are two arguments pleading to define judicial activism and not merely focus on illegitimacy. Firstly, not all cases of illegitimacy are a form of judicial activism. Secondly, a clear definition opens the conversation on the consequences of judicial activism. With a definition, we can have a

[30] Chemerinsky, *The Case Against The Supreme Court*, 38–39.

debate on whether judicial activism is something we should approve or disapprove and if cases of judicial activism should lead to illegitimacy. Therefore, it is useful to maintain the concept.

1.4 Current definitions of judicial activism

Many definitions of judicial activism have been suggested over the past years. I will discuss some of these definitions, to point out the difficulties that arise with trying to define judicial activism. To decide whether a certain definition is valuable, I will use the four criteria that I developed: applicability, precision, impartiality and correspondence with intuitions and usage.

A good starting point is the study that Green conducted in 2009. He analysed some definitions of judicial activism and arranged them as followed: (1) any serious legal error (2) any controversial or undesirable result (3) any decision that nullifies a statute or (4) a smorgasbord of these and other factors.[31]

In the first category, we see definitions such as the one of the Black's Law Dictionary, that defines judicial activism as *'a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among others, to guide their decisions*.' Another study defined judicial activism as *'actions that are more clearly grounded in a Justice's ideology than in legitimate legal sources'*. Both these definitions define judicial activism as the usage of personal ideologies by the judges. It is generally accepted that this is a serious legal error. You could question the possibility of objectivity of the judiciary when interpreting laws and deciding on 'rights-based questions' but that is a different discussion.[32] So are these definitions good definitions? Definitions based on legal errors are in general applicable on court rulings since we can analyse the ruling to determine if there where any errors. However, it is hard to determine whether their errors are due to the judiciary using their own ideologies. The two above mentioned definitions do not fit the criterium of applicability. Furthermore, the definition is too wide. As seen before, there is a difference between legitimacy and judicial activism. These definitions, and definitions based on legal errors in general are not able to make this distinction between legitimacy and judicial activism. Consequently, it also does not fit with our intuitions and the core usage of the term. We have seen that judicial activism is about overstepping certain boundaries, to go against the legislator and the spirit of the law. Making a legal error is something different from that.

[31] Green, 'An Intellectual History of Judicial Activism', 1217.
[32] Dworkin, *Taking Rights Seriously*, 81–130; Sajó and Uitz, *The Constitution of Freedom. An Introduction to Legal Constitutionalism.*, 341–47.

Definitions based on legal errors are not a good way to define judicial activism, due to their lack of precision and correspondence with our intuitions and the usage of the term judicial activism. We must therefore look for definitions that are more precise and are able to make a distinction between mere illegitimacy and judicial activism.

In the second category, any controversial or undesirable result, we can also conclude that these kinds of definitions are not suitable to define judicial activism. Even though this is more precise than using legal errors as a basis, it is a subjective definition that is not value neutral. The third category cannot provide us with more useful definitions, since nullifying a statue is an act that is common in some legal systems, and uncommon in other legal systems. Furthermore, it is only one tool/act from the judiciary, while we have seen that many more are named when talking of judicial activism. It is thus too precise and does not fit our intuitions and usage of the term. The fourth category is the added sum of the first three, and therefore does not provide a decent definition either. Furthermore, it is way too wide to provide applicable criteria and contains all the problems that the first three categories separately triggered.

To summarize, the definition must not be based on a legal error or a specific action or tool of the judiciary. It must be more common than those, while also being able to differ between illegitimacy and judicial activism. Green also proposes a new definition of judicial activism. He proposed: '*the abuse of unsupervised power that is exercised outside the bounds of the judicial role'*.[33] With unsupervised, Green means those judicial decision that cannot be held accountable by another court or power. These decisions are exclusively made by the highest courts.

This definition does not immediately provide applicable criteria but does offer some tools to determine whether a court case is a consequence of judicial activism. We can objectively determine if this is a case of unsupervised power, and then determine if there was an abuse of this power that took place outside the normal authority the judiciary has. These criteria are also quite precise, and do not include normal serious legal errors, but focus specifically on abuse of power and exceeding authority, which also matches our intuitions about judicial activism. The definition is not impartial, because the term abuse implies that the power is used in a negative way. However, this could be easily changed. The definition is not universal since the view is clearly developed from an American point of view. Even though Green argues that unsupervised

[33] Green, 'An Intellectual History of Judicial Activism', 1222.

is not just the result of judicial review and the US constitutional law, it is.[34] In other law systems the legislator can overrule the decisions of the judiciary, even with retroactive laws for the underlying case. This does constitute a form of accountability since the actions of the judiciary can be revoked and they ought to follow these revisions. The act of revoking or adapting the law because of a court cases might not be the same as accountability, it will not lead to resignation or consequences for the specific judges, but it does constrain their powers. It is not that the judiciary decides exclusively, because the outcome can be adjusted. Furthermore, the mere fact that there is accountability does not mean that the judiciary cannot act activistic. The term judicial activism is also useful to determine whether court cases are activistic in a system where the judiciary can be held accountable, because this provides a good reason to consider doing so. It is true that unsupervised judicial activism poses a bigger problem than supervised judicial activism. If the first is the case, you have acknowledged that there has been a judge that acted beyond their authority and there is nothing that can be done about it.

The definition of Green did not make the mistake of including a certain legal error or tool of the judiciary and fitted better with our intuitions due to the focus on authority. Unfortunately, it is an American focused definition, and therefore not applicable on other court cases and it is not impartial since it already condemns the acting beyond the power of the judiciary. We must look for a definition that is based on authority but is more abstract and neutral than the definition of Green.

Mcdowell proposed the following definition: '*judicial activism is the charge that judges are going beyond their appropriate powers and engaging in making law and not merely interpreting it*'.[35] He did not make the mistake to embrace a value judgement in his definition, thereby countering the problem of impartiality. Furthermore, he used the appropriate powers of the judiciary instead of accountability, thereby making the definition more abstract and applicable for all legal systems. He did add a part about engaging in making law, and not merely interpreting it, which triggers the problem of precision. He included a specific legal action from the judiciary, making the definition too narrow. However, we can easily scrape this from his definition and contain the good part: '*judicial activism is the charge that judges go beyond their appropriate powers'*.

[34] Green, 1223.
[35] McDowell, 'Judicial Activism'.

This version of McDowell's definition is applicable on court rulings when we know what the appropriate powers of the judiciary are. It does not offer immediate tools but does show us how to develop these criteria. Secondly, the definition is less precise than the previous one and includes all judicial acts that are beyond appropriate powers. This seems too wide, since not all exceeding of power leads to judicial activism. Here we miss that fundamental difference between mere illegitimacy and judicial activism. That leads me to the point of correspondence with intuitions. This definition only includes our first intuition on authority, but not the second intuition that this overstepping of authority is done to reach a certain result that goes against the legislation or the spirit of the law. So, this definition is too precise and does not correspond with our intuitions and usage. It is impartial, because it does not offer any values, merely the observation of the exceeding of authority.

The best definition of judicial activism to be found within literature is thus based on authority. However, merely overstepping authority does not grasp the core intuitions about judicial activism. Furthermore, this also does not make the difference between an illegitimate court ruling, and a court ruling that is a consequence of judicial activism explicit. Therefore, we must build upon the idea of defining judicial activism based on authority, but make the definition more specific, without including concrete judicial actions or tools.

1.5 A new definition of Judicial Activism

From our intuitions and the usage of Judicial Activism, I could distil two main points:

- The judiciary ought not to exceed their authority.
- The judiciary is not allowed to strive for a certain result that goes against the will of the legislator.

As seen in the previous paragraph, most definitions of Judicial Activism either included specific legal practices, were biased or were too wide and could not pinpoint the difference between illegitimacy and judicial activism. Consequently, these definitions also did not fit with our intuitions about judicial activism. It did become clear that the core of the definition must address the exceeding of authority. Therefore, I propose the following definition: '*Judicial Activism is an act of the judiciary in which they exceed the boundaries of their authority in order to reach a ruling that is contrary to written legislation or the spirit of the law'*. It is exactly the combination of exceeding authority and going against the legislator that constitutes judicial activism.

I will discuss the four criteria to show that this definition is a good definition and argue that this definition is able to avoid the problem of being too precise or too narrow, without losing the distinction between judicial activism and mere illegitimacy.

The first criterium is applicability. This definition offers three criteria that can be applied on court rulings:

- Did the judiciary exceed their authority?
- Was this exceeding of authority necessary to reach the outcome as it is in the ruling?
- Is the outcome of the court case contrary to written legislation or the spirit of the law?

For a court ruling to be labelled activistic, all these three criteria must be met, making the criteria necessary criteria. Otherwise, this definition would not differ from the definition of McDowell and face the same problems.

The three criteria cannot be applied without having some knowledge on the local legal system and the more fundamental questions about the authority of the law, legislator, and judiciary. The first criterium heavily depends on the question what the authority of the judiciary is, were the second and third depend on more objective legal questions. The second criterium requires a study towards the other possibilities that the judiciary might have had, to reach the same ruling. If there was another, legally allowed way, we do not speak of Judicial Activism. It is crucial that judiciary reached an outcome, that it could only reach by doing something that the judiciary is not supposed to do. Therefore, this criterium excludes court cases in which the same outcome could have been reached without overstepping authority. In these cases, the judiciary merely made a mistake in for example choosing the right legal tools. This analysis can be done based on the court ruling and knowledge of the legal system.

The third criterium requires a study towards the spirit of the law. This analysis can also be done based on the court ruling, in which the court will address how it came to a certain interpretation of the law. Furthermore, they will sometimes address the problem of consistency with the spirit of their law and provide their own interpretation of the spirit of the law. Within this analysis, one can study the accepted method of determining the spirit of the law, and check whether the court has followed this method.

An objection against the applicability of the third criterium could be that it is not always possible to objectively determine what the spirit of the law is. When should we label something 'contrary to written law', especially if laws contain open or vaguely formulated principles? In some cases it might be evident, but there are many cases in which it is not. It is indeed true that determining

the spirit of the law is difficult. However, this problem is unavoidable, and has been a continuing problem for legal scholars for years. Furthermore, there is some agreement on what types of interpretation can be used for determining the spirit of the law. Thus, the spirit itself might be unclear, but the method for determining the spirit of the law can be clear. Therefore, we can determine if an act of the legislator is contrary to the spirit of the law by looking at the method the court used to reach such a conclusion. To give an example, in the Dutch legal system it is common that the courts look at the 'memorie van toelichting', an explanatory brief on the meaning of the law. In the English legal system, courts can only take the letter of the law into account. Thus, to determine whether a court ruling was contrary to the spirit of the law we can use the generally accepted methodology for determining what the spirit of the law is. In some cases, the court itself might have addressed this problem and we can analyse their reasoning to determine whether it is reasonable. In other cases, this analysis must be done independently.

For the first criterium, the application is more complicated and will be discussed in the next chapter. As seen with other definitions, all definitions that address authority must defer their criteria towards authority and since this is one of the core intuitions on judicial activism, we must accept that a definition of judicial activism cannot offer more precise criteria on itself.

An advantage of leaving open the specifics of the authority of the judiciary is that it is applicable onto all legal systems. Because the definition does not contain any specific actions, such as squashing or nullifying laws it can be applied on legal systems that allow for judicial review and legal systems that do not. This makes the definition universally applicable.

A general objection against the applicability of this definition is that it will not be easy to determine when a case is the consequence of Judicial Activism. Someone must be able to know exactly what the authority of the judiciary is, must investigate if there were other, legally allowed, options to reach this ruling and if it was contrary to the spirit of the law. Determining whether a case is a case of Judicial Activism requires extensive knowledge of one's legal system and a thorough analysis of the case that is being discussed. However, since my proposed definition of Judicial Activism should be used for academic purposes, the knowledge that is required to use it should not form an obstacle. Furthermore, making the allegation of judicial activism towards the court is not something one should take lightly, and should only be made after careful consideration. It is therefore only positive that my proposed definition requires such a thorough analysis of the case and the legal system.

The second criterium is precision. Through the combination of exceeding authority and a ruling contrary to the legislator or the spirit of the law this definition is quite precise. It does not contain

all court cases in which a judicial mistake is being made, or even authority is exceeded but only those in which this is done to reach a ruling that is contrary to the laws of the legislator and the spirit of the law. Therewith, this definition does not face the problem of not being able to differ between mere illegitimacy and Judicial Activism. This becomes clear from the Child Care Benefits Scandal. In this case, the judiciary used a legal tool that it was not allowed to use. However, the judiciary used it anyways because the judiciary wanted to turn around the interpretation of the law towards an interpretation that did not fit with the spirit of the law. The judiciary clearly intended to go against the spirit of the law.[36] It was thus not merely a mistake and consequently an illegitimate outcome. On the contrary, the court ruling has triggered a wide debate on whether the judiciary should have done so earlier, and what exactly the relation is between the legislator and the judiciary in such cases. Meanwhile, the legitimacy of the court ruling has not been questioned or been called a mistake. Using the label Judicial Activism for such cases allows for this discussion, where labelling it as illegitimate does not, since it suggests that the court ruling was wrong and not valid.

The definition also meets the third criterium of impartiality, because it does not provide a value judgement about the fact that authority is being used to reach a certain result. This can still be a positive or a negative connotation. This probably depends on the reasons why the judiciary decided to perform judicial activism and the specifics of the ruling. The interesting question we need to answer in the final chapter is if there are situations in which the ruling justifies the use of judicial activism. However, the definition itself remains value neutral.

The final criterium is correspondence with intuitions and usage of the term. The definition is based on our two core intuitions and thus fits these. These intuitions were derived from more broad usages of the term and captures the more fundamental critique that underlies the critiques that are commonly heard.

Another objection against my proposed definition could be that it places more emphasis on the outcome of the court case, than on the way this ruling was reached. A court ruling in which the judiciary clearly used its own personal preferences to motivate a court ruling that is not contrary to the spirit of the law does not constitute Judicial Activism. However, this behaviour is often seen as Judicial Activism. I have already argued that we should distinguish between a judiciary that is making mistakes, and a judiciary that is purposely acting against the laws of the legislator. Therefore, if a judiciary uses its own opinions, or wrong interpretation methods, but still rules according to the spirit of the law, this is a mere mistake and of course wrong, but it is not judicial

[36] van Ettekoven, "'Tussen Wet En Recht'".

activism. This might be contrary to the way the term is used in mainstream media and by some academics, but this is also the purpose of my proposed definition. It is important to distil mere mistakes from judicial activism, because for the former there is no reason to talk about justifying the mistake or the court ruling, whereas for the latter there is. If the judiciary has purposely acted against the spirit of the law, they must have had a reason to do so. This reason could be something worth justifying. However, if it is a mere mistake and the ruling is not contrary to written laws, it is not worth discussing the consequences of this mistake. Therefore, the emphasis on the outcome of the case, as begin contrary to written laws and the spirit of the law, is justified,

In conclusion, my proposed definition of Judicial Activism fits the four criteria as determined in the first chapter. Furthermore, it does not encounter the same problems as the other definitions that I discussed. My proposed definition can distinguish between mere illegitimacy and Judicial Activism, is applicable on all legal systems and is narrow enough without making the mistake of including specific legal tools. For the definition to be applicable further research is required on how to determine the authority of the judiciary. This is inevitable, since all definitions that use the term authority have to offer guidelines on how to determine this authority.

Chapter two

2.1 The foundations of judicial authority

For my definition of Judicial Activism to be useful, we must investigate the foundation of authority of the judiciary. In the search towards judicial authority, we must specifically focus on the boundaries of this authority. As soon as these boundaries are crossed to act against the legislator, we speak of Judicial Activism.

The main task of a judge is to settle individual disputes based on the law and the facts of the case. Judges ought to be impartial when deciding cases. They must objectively apply the law onto the facts. The law is their tool towards reaching a ruling on the dispute. This task is attributed to the judiciary by the legislator, most commonly via a written constitution. The task of the judiciary to apply to law is uncontroversial, just as the fact that the judiciary is instated because of the legislator. Thus, the main source of authority for the judiciary is the law. Problems arise concerning the interpretation of the law, adjudication of the law and the acknowledged sources of the law. Therewith, the question on the authority of the judiciary leads back to the question of the sources of the law and the foundation of the law. On the latter, the views vary immensely.

To show that the criterium of applicability is indeed applicable, I have chosen a specific legal theory to specify the authority of the judiciary: the legal theory of Hart. This has two reasons. On the one hand it illustrates that the term authority can be made specific enough to be able to provide applicable criteria. If the concept of authority would be too vague to provide applicable criteria, my proposed definition would not fulfil its purpose of being able to facilitate a clear debate on the desirability of the concept. However, it is not necessary for my definition of Judicial Activism to work that the concept of authority is coloured in by the theory of Hart. This can also be another legal theory that can provide a method to determine the authority of the judiciary.

On the other hand, I do believe that the theory of Hart is a suitable theory to determine the authority of the judiciary when it comes to cases of alleged Judicial Activism due to its universal character. Because the theory of Hart is based on consensus on the sources of the law and the authority of the judiciary, it is flexible. The consensus itself does not contain a normative view on how the legal system should be shaped. It does not prescribe whether judicial review should be possible or that the legislator must have the final word on the law. It does of course contain a certain view on how to determine the sources of the law, but the sources of the law itself are not determined.

It is important that the legal theory that specifies the authority of the judiciary is indeterminate on the specifics of this authority because in all legal systems the judiciary has different powers and different sources of law are acknowledged. In different legal systems there are different views on the authority of the judiciary and the sources of law. Some countries, such as the United States, have judicial review because it is believed that a constitution must have judicial review for the law to be true law. The Netherlands on the other hand do have a constitution, but have excluded judicial review in that same constitution, something that is thought to be impossible and illegal in the United States. This illustrates that there are essential differences in the authority of the judiciary in different legal systems that do acknowledge the same legal sources.

Furthermore, the sources of law that are acknowledged in common law systems and civil law systems are also very different. Civil law systems only recognize written legal sources, where common law system also acknowledge more unwritten laws. These differences in acknowledged sources of law also have an impact on the authority of the judiciary. In civil law systems, the judiciary is more limited in what sources of law it can acknowledge compared to the judiciary in common law systems.

In different legal systems it can also differ who can call something a source of law. In the UK and the United States, the judiciary decides what is 'constitutional law', or a 'super-precedent' and thus points out what laws and what legal sources have a higher status. Not in all legal systems, the judiciary can do so.

Concluding, different legal systems know different sources of law and attribute a different form of authority to the judiciary. Therefore, I propose to use the theory of Hart as the foundation of authority of the law and the judiciary.[37] His theory provides a method to determine what the sources of law are and thus what the authority of the judiciary is but does not set in stone how a legal system ought to look like. With this theory, we can develop an account of Judicial Activism that can be applied to all different kinds of legal systems and thus strengthens the applicability.

2.2. Authority as consensus

Hart starts his book by setting out the famous doctrine of Austin, who defined law as 'orders backed by threats'. This is clearly a legal positivist view, influenced by the doctrine of Hobbes.[38] In contrary to Austin, Hart does acknowledge that there is a relation between law, morality, and

[37] I realise that there are many moderations on the legal theory of Hart, and that there are more theories that only offer a method of determining sources of law and authority, and do not prescribe how the legal system ought to look. However, I merely want to show that with any legal theory that provides such a method, my definition works. Since Harts theory is well known, his theory was most suitable to illustrate this point with.
[38] Hart, *The Concept of Law*, 6–7.

justice. He also clearly rejects the natural law theorist who, like Dworkin, believe that law and morality are inherently connected and that the natural law should prevail.[39] His theory is therefore a form of 'soft positivism'.[40]

The theory of Hart bases authority upon the fundamental rule of recognition and this fundamental rule of recognition is the foundation of the whole legal system.[41] The legal system Hart describes consist of primary rules of obligation and secondary rules of recognition, change and adjudication. Whenever a secondary rule of recognition is accepted, it provides authoritative criteria for identifying primary rules of obligation.[42] This system of primary rules of obligation, and secondary rules of recognition itself is based upon the fundamental rule of recognition and the supremacy of one of its criteria. A criterium is supreme if rules that are identified by this criterium override conflicting rules identified by other criteria. In some legal systems this ultimate criterium is enactment by the legislator, in others it is the interpretation of the courts or even something else.[43] The content of this fundamental rule of recognition can thus vary. The ultimate rule of recognition is the rule that provides the criteria for the assessment of the validity of other rules but does not need a rule providing criteria for its own assessment.[44] The rules that are authorised by the rule of recognition must be obliged and applied by officials.[45] In this sense, it is the 'highest' rule and therefore the most important in our quest towards the foundation of authority.

Acceptance of the rule of recognition is manifested in the general practice of the people, and these rules of recognition are mostly not explicitly expressed as a rule. Rather, the existence of the rules of recognition can be seen in the behaviour of courts, other officials or private persons and their advisors.[46] Hart attributes the judiciary a special status in the identifying of rules of recognition, as he argues that the judiciary has a special authoritative status, conferred on it by other rules, to conclude how to identify primary rules of obligation (and thus formulate rules of recognition).[47]

Hart makes a useful analogy with sports games. In sports games there is always a general rule that defines what activity constitutes a score in a game. This rule is seldomly formulated but is known

[39] Hart, 7–8.
[40] Mitrophanous, 'Soft Positivism'.
[41] Hart, *The Concept of Law*, 100.
[42] Hart, 100.
[43] Hart, 106.
[44] Hart, 107.
[45] Shapiro, 'WHAT IS THE RULE OF RECOGNITION (AND DOES IT EXIST)?', 4.
[46] Hart, *The Concept of Law*, 101.
[47] Hart, 102.

and applied by the officials and the players of the game. The officials of the game have a special authorization towards determining when an activity counts as scoring. They can apply and interpret the general rule, which ought to be followed by the players.[48] This is the same with the rules of recognition in a legal system. They are known by both the government officials and legal professionals, but also by the people. When it comes to applying the rules, government officials and legal professionals have a special authorisation to apply the rules. Hart calls this the 'internal point of view'.[49] The internal point of view is that of the individual that accepts the rule of recognition without explicitly stating so and applies the rule by recognizing some rule of the legal system as valid.[50] Thus the internal view is manifested in the (social) behaviour of the people that are living in a certain legal system.

What can the theory of Hart tell us about authority? A rule is valid if it passes all the tests given by the rule of recognition. The rule of recognition is valid if it can be seen from the internal view, thus if it is applied by officials, legal professionals, and citizens with a special authority for the first two. This special authority is therefore also applicable on the judiciary, since they are part of the officials that determine the 'rules of the legal game'. However, it is important to note that this is a shared special authority. It is not only up to the judiciary, but the government officials and legal scholars also have a special authority. This notion can therefore not be used by the judiciary to overrule the vision of the other officials on the rules of recognition. On the other hand, the government alone cannot decide on the rule of recognition either. It must be an accepted rule in both branches and with legal scholars.

The authority and validity of the primary and secondary rules can be traced back to the ultimate rule of recognition. This ultimate rule of recognition is also valid because it is accepted in society. There is no external explanation, because then we would leave the internal point of view which itself is the validation of the ultimate rule.[51] Therefore, the authority of the entire legal system is dependent upon a social rule. For the existence of the legal system, it is important that there is a shared acceptance of the rules by the officials. Hence, the ultimate rule of recognition is mostly dependent on the view of the officials.[52] It is important to note that for Hart, the content of the law does not influence its legal status. In this way, he is clearly a legal positivist.

[48] Hart, 102.
[49] Hart, 102.
[50] Hart, 102–3.
[51] Hart, 109.
[52] Hart, 115.

What happens if there is no disagreement between government officials, the judiciary, and legal scholars on the rule of recognition? Hart addresses this problem when he discusses a constitutional debate in South Africa. He describes a court where the legislator and judiciary were arguing about the foundations of the constitution and the legal competences and powers of the legislators. When such a conflict arises, most of the legal operations do not suffer from this disagreement and can carry on. However, the disagreement does lead to a suspension of the possibility to identify the systems ultimate rule of recognition. Without a solution this would be a threat that could lead to the dissolution of the legal system, if this dispute would divide people in society too much.[53]

Summarizing, the authority of the judiciary is dependent on secondary rules of adjudication and the ultimate rule of recognition. The secondary rules can be written rules, but also doctrines and principles. The validity of these written rules, doctrines and principles depends upon the accepted rule of recognition. The criteria of the rule of recognition are not written but can be seen in the behaviour of the people and government officials, the judiciary, and legal scholars. These last three have special authority in determining the rule of recognition. Therefore, their consensus on the rule of recognition is the basis of the authority of the judiciary.

How are we to recognize rules of recognition? There are two important criteria when it comes to determining a social rule. There must be a regularity of behaviour and a group of members must adopt a normative attitude to that regularity, using it as a guide for their behaviour.[54] Hart stresses throughout his work that the rule of recognition is based on actual behaviour. Thus, a study of court cases and the behaviour of government officials and legal scholars can provide clarity on the rules of recognition. This can be used to determine whether a judge overstepped their authority. The theory of Hart offers tools for empirical research and can provide clear answers on the question what the authority is, when there is indeed consensus. However, it is also likely that at some point there will be no consensus on the rule of recognition, which brings me to the next question. Can authority as consensus provide clear criteria for our definition of Judicial Activism in times of conflict? [55]

2.3. Is authority as consensus a clear criterium in times of conflict?

For the proposed definition of Judicial Activism to be useful, the concept of authority as consensus must be applicable. For the criterium to be applicable, we must be able to establish

[53] Hart, 122–23.
[54] Tucker, 'Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty', 65–66.
[55] Hart, *The Concept of Law*, 150.

what the consensus is. The problem that immediately arises is that in cases of alleged Judicial Activism the judiciary has allegedly ruled contrary to the legislator and the spirit of the law. Thus, we always start of from a point of conflict while we must determine what the shared consensus on the authority of the judiciary is.

We can distinguish two different situations: in the first there is conflict between the legislator and the judiciary on the fundamental rule of recognition itself where in the second there is a conflict over what the primary law ought to be in a specific case. I will first address whether authority as consensus provides guidelines in the second situation. If this answer is positive, I will address the question on how to determine the fundamental rule of recognition itself in times of conflict on the rule itself.

The secondary rules in the system of Hart provide criteria for determining what the primary law is, how the primary law can be changed & introduced and how violations of primary law can be determined (adjudication).[56] These secondary rules can be seen as the guidelines that determine how the judiciary ought to adjudicate. In a complex legal system these secondary rules are also complex. For our quest towards clarity on authority, the rules of adjudication are important. These will not only determine who ought to decide on alleged violations of the law, but also the procedures that must be followed. These secondary rules determine the penalties for violations, the jurisdiction of courts and the allowed interpretation methods. Therewith these secondary rules determine the authority of the judiciary.[57] Therefore, we must study these secondary rules of one's system to determine the authority of the judiciary. Most systems have procedural rules to determine the authority of the judiciary. These make it easy to determine whether courts have jurisdiction, what laws ought to apply and what kind of discretion must be applied. Therefore, we can clearly establish if the judiciary had the authority to determine or interpret primary rules of obligation in the way that they did. Of course, there is discussion on the right interpretation of these concepts, but they are often resolved with higher courts based on the framework of secondary law.

These secondary rules are quite precise on most legal systems and codified in some sort of administrative or procedural lawbook. These rules are in general also impartial and uncontroversial. Thus, the definition of Judicial Activism is workable in the second situation where there is discussion on what the law is, but the secondary rules itself are not being doubted. Perhaps their interpretation is, but that can be resolved and adapted in higher courts.

[56] Hart, 94.
[57] Hart, 97.

The real pain lies in cases where there is discussion on the rule of recognition itself. I do not point towards the secondary rules of recognition, but the fundamental rule of recognition.[58] This can arise directly or result from conflicts on the content of the secondary rules. The entire legal system is based on the obedience by the people on the one hand, and the acceptance of the rules of recognition by officials on the other hand. This acceptance can be seen from the internal perspective. The officials must accept and apply these rules of recognition. If there is no consensus, one branch of the government might not apply or obey to a rule of recognition that is accepted by another branch of the government. This can result in a clash between the legislator and the judiciary, in which both claim that the other has overstepped their authority. As argued before, when it comes to secondary rules of recognition these conflicts can most likely be resolved within the legal system. However, this is not as simple with the discussion on the ultimate rule of recognition.

This is seen now in the UK, where parliament, the judiciary and legal scholars are arguing about the foundations of the constitution and the principle of parliamentary sovereignty. Parliament claims sovereignty and therefore claims the authority to determine the boundaries of their sovereignty.[59] Part of the judiciary claims that parliamentary sovereignty is a principle of the common law, and thus the judiciary can determine the boundaries of parliamentary sovereignty. Legal scholars are divided between both views.[60] As Hart described, most legal rules are still functioning in the UK, but the amount of cases where this disagreement on the foundations of the constitution leads to discussion on the legitimacy of the outcome of court cases is rising.[61] Because it is not clear what the authority of the judiciary is, we can also not rule on whether they are preforming Judicial Activism and address the question whether it is legitimate. The debate keeps circling around the question what the proper rule of recognition is in this case. Does Hart offer any pointer on how to resolve such a dispute?

When there is dispute on the ultimate rule of recognition there is a threat of the dissolution of the legal system. This implies that there is no procedure or possibility to determine an answer when there is no consensus on the ultimate rule of recognition. However, throughout his writing

[58] I believe that disputes on secondary rules can be accounted for within courts, and where the authority of the courts is not accepted, these will lead to disputes on the primary rule of recognition. Furthermore, if we can account for disputes and disagreement on the most fundamental rule of recognition the same approach can be applied on secondary rules of recognition.
[59] In the concept of law Hart also discussed the UK system. He even noted that the current rule of recognition was that everything that the queen enacted in parliament was law and discussed the possibility of this rule of recognition to change. Something that has happened/or is happening right now.
[60] Goldsworthy, *The Sovereignty of Parliament. History and Philosophy.*; Allan, *Law, Liberty and Justice. The Legal Foundations of British Constitutionalism*; Jackson V Attorney Parliament.
[61] Factortame I; Factortame II; R v Miller I; R V Miller II; Jackson V Attorney Parliament.

Hart seems to place an emphasizes on the judiciary when it comes to determining the rule of recognition. Sometimes he mentions all officials, and sometimes only the judiciary.[62] This might imply that according to Hart the judiciary should have the final word on determining the ultimate rule of recognition.

Hart argues that the rule of recognition is a form of judicial customary rule and that it exists only if it is accepted and practised in the law-identifying and law-applying operations of the courts and that the existence and authority of the rule of recognition depends on the acceptance by the courts.[63] This seems to suggest that the courts have the decisive word on determining the rule of recognition, which is contrary to what Hart has argued before.[64] However, Hart also argued that there is a distinction between what the law is, and what the court determines what the law is, even in cases where the decision of the court is authoritative and final. Judges can only determine the law based on the rules of recognition. These are not made up by the judge, but only established by them. Their fundament lies in the consensus, not in the mind of the judiciary. The judge must maintain the standards but does not make them. [65] It is not the application of the rule of recognition of one individual judge that creates the rule of recognition, but the application of this rule by most of the judges and most of the other officials. Here Hart shows that the judiciary does have a special, but not final authority when it comes to determining the rules of recognition.

A final clue can be found in Hart's discussion of the recognition of legal principles. He argues that they have been accepted as law when they are 'consistently invoked by courts in ranges of different cases'.[66] This again seems to suggest that the judiciary is the most authoritative in deciding the rule of recognition, or at least that Hart suggests that the most supreme criteria is the application in court. This raises the question what happens if these principles are contrary to written legislation, and we must determine the authority of the judiciary to apply such principles.

It seems that there is no coherent answer on the question who ought to determine the ultimate rule of recognition when the shared consensus is falling apart. As Hart himself said: '*If there are questions about the rule of recognition they can be settled by choice, made by someone to whose choices in this matter authority is eventually accorded*'.[67] Hart seems to suggest that the only solution for debates on the ultimate rule of recognition is the success of the solution, with success being measured in terms of acceptance and consensus. But this is begging the question. The rule of recognition is based

[62] Shapiro, 'WHAT IS THE RULE OF RECOGNITION (AND DOES IT EXIST)?', 7.
[63] Hart, *The Concept of Law*, 250–56.
[64] Hart, 115.
[65] Hart, 141–46.
[66] Hart, 265.
[67] Hart, 150.

on consensus. If there is disagreement, we can solve this by proposing a solution or answer that is accepted. But there was no consensus to begin with, thus where should this consensus come from? And who ought to determine when there is enough consensus to proceed?

I must conclude that Hart does not offer a dispute procedure to decide on disputes on the fundamental rule of recognition. Therefore, we cannot conclude if the authority of the judiciary has been overstepped and we cannot conclude if there was Judicial Activism. According to Hart, legal systems in which the fundamental rule of recognition is not clear can still function. Most primary rules do not depend directly unto the fundamental rule of recognition. However, if the conflict becomes too pressing, it could have a ripple effect onto other legislation and lead to the dissolution of the legal system. This is a weak spot in the theory of Hart. Unfortunately, this cannot be avoided. However, a legal theory that does offer a clear normative view on how the legal system should be designed and appoints an authoritative institution to have the final say on disputes on the law, also risks dissolution in the form of disobedience by the people or rebellion.[68] Furthermore, before the whole legal system will dissolve, the disagreement on the fundamental law must be quite extreme. As is seen now in the UK, the legal system is still able to function even though there is a quite fundamental debate going on about the nature of the constitution and the authority of the judiciary and the legislator.[69] This shows that the weak spot in the theory of Hart is more of a theoretical danger and should not lead to a dismissal of Hart's theory.

Concluding, my proposed definition works for disagreements on primary rules of obligation or secondary rules of recognition, adjudication and change that can be settled within the framework of the law. When it comes to the most fundamental question or questions, we cannot use the system of Hart if there is no consensus to begin with. However, the inapplicability of the definition of Judicial Activism will also lead to valuable information. We will know in those cases that there is a fundamental disagreement on the ultimate rule of recognition. There is no consensus amongst the important legal officers, which could possibly lead to a dissolution of the legal system. If this conclusion comes forward, it is most important that a process is started to reinstate this consensus. Thus, the application of the definition can lead to three different, but useful, outcomes: this was a case of judicial activism, this was not a case of judicial activism or there is no consensus on the authority of judiciary which could possibly lead to the dissolution of the legal system. Thus, the first criterium of my definition is applicable, and consequently my

[68] Locke, *Two Treaties of Government & a Letter Concerning Toleration*; Hobbes, *Leviathan*; Austin, *Austin*.
[69] See the debate between Goldsworhty and Allen. Goldsworthy, *The Sovereignty of Parliament. History and Philosophy.*; Allan, *Law, Liberty and Justice. The Legal Foundations of British Constitutionalism*.

proposed definition of Judicial Activism is usable. Now that I have established a workable and clear definition of Judicial Activism, the question of justifying Judicial Activism can be addressed.

Chapter three

3.1 The puzzle of unjust laws.

So far, I have established what a good definition of judicial activism must contain, proposed a new definition, and argued that the use of the term authority can provide applicable criteria when using the legal theory of Hart. Now that it is clear what Judicial Activism is and therewith which court cases are examples of Judicial Activism the question of justifying Judicial Activism can be addressed.

It is important to note that many scholars defend a form of judicial activism, but not the version that I argued for. They pledge for allowing the judiciary to squash laws, or the courts to widen individual rights. Something that does not necessarily constitute Judicial Activism under my definition. Therefore, these arguments are not relevant in the discussion of justifying courts to act beyond their authority to strive for results that go against the wishes of the legislator. In my discussion on the justification of Judicial Activism I will only focus on the question if we could allow for the judiciary to do something they are not allowed to do, that goes against the wishes of the legislator.

The biggest objection against condemning Judicial Activism is the puzzle of unjust laws. Unjust laws are laws from the legislator, that are either unjust in themselves, or provide an unjust outcome when applied in a certain case. In most cases, the former will also lead to the latter. This feeling of justice is something fundamental and depends heavily on the circumstances of a particular case.[70] The foundation of justice can be human dignity or a divine command. Either way, people have some feeling of justice, and feel like the law should be just and treat people just. This is often connected with natural law thinking, a theory that links the validity of laws to morality.

Through creative interpreting and reasoning or simply disapplying the law or using principles the unjust situation can be avoided by judges. In these cases, it is argued that the desired outcome of the case justifies the behaviour of the courts. This behaviour can be seen in the case Brown v. Board of Education. In this case the Supreme Court overruled earlier precedent that allowed for schools with the same facilities to be segregated.[71] Nowadays, many people believe that the outcome of this case was just, since it ended (formal) segregation on schools. The same can be

[70] Allan, *Law, Liberty and Justice. The Legal Foundations of British Constitutionalism*, 21–22.
[71] It can be debated if this case constituted Judicial Activism, since interpretation of the constitution and leaving precedent are not unknown/illegal practices in the US. However, I merely want to use this example to show how the outcome of the case could be received as just and therefore provide a justification for the behaviour of the courts.

said about the Nuremberg tribunals. It is disputed if these convictions were even legal, but because of the just outcome, the alleged illegal proceedings are justified.[72]

Proponents of judicial activism argue that courts must be able to improve the future and do justice in individual cases, even by means of judicial activism.[73] This argument assumes that there is something we call justice, and that courts are able to be guided by this principle. Formulated negatively, it requires at least that courts can recognize injustice. These arguments based on justice take different forms. Some argue that we have individual rights against the state that need to be protected based on the constitution, others argue on a more fundamental view of justice as something religious or something that is natural to all humans.[74]

Another problem is the unjust outcome of a just law. In some cases, a law that is not problematic can have dramatic consequences when applied in specific circumstances. It is impossible for the legislator to oversee all possible situations that the law will be applied on. In those cases, the outcome could be unjust. If the judiciary would act outside its authority to prevent this unjust outcome, in line with the spirit of the law, this is not Judicial Activism. However, if the judiciary prevents the unjust situation and thereby creates a situation that is allegedly against the spirit of the law, this is Judicial Activism. It can be argued that it is necessary to allow the judiciary to prevent these unjust situations in cases where the legislator could not oversee the consequences.

The core of the argument on justice is that there is a tipping point between positive law and justice & morality, and if the positive laws go to much against what is just, the laws ought not to be seen as laws anymore. This points to a minimum standard of morality that the law must adhere to, for a law to be applicable. For example, if the legislator would approve a law that all blue-eyed babies must be killed, this law is so unjust that the judiciary ought to squash it, whether they can do so or not.

A recent example of such a tipping point between law and justice is the Dutch childcare benefits scandal. In many court cases the judiciary reaffirmed the law as the legislator wrote it, thus affirming the harsh line that has led to these scandals. However, as it now turns out most people found the law gravely unjust. The problem in these childcare benefits scandals was that the judiciary was not allowed to use the 'evenredigheidsbeginsel', a principle that can be seen as a principle of fairness, to reinterpret the law because this reinterpretation was contrary to the spere of the law. Therefore, the judiciary has waited a few years before using an 'emergency tool' to

[72] Wyzansky, 'Nuremberg: A Fair Trial? A Dangerous Precedent.'
[73] Dworkin, *Taking Rights Seriously*, 143–45.
[74] Dworkin, 132–49.

reinterpret the law, as they call it themselves. In this case the law was reinterpreted against the spirit of the law by using a tool the judiciary was not allowed to use. The judiciary acted beyond their authority (they are not allowed to reinterpret formal laws based on this principle of fairness) to reinterpret the law against the spirit of the law, thus preforming Judicial Activism.[75] Due to these kinds of scandals, the call for allowing Judicial Activism is rising.

Even though cases such as the Dutch childcare benefits scandal are painful, I will still pledge for defying judicial activism. This will be based on two different arguments. First, I will show that allowing for Judicial Activism has many negative consequences. Secondly, I will show that allowing for Judicial Activism (legally) is not a solution for the problem of unjust laws. On the contrary, it could turn out to be counter effective. With these two arguments in mind, the positive aspects of condemning Judicial activism will outweigh the few painful cases that will appear within a system that does not allow for Judicial Activism from a legal perspective.

3.2 The negative consequences of allowing for Judicial Activism

Allowing for Judicial Activism would mean that the judiciary receives a free pass to judge as it likes. Since the definition of Judicial Activism is based on acting without authority and against the legislator/the spirit of the law, allowing for Judicial Activism would mean that the judiciary can do anything. They can perform the actions they are authorised for, under the law and they can do all those actions that they are not allowed to do in order to change the laws of the legislator if they feel that it was just to do so. This would attribute the judiciary with an immense power and freedom. Therefore, from a legal point of view, we must condemn Judicial Activism. I do not deny, that in some cases it might be, from a moral point of view, better to preform Judicial Activism than to follow the law. However, I will provide three arguments on why allowing for Judicial Activism from a legal point of view, will have negative consequences.

Firstly, allowing Judicial Activism will harm clarity on the meaning of fundamental principles. The debate on the precise meaning of fundamental rights is extremely old. Already decades ago, philosopher such as Thomas Hobbes and John Locke acknowledged that people would not be able to agree upon a shared meaning on these fundamental rights, and therefore needed a 'judge on earth' to decide upon the precise content and application of fundamental rights.[76] Most people do agree on the fact that we need human rights. One of these rights, is the right to privacy. However, people do not agree on the question whether the right to privacy should lead to the

[75] van Ettekoven, "'Tussen Wet En Recht'".
[76] Hobbes, *Leviathan*; Locke, *Two Treaties of Government & a Letter Concerning Toleration*.

right on abortus.[77] Is it just for the judiciary to squash all laws trying to restrict the right on abortus? It is acknowledged that there is reasonable disagreement possible on the specific interpretation and scope of certain fundamental rights. Within this reasonable disagreement, multiple choices can be made, among which choices that contradict each other, but are both reasonable and therefore just.[78] There are two main reasons why the legislator should decide on these controversial issues by choosing one of these reasonable options, and not the judiciary, thus not allowing Judicial Activism.

The first reason is that people need to have clarity on these fundamental principles. If we allow the judiciary to change or squash laws based on justice, we have two authorities ruling on these principles, with the possibility of conflicts. The legislator could first decide that abortion is only legal up to 20 weeks. However, we would never be sure if this is indeed in accordance with justice since the judiciary could always squash or change this law if someone would challenge it.

Furthermore, the judiciary is not democratically accountable. By allowing the judiciary to decide on justice, we lose the right ourselves to influence what we find just. In democratic societies, we can vote for parties or members of parties whose view on justice matches our own view. This way, the common understanding of justice is based upon the views in society. If the judiciary can override this view, it is the judiciary who determines the final view on what is just. However, we cannot hold the judiciary accountable through elections, and we cannot steer the views of the judiciary since they are independent. Since there is always a reasonable disagreement possible on what is just in a specific case, we must not allow the judiciary to have a final say on what is just.

Thus, for the sake of clarity on fundamental principles we need one authoritative institution to decide on the scope and content of these fundamental rights. This must either be the judiciary or the legislator. For the sake of clarity, it is better if it is the legislator, so that people do not have to wait until a certain law goes to court to be sure whether the law contains the right view on justice. Furthermore, because the legislator is democratically accountable, and the judiciary is not, we can influence the view of the legislator on what is just and correct the view if necessary.

A second disadvantage of allowing Judicial Activism is the legal uncertainty that it creates. Not only do we not know for sure what justice means for our society, we also do not know whether legal rights and obligations will be upheld in front of a court. Every normal legal law could be called unjust by the court. Even laws that seem like they have nothing to do with fundamental

[77] In the United States, the Supreme Court based the right on abortion on the right to privacy. For more details, see Roe v. Wade.
[78] Bellamy, *Political Constitutionalism*, 4.

human rights. This disadvantage can clearly be seen in the euthanasia cases in the Netherlands. Before euthanasia was allowed by the legislator, it was the judiciary who legalised euthanasia based on article 40 of the criminal law, which states that if you violated a criminal law due to force majeure, you will not be convicted.[79] However, because it was not clear exactly in which cases euthanasia where allowed, doctors were faced with great uncertainty on whether what they did was legal or not, creating stress on them, their patients that tried to receive euthanasia, and the family members of these patients. This has led to great differences per doctor in whether they would or would not preform euthanasia in certain cases.[80] It would therefore have been better, if the judiciary would have not re-interpreted this article so drastically and would have urged the legislator to provide a clear framework on this matter. That might mean biting the bullet on the initial case, that could be considered an 'unjust' conviction, but would have had significant advantages in the long run. It would have provided certainty for all people involved and would have led to less convictions in the long run. Due to the uncertainty, some doctors did get convicted later for preforming euthanasia. If they would have had a clear framework on when euthanasia was allowed, they might have not gotten convicted. Thus, the uncertainty on the law created more convictions that we could call 'unjust'.

The last disadvantage is that allowing for Judicial Activism would harm the legitimacy of the judiciary. If Judicial Activism would be justified and allowed, it becomes unclear on what grounds the judiciary bases their decisions. Allowing Judicial Activism would not necessarily mean that the judiciary starts making arbitrary decisions. They would motivate their decisions and develop some framework on justice and fundamental human rights within their rulings. However, since this framework is then entirely judicially developed, and does not refer to an outer-judicial framework, one cannot be reassured that the judiciary will keep following this line. Because of the legal uncertainty, and the uncertainty on the meaning of justice, the decisions of the judiciary will feel more random and arbitrary. Furthermore, it becomes unclear exactly why the judiciary has the right to make these decisions. With the legislator, due to their democratic accountability, we know why they have the authority and power to decide on the contents of the law. They are chosen by the people. The judiciary on the other hand is an independent institution, without democratic accountability, that when preforming Judicial Activism is acting outside the authority that it received from the people. These decisions, taken through the act of Judicial Activism have

[79] Whether the first case in which Euthanasia was allowed was a consequence of Judicial Activism requires a more thorough inquiry into the allowed and common ways of interpreting such clauses in the criminal law. However, it was clearly a case in which the judiciary made a significant change in the meaning of the law, thereby creating legal uncertainty.
[80] Jochemsen, 'Update'.

no legitimacy besides that the judiciary themselves claim that it is just to decide so. However, who says that their view on what is just, is better than mine?

If we allow for Judicial Activism, the legitimacy of the judiciary, and the trust in the judiciary as an institution will be harmed. Since it is not clear why the judiciary has the authority to act beyond their authority, there is no legitimacy for the outcome. This will have a ripple effect on all the cases that the judiciary decides, since they are seen as one institution. Furthermore, one can never know when Judicial Activism will be performed, thus harming the trust in the judiciary in general.

A counter argument is that sometimes the legislator might make a mistake, or purposely follows a view on justice that is contrary to what 'the people' want. Furthermore, in some cases we might not speak of reasonable disagreement, but a gravely unjust law. Such as the Nazi-Laws in Germany. Shouldn't the judiciary get the right to correct this on behalf of the people? I believe not. In the next paragraph I will set out why allowing the judiciary to perform such a check will not solve the problem on unjust laws.

3.3 Allowing for Judicial Activism will not solve the problem of unjust laws.

The main objection against condemning Judicial Activism is that we cannot solve the problem of unjust laws without it. We live in a non-ideal legal system, in which unlawful laws will come by every now and then. The legislator can make a mistake, is not be able to oversee all future cases in which the law will be applied or might sometimes deliberately act against the common consensus on what is just. The solution is then allowing for Judicial Activism, to correct for these unjust laws.

I want to emphasize that I am not pledging for a system in which the judiciary is merely the mouthpiece of the legislator and must apply the law mechanically. I am not per definition against a strong role for the judiciary. The definition of Judicial Activism provides room for every society to attribute the judiciary with tools to battle the consequences of unjust laws. The definition does not exclude specific behaviour such as squashing higher laws or extending fundamental human rights. This is one of the advantages of the proposed definition; that it is applicable to all legal systems, including those that do allow the judiciary an important role in shaping and sometimes even creating law. The point that I want to make is that the judiciary should not be granted an infinitive power to do everything that it can think of, to battle laws that the judiciary itself deems unjust.

Furthermore, granting the judiciary the right to preform judicial activism would not guarantee that unjust laws will not pose a problem anymore. Just as the legislator can make mistakes, so can the judiciary. It is even argued that the judiciary is less reliable than the legislator in protecting fundamental rights and making just decisions.[81] This statement is controversial, and there is no clear empirical data on the question who the best guardian of justice is: the legislator or the judiciary. However, this works both ways. It is not proven that the judiciary is better in safeguarding justice either.

Chemerinsky convincingly showed how the US Supreme court has ruled in cases to protect justice and fundamental rights but has also ruled in cases in such a way that it harmed justice and fundamental rights. Furthermore, some cases have divided people on whether they were just or not.[82] To give one example, the Supreme Court in the US ruled that a law, prohibiting bakers from working more than 60 hours a week, or 10 hours a day, was not lawful. This law was contrary to the liberty of the individual and interfered with the freedom of contract. The latter could only be restricted based on public safety, public health, or public morals. The Supreme Court decided that the medical problems that bakers suffered due to working many hours in the exposure of flour dust and intense heath were not a problem. Even though studies showed that the age on which the average baker died was lower than the national average.[83] I, and I think with me many others, would have thought that the right to individual liberty and the terms public safety, health and morals ought to have a different meaning in this case. I believe it is against public safety, health, and morals to allow for dangerous working environments. However, the judiciary decided differently, and the law of the state was squashed. Even though this was not a case of Judicial Activism[84], it does illustrate how the state, the people and the judiciary can (reasonable) disagree on the meaning of fundamental rights and principles.

Thus, by allowing the judiciary to preform Judicial Activism, we transform the problem of unjust laws towards the problem of unjust court rulings. If the judiciary preforms Judicial Activism based on their conception of justice, and we feel that this decision is unjust, we are left empty handed. Justifying Judicial Activism, and legally accepting the outcome of a case that came to be due to Judicial Activism cannot be allowed and will not be able to eliminate injustice. It might

[81] Bellamy, *Political Constitutionalism*, 3.
[82] Chemerinsky, *The Case Against The Supreme Court*.
[83] Chemerinsky, 95–97.
[84] The US Supreme Court is allowed to squash laws based on the constitution, thus did not act outside of its' authority.

tackle the problem of unjust laws in some cases but will also call into life new problems in the form of unjust court decisions.

3.4 The case against Judicial Activism

I have introduced the argument that we should always, from a legal point of view, condemn Judicial Activism. This means that court rulings that are the outcome of an act of Judicial Activism should be declared illegitimate, and the case should be tried again, no matter how 'just' or 'right' the ruling might be. The main objection against this argument, is the puzzle of unjust laws. This objection claims that if a law is unjust, or the application of the law leads to an unjust situation, the judiciary should preform Judicial Activism to prevent such an unjust outcome. I have introduced two arguments to counter this objection. The first argument is that justifying Judicial Activism is too costly, when it comes to certainty on fundamental principles, legal certainty, and the legitimacy of the judiciary. Additionally, justifying Judicial Activism is not a guaranteed solution for the problem of unjust laws. It rather moves the problem away from the legislator but creates a new problem of having unjust court rulings that cannot be corrected.

Within the legal system there must, at some point, be an institution that can take the final decision. Whether this is the legislator or the judiciary, we will always encounter unjust legal outcomes. This is therefore not a successful argument to justify Judicial Activism from a legal point of view. Furthermore, within my proposed definition of Judicial Activism there is room for the judiciary to be authorised to use interpretation methods based on general principles such as justice. Thus, the choice whether we want the legislator or the judiciary to have the final word, is in our own hands. However, once the choice is made, we must stick with this choice for the sake of legal certainty, certainty on principles of justice and the legitimacy of the judiciary.

Conclusion

In this thesis I have addressed the question what judicial activism is, and if judicial activism can be justified. A good definition of judicial activism must be able to determine when a court decision is the consequence of judicial activism. To determine if a definition of judicial activism is good, I have used the following criteria:

1) Applicability.
2) Correspondence with core intuitions & usage.
3) Precision.
4) Impartiality.

To be able to judge if the criteria are good, we need to know how the term is currently being used, and what our underlying intuitions are when using the term judicial activism. I quickly concluded that the term judicial activism is closely related with the specific rules and customs of legal systems. Whereas in some countries the judiciary can squash laws, in other countries it is not even allowed to check whether a law is constitutional or not. The overall conclusion was that the core of our intuitions about judicial activism is that the judiciary oversteps its authority to strive for a certain result that is contrary to the law of the legislator or the spirit of the law.

The investigation into the intuitions and use of the term judicial activism has also shown that it is something different from mere illegitimacy. Judicial activism points towards something more fundamental than the judiciary making a mere mistake. Therefore, it is important to make a distinction between judicial activism and illegitimacy. Even if the conclusion is that judicial activism should always lead to illegitimacy, as I have argued. By taking my road, instead of starting off from illegitimacy, we can discuss the consequences of judicial activism. There are arguments in favour of justifying judicial activism, even with my definition. By having a clear definition, this discussion can take place. When rejecting judicial activism and only focussing on illegitimacy we lose this opportunity.

A study of existing definitions has shown that many definitions are too narrow because they include specific actions that the judiciary can perform. Furthermore, since all legal systems are different these definitions are not universally applicable. Another problem is that the definitions are too wide and include cases in which the judiciary merely made a mistake. These definitions lose the essential difference between illegitimacy and judicial activism. It is therefore important to have a definition that is more abstract and does not include specific actions but is able to distinguish between illegitimacy and judicial activism.

I have proposed to use the following definition of judicial activism: *Judicial Activism is an act of the judiciary in which they exceed the boundaries of their authority in order to reach a ruling that is contrary to written legislation or the spirit of the law'.*

Looking back at the criteria I developed, this definition fits them all. It is precise, through the combination of exceeding authority and the ruling against the legislator. It excludes judicial decisions that were a mere mistake and does not contain any specific legal tools making the definition universally applicable. This offers room for the definition to point exactly towards the fundamental problem of Judicial Activism in all legal systems. It is also impartial, because it does not contain a value judgement about the act of Judicial Activism. The discussion on the consequences of Judicial Activism can still take place. The definition also fits with the most fundamental core intuitions, but not all intuitions that the term was used for. This is fine, as it will contribute towards more clarity and sharpen the debate on judicial activism.

The criterium of applicability can only be tested when we know what authority is. When applying this definition, we must check if the judiciary exceeded authority, if this was done because of the desired outcome, and if the outcome was against written legislation or the spirit of the law. The latter two can be applied instantly, but for the question of authority further research was needed.

To know if the boundaries of authority are overstepped, we must know what the authority of the judiciary is within a given legal system. This question is interdependent on the question what the law is, and why the law has authority. I have chosen Hart's theory to specify the concept of authority. Using his theory is not a necessary condition for my definition to work. It merely illustrates that the concept of authority can be made specific enough to determine whether authority was overstepped. The theory of Hart is suitable because it does not prescribe how the legal system ought to look. It merely prescribes a method on determining sources of law and thus authority within a system. This is a requirement for the universal applicability of the definition.

The legal system of Hart is built upon primary and secondary rules. Primary rules consist of obligations for subjects. Secondary rules contain rules of recognition (how to recognize primary rules), rules of adjudication and rules of change. The whole system is based upon the most fundamental rule of recognition, which gives the other rules authority. This fundamental rule of recognition depends upon consensus amongst people. Because people obey the rule, it exists. When it comes to determining the consensus, government officials have special authority to decide on the consensus. In their behaviour, we can see the rule of recognition.

When applying the criterium of authority we must investigate the rules of recognition and the fundamental rule of recognition to determine what the authority of the judiciary is, and when this authority is overstepped. We can simply look at the rules of adjudication and see if these have been taken into account when applying and interpreting primary rules. If discussion arises on the interpretation of these rules of adjudication, we can use the system of review by higher courts to determine these issues within the framework of the law.

It becomes more problematic when it comes to disputes on the most fundamental rule of recognition. If there is no consensus on what this fundamental rule is, we risk the dissolution of the legal system since Hart does not offer a solution for this situation. Therefore, the definition of Judicial Activism cannot be applied on cases where the fundamental rule of recognition is being discussed. The definition only works for primary rules of obligation or secondary rules of recognition, adjudication and change that can be settled within the framework of the law.

This does not have to lead to the conclusion that the definition is useless. The definition offers three valuable outcomes when being applied: this was a case of Judicial Activism, this was not a case of Judicial Activism or there is no consensus on the most fundamental rule of recognition of the legal system. The definition therefore also fulfils the criterium of applicability. Therewith, the first part of the research question is answered positively. We have a definition of Judicial Activism that meets the criteria that constitute a decent definition.

The final part of the research question was the question if Judicial Activism can be justified. The main reason to allow for Judicial Activism is because it can solve the problem of unjust laws. Through allowing Judicial Activism, the judiciary can disapply or correct unjust laws and prevent court rulings that we would deem 'unjust'. However, I have introduced two arguments why we should condemn Judicial Activism anyway. Allowing for Judicial Activism would have too many negative consequences, such as uncertainty on the meaning of fundamental principles, legal uncertainty and it would harm the legitimacy of the judiciary. We need one authoritative institution to decide on what fundamental rights mean for us, and for the sake of certainty and democratic accountability, this must be the legislator. Furthermore, allowing for Judicial Activism is not the solution for the problem of unjust laws. On the contrary, it might even lead to unjust court rulings, thus merely shifting the problem.

My argument leads to the controversial conclusion that the rulings that the court made in the Dutch childcare benefits scandal case to change the 'unjust law', must be illegitimate. This is a painful bullet to bite, but from a legal point of view the long-term advantages of defying Judicial Activism outweigh the incidental unjust laws that must be applied by the judiciary. Furthermore,

my proposed definition does offer room for a strong judiciary that can form a check onto the legislator. Through this new definition of Judicial Activism, we can have a clear debate on the consequences of Judicial Activism and determine better when a court has preformed Judicial Activism. This will strengthen the legitimacy of courts and provide more clarity on what courts ought to do and what not, which will lead to a more enriched debate on the desirability of the authority and the role we have attributed the courts. These debates will hopefully strengthen the design of our legal system, so that the problem of unjust laws will diminish towards a theoretical problem instead of a practical problem.

Bibliography

Allan, Trevor. *Law, Liberty and Justice. The Legal Foundations of British Constitutionalism*. Oxford: Oxford University Press, 1993.

Austin, John. *Austin: The Province of Jurisprudence Determined*. Edited by Wilfrid E. Rumble. Cambridge Texts in the History of Political Thought. Cambridge: Cambridge University Press, 1995.

Bellamy, Richard. *Political Constitutionalism*. Cambridge: Cambridge University Press, 2007.

Boersema, Wendelmoet. 'VVD herschrijft verkiezingsprogramma na kritiek van leden op passages over de rechtsstaat', 12 December 2020.

Chemerinsky, Erwin. *The Case Against The Supreme Court*. New York: Penguin Books, 2015.

Cohler, Anne, Basia Miller, and Harold Stone, eds. *Montesquieu: The Spirits of Law*. Cambridge: Cambridge University Press, 1989.

Cross, Frank, and Stefanie Lindquist. 'The Scientific Study of Judicial Activism'. *Minnesota Law Review* 91, no. 6 (June 2007): 1752–84.

Dworkin, Ronald. *Law's Empire*. Cambridge, Massachusetts, London: Harvard University Press, 1986.

———. *Taking Rights Seriously*. 4th ed. Cambridge, Massachusetts: Harvard University Press, 1977.

Eijsbouts, Tom. 'Rechter zat opzichtig te slapen in toeslagenaffaire'. De Volkskrant, 22 December 2020. https://www.volkskrant.nl/gs-b736294b.

Ettekoven, Bart Jan van. "'Tussen Wet En Recht'". *Nederlands Juristenblad* 2 (11 January 2021).

Factortame I (House of Lords 11 October 1990).

Factortame II (ECJ 25 July 1991).

Gestel, Rob van, and Marc Loth. 'Urgenda: Roekeloze Rechtspraak of Rechtsvinding 3.0'. *Nederlands Juristenblad*, 30 October 2015, 2598–2605.

Goldsworthy, Jeffrey. *The Sovereignty of Parliament. History and Philosophy*. Oxford: Clarendon Press, 2001.

Green, Craig. 'An Intellectual History of Judicial Activism'. *Emory Law Journal*, no. 58, 5 (2009): 1195–1265.

Hart, Herbert. *The Concept of Law*. 3th ed. Oxford: Oxford University Press, 2012.

Hobbes, Thomas. *Leviathan*. Edited by Edwin Curley. Indianapolis/Cambridge: Hackett Publishing Company, 1994.

Jackson V Attorney Parliament (House of Lords 2006).

Jaggar, Alison. 'What Is Terrorism, Why Is It Wrong, and Could It Ever Be Morally Permissible?' *Journal of Social Philosophy*, 36, no. 2 (2005): 202–17.

Jochemsen, H. 'Update: The Legalization of Euthanasia in the Netherlands'. *Ethics & Medicine : A Christian Perspective on Issues in Bioethics* 17 (1 February 2001): 7–12.

Kmiec, Keenan. 'The Origin and Current Meaning of "'Judicial Activism"". *California Law Review* 92, no. 5 (2004): 1441–77.

Locke, John. *Two Treaties of Government & a Letter Concerning Toleration*. Translated by William Popple. Paris: Adansonia Press, 2018.

McDowell, Gary. 'Judicial Activism'. In *The Oxford Companion to the Supreme Court of the United States*, edited by Kermit Hall, 2nd ed. Oxford: Oxford University Press, 2005.

Mitrophanous, Eleni. 'Soft Positivism'. *Oxford Journal of Legal Studies* 17, no. 4 (1997): 621–41.

R v Miller I (Supreme Court 24 January 2017).

R V Miller II (Supreme Court 24 September 2019).

Roe v. Wade (Supreme Court of the United States 22 January 1973).

Roosevelt, Kermit. *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions*. New Haven, London: Yale University Press, 2006.

Sajó, András, and Renáta Uitz. *The Constitution of Freedom. An Introduction to Legal Constitutionalism*. Oxford: Oxford University Press, 2017.

Shapiro, Scott. 'WHAT IS THE RULE OF RECOGNITION (AND DOES IT EXIST)?' *Public Law & Legal Theory*, Reserach Paper Series, 181 (23 November 2008).

Sommer, Martin. 'Met Het Urgenda-Arrest Doet de Hoge Raad Aan Juridisch Activisme.', 3 January 2020.

Spitzer, Elianna. 'What Is Judicial Activism'. ThougtCo. *What Is Judicial Activism?* (blog), 22 July 2020. https://www.thoughtco.com/judicial-activism-definition-examples-4172436.

Tucker, Adam. 'Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty'. *Oxford Journal of Legal Studies* 31, no. 1 (2011): 61–88.

Urgenda, No. ECLI:NL:HR:2019:2006 (Hoge Raad 20 December 2019).

Wyzansky, Charles. 'Nuremberg: A Fair Trial? A Dangerous Precedent.' The Atlantic, April 1946. https://www.theatlantic.com/magazine/archive/1946/04/nuremberg-a-fair-trial-a-dangerous-precedent/306492/.