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JUDICIAL ACTIVISM IN CONSTITUTIONAL JUSTICE: COMPARATIVE ANALYSIS AND INTERNATIONAL STANDARDS

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Abstract
Judicial activism has generated intense debates about its scope and limits within constitutional democracies, especially in Latin America. This article examines the Peruvian experience, where the Constitutional Court has developed a practice that directly influences the configuration and reform of public policies. Through the analysis of five emblematic judgments – on prison overcrowding, the right to identity, public health, family planning and a gender perspective – the ways in which judicial activism has operated as a corrective mechanism in the face of legislative and administrative omissions are evidenced. The study, with a qualitative and hermeneutical approach, argues that the judicial action has had a positive impact, contributing to the effective guarantee of fundamental rights. Likewise, a comparative analysis is carried out with the cases of Colombia, Spain and the European Court of Human Rights, with the aim of identifying criteria that guide legitimate judicial activism that respects the democratic principle.

Keywords: Judicial activism, constitutional justice, fundamental rights, public policies, comparative perspective.

1. Introduction

In contemporary constitutional states, the role of the judiciary has undergone a substantial transformation. Constitutional courts no longer limit themselves to negative control of unconstitutional norms; they have also assumed active roles in shaping public policies, especially those that directly affect the enjoyment and exercise of fundamental rights. This phenomenon, known as judicial activism, has sparked intense debates about its theoretical and practical implications, particularly in contexts like Peru's, which are characterized by institutional weaknesses, structural inequalities, and state omissions.

This article analyzes the impact of judicial activism by the Constitutional Court of Peru (TCP) on public policy, based on a study of landmark cases in which judicial decisions not only corrected omissions or undue restrictions of rights but also established binding legal standards. The article also examines relevant international experiences, such as those in Colombia, Spain, and before the European Court of Human Rights, to place the phenomenon in a comparative perspective and provide guiding criteria for legitimate judicial practice.

Using a qualitative methodology, the paper proposes that judicial activism is a legitimate mechanism for ensuring the effectiveness of rights in contexts of structural failure. However, its exercise must be subject to normative, argumentative, and institutional limits to ensure compatibility with democratic principles and the separation of powers. Only then can judicial activism consolidate itself as a tool for constitutional justice and social transformation without compromising its legitimacy.

2. Judicial activism in the constitutional state

2.1.1 Origin and evolution of the concept

Judicial activism is a term that originated in American doctrine in the mid-twentieth century, used to describe the phenomenonby which judges take an active role in constitutional interpretation and in the protection of fundamental rights, beyond the simple application of the law. This idea took shape with the

work of TUSHNET, who argues that constitutionalism allows for a redistribution of power to the courts[1] and advocates deliberative judicial review with a political character.[2]

In Latin America, the concept has evolved to respond to realities of structural inequality and institutional weakness. Authors such as RAMÍREZ HUAROTO have studied how the figure of the "unconstitutional state of affairs" has become a tool of strategic litigation in countries such as Colombia and Peru, reflecting how judicial activism serves as a mechanism for the structural transformation of the State when the other powers fail to guarantee rights.[3]

Likewise, ATIENZA defends a more nuanced view: he argues that activism – far from being an overreach – is a legitimate judicial function within constitutional states, especially when it meets the standards of substantive law.[4]

1.1. Neoconstitutionalism and the role of the judge as a guarantor of rights

Neoconstitutionalism emerges as a legal paradigm that redefines the structure and function of law in contemporary states. It is characterized by the centrality of the Constitution, the normative force of the principles and the expansion of judicial control.[5] This model brings to the fore the idea that the Constitution contains not only programmatic norms, but also provisions that are directly applicable and enforceable before the courts.[6]

In this context, the constitutional judge ceases to be a mere applicator of the law to become an active interpreter of constitutional principles, especially when there are conflicts between rights or tensions between the different branches of government.[7] Neo-constitutionalism, promoted by authors such as FERRAJOLI, ALEXY and ZAGREBELSKY, states that the effective protection of fundamental rights can only be guaranteed if judges adopt a dynamic and weighty role.[8]

This transformation has allowed constitutional justice to assume powers that were previously considered exclusive to the legislator or the Executive, such as the ordering of structural measures to correct systemic violations or the creation of binding interpretative standards.[9] Consequently, judicial activism finds in neo-constitutionalism not only a theoretical justification, but also a practical legitimacy, since both respond to the need to materialize substantive justice in complex and changing scenarios.

1.2. The theory of legal argumentation as a basis for activism

The theory of legal argumentation, developed fundamentally by ALEXY, ATIENZA and MACCORMICK, has served as a rational basis to justify the active work of judges in constitutional states of law.[10] This theory

[1] TUSHNET, *Taking the Constitution Away from the Courts*, Princeton University Press, Princeton, 1999, available at: https://scispace.com/pdf/taking-the-constitution-away-from-the-courts-39d83kbkcp.pdf.

[2] LANDA ARROYO, «Judicial activism and constitutional supremacy: challenges in Latin America», *Revista de Derecho PUCP*, no. 69, 2012, pp. 87–118, available at: https://revistas.pucp.edu.pe/index.php/derechopucp/article/download/13618/14241

[3] RAMÍREZ HUAROTO, *The Unconstitutional State of Things and its Possibilities as a Tool for Strategic Public Law Litigation: A Look at Colombian and Peruvian Jurisprudence*, PUCP, Lima, 2016, available at: http://repositorio.pucp.edu.pe/index/handle/123456789/175395

[4] ATIENZA RODRÍGUEZ, *Siete tesis sobre el activismo judicial*, Bogotá, Legis, 2019, p. 22, available at: https://palestraeditores.com/wp-content/uploads/2025/03/Muestra_Activismo-judicial.pdf.

[5] GARCÍA FIGUEROA, «Neoconstitucionalismo y argumentación jurídica», *Revista de Derecho PUCP*, no. 79, 2017, pp. 9–32, available at: https://revistas.pucp.edu.pe/index.php/derechopucp/article/view/19313

[6] ZAGREBELSKY, *El derecho ductil: ley, derechos, justicia*, Trotta, Madrid, 1995.

[7] ALEXY, *Theory of Fundamental Rights*, Madrid: Center for Constitutional Studies, 1993, pp. 40-60.

[8] FERRAJOLI, *Law and Reason: Theory of Penal Guarantees*, Trotta, Madrid, 1995, pp. 11-20.

[9] ATIENZA RODRÍGUEZ, *Siete tesis sobre el activismo judicial*, cit., p. 50.

[10] ALEXY, *Teoría de la argumentación jurídica*, Madrid, Centro de Estudios Constitucionales, 1989.

holds that the application of the law is not a mechanical process, but an interpretative activity that requires justifying judicial decisions through rational and public arguments.[11]

One of the main contributions of argumentation theory is the distinction between norms and principles. While norms are definitive mandates, principles are optimization mandates that require weighing in the event of conflict.[12] This approach has been instrumental in legitimizing judicial activism, as it allows judges to prioritize constitutional principles, even over legal norms that may be inadequate or insufficient to protect fundamental rights.[13]

Likewise, the requirement of sufficient motivation and discursive rationality in judgments reinforces the democratic legitimacy of judicial activism. This is achieved by transforming each ruling into a public justification based on universal and controllable legal reasons, thus avoiding arbitrariness, as MACCORMICK states in his theory of legal reasoning, stressing that "the requirement of universalization is the basis of legal argumentation".[14] The theory of argumentation, therefore, not only offers a methodological basis for jurisdictional activity, but also delimits its limits and conditions of validity, avoiding judicial decisionism.

2. Judicial Activism and Public Policy: Conflicts and Complementarities

2.1. Tensions between branches of government

Judicial activism poses one of the most debated dilemmas in constitutional theory: the tension between the judiciary and the other branches of government. In democratic systems, the separation of powers is an essential principle, designed to prevent the concentration of power and ensure a system of checks and balances.[15] However, the growing judicial intervention in the configuration of public policies has generated controversies about the possible invasion of the scope of competence of the legislator and the Executive.[16]

This tension is especially manifest when the courts not only annul normative provisions contrary to the Constitution, but also order concrete measures or establish guidelines that imply a kind of "co-government".[17] In the Peruvian case, the jurisprudence of the CONSTITUTIONAL COURT (*TC)* has been criticized for adopting decisions that directly impact public policy, as occurred in the rulings on prison overcrowding or the distribution of contraceptives.[18]

In this sense, judicial intervention is justified as an exceptional response to situations of "structural failure" of the State, as conceptualized by the Colombian Constitutional Court. From the theory of guarantees, Luigi Ferrajoli argues that the constitutional judge not only can, but must intervene when the omissions of the legislator or the Executive prevent the effectiveness of fundamental rights.[19] This phenomenon has reactivated the debate on the limits and legitimacy of judicial activism in a democratic state governed by the rule of law.

2.2. Doctrinal objections to the judicialization of public policies

[11] ATIENZA RODRÍGUEZ/RUIZ MANERO, *Las piezas del derecho: Teoría de los enunciados jurídicos*, Barcelona, Ariel, 1996.

[12] ALEXY, *Theory of Legal Argumentation*, cit.

[13] RIVAS-ROBLEDO, «What is judicial activism? Part II: A Definition Beyond Overreaching', *Díkaion*, Vol. 31, No. 2, 2022, pp. 1–28

[14] SOPIŃSKI, "Neil MacCormick's Theory of Legal Reasoning and Its Evolution", *Studia Iuridica Lublinensia*, vol. 30, no. 4, 2021, pp. 275–289, available at: https://www.researchgate.net/publication/347394871_Neil_McCormick's_Theory_of_Legal_Reasoning_and_Its_Evolution

[15] LOCKE, *Second Treatise of Government*, London, Tegg & Sharpe, 1823, §§ 143–144, available at: https://www.yorku.ca/comninel/courses/3025pdf/Locke.pdf

[16] TUSHNET, *Taking the Constitution Away from the Courts*, cit.

[17] ATIENZA RODRÍGUEZ, *Siete tesis sobre el activismo judicial*, cit., p. 85.

[18] CONSTITUTIONAL COURT OF PERU, Exp. No. 05436-2014-PHC/TC, judgment of November 3, 2016; Exp. No. 00238-2021-PA/TC, judgment of August 25, 2021.

[19] FERRAJOLI, *Law and Reason: Theory of Penal Guarantees*, Madrid, Trotta, 2005, pp. 35–36.

Various sectors of the doctrine have raised objections to judicial activism, especially when it leads to the judicialization of public policies. The central criticism points out that judges, by intervening in areas that traditionally correspond to the legislator or the Executive, could violate the democratic principle, since they lack direct political legitimacy.[20]

From this perspective, it is argued that the expansion of the judiciary distorts the institutional balance and could lead to a "government of judges" (*gouvernement des juges*), a phenomenon historically questioned by classical liberal doctrine.[21] In addition, it warns that the courts lack the technical expertise and operational capacity to design and implement effective public policies, which could translate into ineffective or counterproductive judicial decisions.[22]

Authors such as TUSHNET and WALDRON have been especially critical of judicial activism, warning that excessive judicialization can weaken the political accountability of elected bodies and erode citizen trust in democratic institutions.[23] From this point of view, it is considered that the function of constitutional judges should focus exclusively on the control of the constitutionality of norms,

without intervening in decisions of the legislator or the Executive. This approach underscores the need to preserve institutional balance and the principle of separation of powers as essential guarantees of the rule of law.[24]

2.3. Arguments in favor of judicial activism in contexts of state omission

In the face of criticism of judicial activism, a relevant part of the doctrine maintains that it constitutes a legitimate mechanism and, in contexts of legislative omission or executive inaction, sometimes even necessary to guarantee the effective protection of fundamental rights. This view emphasizes that, in the face of structural failures of the State, the constitutional judge plays a crucial role as the ultimate guarantor of citizens' rights.[25] This perspective holds that the constitutional State should not be reduced to a merely formal or legalistic State, but that its main mission is to ensure that fundamental rights are effectively protected and realized in practice.[26]

In this sense, judicial intervention can be fully justified as an exceptional response to a "structural failure of the State". This concept, known as the "unconstitutional state of affairs", has been developed by Latin American constitutional courts – such as the Colombian one – to legitimize judicial actions aimed at comprehensive institutional remedies in situations of systemic state omission.[27] According to this perspective, constitutional judges must not only act as arbitrators between the public authorities, but also as definitive guarantors of fundamental rights when they are threatened by state omissions.[28]

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[20] WALDRON, "The Core of the Case Against Judicial Review", *The Yale Law Journal*, vol. 115, no. 6, 2006, pp. 1346–1406, available at: https://www.yalelawjournal.org/pdf/515_f5cz1u6z.pdf.

[21] KELSEN, *Teoría pura del derecho*, trans. by Roberto J. Vernengo, 2nd ed., UNAM, Mexico, 2009.

[22] SUNSTEIN, *Design of Democracy: The Architecture of Public Policy*, Ariel, Barcelona, 2003, pp. 202–210, available at: https://archive.org/details/designingdemocra0000suns/page/202/mode/2up

[23] TUSHNET, *Taking the Constitution Away from the Courts*, cit.; WALDRON, Jeremy, "The Core of the Case Against Judicial Review," *The Yale Law Journal*, vol. 115, no. 6, 2006, pp. 1346–1406, available at: https://openyls.law.yale.edu/bitstream/handle/20.500.13051/9638/54_115YaleLJ1346_April2006_.pdf?isAllowed=y&sequence=2.

[24] RECASENS, «The function and limits of the Constitutional Court in the rule of law», Ius et Veritas, no. 49, 2014, pp. 55–72, available at: https://revistas.pucp.edu.pe/index.php/iusetveritas/article/view/13618/14241

[25] LANDA ARROYO, "Judicial Activism and Constitutional Supremacy: Challenges in Latin America," cit.

[26] GARCÍA FIGUEROA, "Neoconstitucionalismo y argumentación jurídica", cit.

[27] RAMÍREZ HUAROTO, The unconstitutional state of affairs and its possibilities as a tool for strategic litigation of public law, cit.

[28] ALEXY, *A Theory of Constitutional Rights*, 2nd revised ed., Oxford University Press, Oxford, 2002, §§ 118–125, available at: https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=2159&context=concomm

In addition, judicial activism finds support in the theory of weighting, which requires that constitutional principles be applied as effectively as possible, even if this implies intervening in areas reserved for the legislator.[29] Ultimately , the key to its legitimacy lies in the quality of the argumentation and in the respect for democratic principles, avoiding any form of arbitrary decisionism.

3. Lessons from the Peruvian constitutional experience

3.1. Prison overcrowding and the unconstitutional state of affairs

In Exp. No. 05436-2014-PHC/TC, the TCP recognized, for the first time, the existence of an "unconstitutional state of affairs" (*ECI*) in the national prison system. This ruling, inspired by the jurisprudential doctrine of the Colombian Constitutional Court, allowed the Court to declare the structural unconstitutionality of prison overcrowding and order the State to adopt urgent corrective measures.[30]

The ruling forced the implementation of structural reforms aimed at progressively reducing the prison population, promoting the use of alternative sentences, improving prison infrastructure and guaranteeing minimum health conditions.[31] As a result of these demands, the Executive Branch issued legislative decrees aimed at facilitating release through electronic surveillance and expediting the execution of sentences, thus evidencing the direct impact of the judicial decision on the formulation of public policy.[32]

However, practical implementation has faced significant obstacles, such as budgetary restrictions, institutional weaknesses, and the health emergency caused by the COVID-19 pandemic, which exacerbated the prison crisis throughout the country.[33] While certain regulatory advances are recognized, various civil society organizations have publicly asked the Court to report on effective compliance with the judgment and have even raised the possibility of sanctioning the Executive for its repeated non-compliance.[34]

More recently, the president of the CONSTITUTIONAL Court held meetings with the Minister of Justice to address the persistent problem of overcrowding and coordinate joint actions, which reveals that the prison situation continues to be a priority structural challenge on the country's institutional agenda.[35]

3.2. Right to Identity: Ricardo Morán Case

The case of file No. 00882-2023-PA/TC marked a turning point in Peruvian jurisprudence on identity rights and non-discrimination. The plaintiff, producer Ricardo Morán, requested the registration in the National Registry of Identification and Civil Status (*RENIEC*) of his children born by surrogacy abroad. The registry entity denied the request invoking a restrictive interpretation of Article 21 of the Civil Code[36], which conditions the recognition of filiation to biological or legally adoptive ties in national territory.

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[29] ATIENZA RODRÍGUEZ, *Two versions of constitutionalism: formalism and argumentation*, Trotta, Madrid, 2013, pp. 122–124, available at: https://aprenderly.com/doc/3212048/pdf-dos-versiones-del-constitucionalismo---manuel-atienza.pdf

[30] CONSTITUTIONAL COURT OF PERU, *Exp. nº 05436-2014-PHC/TC,* judgment of November 3, 2016, operative points 3 and 4, available at: https://img.lpderecho.pe/wp-content/uploads/2020/05/Parte-resolutiva-del-Exp.-05436-2014-PHC-TC-LP.pdf

[31] COLOMBIAN COMMISSION OF JURISTS, "Unconstitutional State of Things (ECI) – Sentence T-025", *Series on Structural Failure*, Bogotá, 2013, available at: https://repository.iom.int/bitstream/handle/20.500.11788/975/Capitulo%2006.pdf?sequence=10

[32] Legislative Decree No. 1513, "Establishing measures to reduce prison overcrowding through the use of personal electronic surveillance", *El Peruano,* 2020; Legislative Decree No. 1514, "Amending the Penal Execution Code to Optimize the Conversion of Sentences," *El Peruano,* 2020.

[33] OMBUDSMAN'S OFFICE OF PERU, *Report on the situation of prisons during the COVID-19 pandemic,* Lima, 2021, available at: https://www.defensoria.gob.pe/wp-content/uploads/2021/08/Informe-COVID19-y-Centros-Penitenciarios.pdf

[34] INFOBAE PERU, "They demand the TC to report progress on overcrowding in prisons and sanctions to the Executive for not complying with reducing overcrowding", April 9, 2025, available at: https://www.infobae.com/peru/2025/04/09/exigen-al-tc-informar-avance-de-deshacinamiento-en-penales-y-sanciones-al-ejecutivo-de-no-cumplir-con-reducir-sobrepoblacion/

[35] CONSTITUTIONAL COURT OF PERU, "Constitutional Court President Luz Pacheco received a visit from the Minister of Justice Eduardo Arana to talk about the problem of prison overcrowding", *Press release*, April 28, 2025, available at: https://www.tc.gob.pe/institucional/notas-de-prensa/presidenta-del-tc-luz-pacheco-recibio-la-visita-del-ministro-de-justicia-eduardo-arana-para-hablar-sobre-problematica-del-hacinamiento-de-los-penales/

[36] Article 21 of the Peruvian Civil Code – Registration of birth, establishes: "When the father or mother separately registers the birth of a child born out of wedlock, he or she may reveal the name of the person with whom he or she had the child. In

The CONSTITUTIONAL COURT found that this refusal violated the fundamental rights of minors, especially their right to identity and the best interests of the child, enshrined both in the Constitution and in international treaties such as the Convention on the Rights of the Child. For this reason, it ordered the immediate registration of minors in the civil registry, also urging Congress to legislate on surrogacy in accordance with the international commitments assumed by Peru.[37]

This judgment not only corrected a normative omission but also introduced a line of jurisprudence linked to the reinforced protection of children's rights, especially in non-traditional family contexts. The decision aligns with the jurisprudence of the European Court of Human Rights in cases such as Mennesson v. France, which has established that States may not deprive children born by surrogacy of the recognition of their legal identity on the basis of the methods of reproduction used.[38]

From a legal point of view, this resolution represents a legitimate exercise in judicial activism, by making up for a legislative omission that placed minors in a situation of structural vulnerability. The intervention of the CONSTITUTIONAL COURT did not impose a new public policy, but it did activate constitutional mechanisms to demand the full recognition of fundamental rights postponed by anachronistic norms or discriminatory practices. Consequently, the judgment reaffirms the role of the constitutional judge as guarantor of the principles of equality, non-discrimination and human dignity.

3.3. Public Health and Personal Freedom: Mandatory Mask Wearing

During the COVID-19 pandemic, the TPC ruled in Exp. No. 0233-2022-PA/TC, evaluating the constitutionality of the mandatory use of face masks decreed by the Executive.[39] In its analysis, the Court applied the technique of constitutional weighting: it balanced the individual right to the free development of personality against the collective interest of safeguarding public health. It concluded that the measure was suitable, necessary and proportional, therefore constitutionally legitimate.

This pronouncement did not generate a new health policy, but it did strengthen the legitimacy of a measure already implemented, constitutionally validating decisions of the Executive and consolidating their institutional solidity. It is a case of judicial activism in its most moderate form: it does not replace the legislator, but legitimizes state policies through judicial control.

3.4. Family Planning: Free Emergency Oral Contraceptive Delivery

In case No. 00238-2021-PA/TC, the CONSTITUTIONAL COURT reviewed its own jurisprudence regarding the free distribution of emergency oral contraception (EOC), known as the "morning-after pill". In 2009, the Court had restricted its public distribution, citing a lack of scientific certainty about its non-abortifacient nature.[40] However, in this new 2021 judgment, the Court concluded that the available scientific evidence demonstrated that AOE was not abortifacient and that the restriction violated women's fundamental rights to access to health and equality.[41]

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this case, the child will bear the surname of the father or mother who registered him, as well as of the alleged parent, in the latter case he does not establish a filiation bond. After registration, within thirty (30) days, the registrar, under responsibility, shall inform the alleged parent of such fact, in accordance with the regulations. Where the mother does not reveal the identity of the father, she may register her child with her surname.'

[37] CONSTITUTIONAL COURT OF PERU, *Exp. no. 00882-2023-PA/TC*, judgment of October 12, 2023, available at: https://tc.gob.pe/jurisprudencia/2023/00882-2023-AA.pdf

[38] EUROPEAN COURT OF HUMAN RIGHTS, *Mennesson v. France*, Application No. 65192/11, Judgment of 26 June 2014, available in English at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-145179%22]}

[39] CONSTITUTIONAL COURT OF PERU, *Exp. no. 0233-2022-PA/TC*, judgment of April 28, 2022, grounds 8–15 and 25–26, available in PDF: https://tc.gob.pe/jurisprudencia/2022/00233-2022-AA.pdf

[40] CONSTITUTIONAL COURT OF PERU, *Exp. nº 02005-2009-PA/TC*, judgment of October 16, 2009, available in PDF: https://tc.gob.pe/jurisprudencia/2009/02005-2009-AA.pdf

[41] CONSTITUTIONAL COURT OF PERU, *Exp. no. 00238-2021-PA/TC*, judgment of March 21, 2023 (ratified in Plenary), available at: https://tc.gob.pe/jurisprudencia/2023/00238-2021-AA.pdf

In addition, the TC ordered that Minsa develop as a public policy for family planning, the free national distribution of the AOE. It considers that, since AOE has been determined not to be abortifacient, there is no objective and reasonable basis to prevent the State, in compliance with its obligation to ensure access to family planning means, from distributing such a pill free of charge to persons who, because of their economic status, are unable to purchase it. This case is paradigmatic because it shows how the Court, by rectifying its own jurisprudence, plays a role of corrective judicial activism and guarantees the dynamic validity of fundamental rights according to scientific and social evolution.

3.5. Gender perspective in the administration of justice

File No. 05121-2015-PA/TC set a key precedent in Peruvian constitutional jurisprudence by establishing the obligation of justice operators to deliver justice with a gender perspective. The case arose from a complaint of sexual violence that was filed based on discriminatory stereotypes about the victim – including her age, occupation and delay in reporting – which the Court considered a violation of the right to equality and effective protection. The Court underlined that the criteria used reflected a biased view that ignored the intersectional approach and the situation of vulnerability of women in contexts of violence. Consequently, it declared the application for amparo to be well-founded, annulled the tax provisions and ordered the Public Prosecutor's Office to give adequate reasons for its decisions, without resorting to discriminatory reasoning.[42]

The ruling also urged judicial bodies to incorporate the gender approach in the training of judges and prosecutors, aligning themselves with international standards, such as *General Recommendation No. 33 of CEDAW*, of the Committee on the Elimination of Discrimination against Women (*CEDAW*), which urges States to guarantee equal access to justice through the elimination of stereotypes and specialized training of the judicial personnel.[43]

The ruling of Peru's Constitutional Court is a clear example of judicial activism in its structural dimension: it intervenes to prevent recurrent patterns of discrimination, not only in individual cases. It promotes the adoption of protocols and public policies aimed at eliminating gender stereotypes, strengthening a more egalitarian judicial system that respects women's rights. The Constitutional Court has established as a public policy that, in the Justice System, whether in the constitutional, judicial or fiscal sphere, the decisions adopted when resolving cases must take into account the gender perspective.

4. Judicial Activism in Comparative Perspective: International Experiences and Lessons

4.1. Colombia: The unconstitutional state of affairs as a reference model

Since judgment SU-557/97, the CONSTITUTIONAL COURT OF COLOMBIA developed the concept of "unconstitutional state of affairs" (*ECI*) to address massive and persistent violations of fundamental rights that could not be corrected through individual judgments. It is a structural solution to remedy systemic situations of injustice, through general orders addressed to various public institutions.[44]

The jurisprudence progressed with rulings such as T-025/04, which applied the ECI in scenarios of forced displacement, and T-068/98, referring to deficiencies in the social security health system. These decisions

[42] CONSTITUTIONAL COURT OF PERU, *Exp. no. 05121-2015-PA/TC*, judgment of January 24, 2018, available at: https://tc.gob.pe/jurisprudencia/2018/05121-2015-AA.pdf

[43] Committee on the Elimination of Discrimination against Women (CEDAW), *General Recommendation No. 33 (2015) on women's access to justice*, available at: https://www.refworld.org/es/leg/coment/cedaw/2015/es/133599

[44] RÍOS TORRES, *Structural Sentences in the Jurisprudence of the Colombian Constitutional Court: Origin, Evolution and Effectiveness*, Bogotá, Universidad Externado de Colombia, 2024, p. 16, available at: https://bdigital.uexternado.edu.co/handle/001/15029

required comprehensive public policies and established follow-up mechanisms such as periodic court orders, reflecting judicial activism aimed at guaranteeing real effectiveness of social rights.[45]

Comparative studies show that the Colombian figure has been adopted in other Latin American countries, including Peru and Costa Rica, although with variants.[46] The Colombian model requires the concurrence of several harmful acts and the participation of multiple institutions, unlike the Peruvian design that allows a JIT to be declared by a single act of authority. This difference highlights how structural judgments can be strengthened through a more robust approach to inter-institutional cooperation.[47]

A recent academic review concludes that the success of the Colombian model lies in its combination of clear judicial mandates and continuous oversight mechanisms. However, it also warns of the risks of excessive bureaucratization and reliance on government reporting, which could dilute the transformative effects of the JIT.[48]

4.2. Spain: Judicial Activism in Equality and Public Health Policies

During the COVID-19 pandemic, the SPANISH CONSTITUTIONAL COURT (*TCE)* became a key player in reassessing the Executive's health measures. In STC 148/2021 (14 July 2021), the constitutionality of the first state of alarm, decreed by Royal Decree 463/2020, was analysed. The Court determined that the most severe restrictions, such as home confinement, required a declaration of a state of emergency, not an alarm, because they exceeded the legal limits of the state of alarm and affected fundamental rights, such as freedom of movement.[49] Although it did not completely annul the health decree, it demanded greater respect for the principle of proportionality and parliamentary control, validating the use of sanitary measures under a robust constitutional criterion.

On the other hand, the Court confirmed the constitutionality of Organic Law 2/2010, which regulates abortion under the so-called "term model" – legal interruption up to 14 weeks – in STC 44/2023. This ruling reaffirmed that the protection of the right to reproductive health does not contradict freedom of conscience or expression, consolidating a high judicial standard in matters of equality and sexual rights.[50]

Both rulings reflect a form of balanced and technically argued judicial activism, in which the Spanish Constitutional Court does not assume legislative functions or replace political power, but does exercise rigorous control over the constitutionality of the public policies adopted. Through its pronouncements, the Court establishes clear limits on the margin of action of the Executive and Legislative branches, ensuring that its decisions respect the fundamental principles of the constitutional order.

This type of judicial intervention does not imply an excess of competence, but a way of guaranteeing that the measures adopted – in terms of health or gender equality – comply with criteria of proportionality, reasonableness and respect for fundamental rights. In this sense, judicial activism becomes an instrument

[45] SARMIENTO ERAZO et al., «Prospective connection: from the unconstitutional state of affairs to ecosystems as subjects of law – contributions from the Colombian experience», *Revista de Investigações Constitucionais*, vol. 9, no. 2, 2022, pp. 301–328, available at: https://www.scielo.br/j/rinc/a/nqrdmqYP5bvxNn5bNCZBvzC/?lang=es

[46] PALACIOS SALCEDO, "Analysis of Sentence T-025 of 2004 declaring the state of affairs unconstitutional: by the Constitutional Court of Colombia against the tutelary protection of the rights of victims of armed displacement in the framework of the Colombian internal conflict", *DIXI*, vol. 20, no. 27, 2018, available at: https://doi.org/10.16925/di.v20i27.2388

[47] FALLA LY/ZAPATA TELLO, «Prospective connection: from the unconstitutional state of affairs to ecosystems as subjects of law – contributions from the Colombian experience», *Revista de Investigações Constitucionais*, vol. 9, no. 2, 2022, pp. 301–328, available at: https://www.scielo.br/j/rinc/a/nqrdmqYP5bvxNn5bNCZBvzC/?lang=es

[48] CANO BLANDÓN, "The unconstitutional state of affairs in Colombia: the normalization of the exception?", *IberICONnect*, December 2024, available at: https://www.ibericonnect.blog/2024/12/el-estado-de-cosas-inconstitucional-en-colombia-la-normalizacion-de-la-excepcion/

[49] STC (Plenary) 148/2021, of 14 July 2021 (BOE no. 197, of 18 August 2021), available at: https://gredos.usal.es/bitstream/handle/10366/150493/Sentencia_del_Tribunal_Constitucional_14.pdf

[50] STC (First Chamber) 44/2023, of 9 May 2023 (BOE no. 138, of 10 June 2023), available in PDF: https://revistas.usal.es/cuatro/index.php/ais/article/download/31693/29757/118954

of effective protection, which does not paralyze political action, but does require its adaptation to the higher values of the legal system. This work reinforces the rule of law, by consolidating jurisprudence that promotes regulatory coherence, the protection of collective rights and institutional stability in complex contexts.

4.3. The European Court of Human Rights and the consolidation of judicial activism

In April 2024, the European Court of Human Rights ruled in the case of *Verein KlimaSeniorinnen Schweiz and others v. Switzerland* that the State's inaction in the face of the climate crisis violated the rights to respect for private and family life. The central rationale was that their lack of adequate measures, especially in relation to older women vulnerable to heat waves, exposed them to a real risk of harm, thus consolidating an active obligation of the State to protect their health and environment. Courts in Australia, Brazil, Peru and South Korea are considering similar cases, arguing that governments have breached their duty to protect the environment and public health.[51]

This ruling represents a legal milestone: for the first time, a European Court explicitly linked climate change to human rights violations. In addition, the Court determined that States have an active obligation to implement effective climate policies, setting a binding precedent for the 46 member countries of the Council of Europe.[52] This decision makes the Court a key player in European judicial activism, not because it legislates, but because it requires public policies to meet constitutional standards and protect vital collective rights.

Consequently, the ruling not only resolved an individual case, but also generated standards with impact for the 46 member countries of the Council of Europe. Through its jurisprudence, the Court consolidated the principle that courts can demand real measures in environmental matters without legislating, but activating the constitutional duty of States to protect collective rights in the face of global challenges such as climate change.[53]

5. Critical Assessment of Judicial Activism in Peru

5.1. Benefits and risks identified

The analysis of the judgments examined allows us to identify a recurrent pattern: in situations of legislative omission, administrative inefficiency or structural violation of rights, the Constitutional Court of Peru has exercised a proactive role that has directly influenced the configuration and reform of public policies. This action, although the subject of debate from the point of view of the separation of powers, is justified within the framework of the constitutional rule of law, particularly when it comes to guaranteeing the effectiveness of fundamental rights.

The Peruvian experience reflects a form of judicial activism that transcends the abstract control of norms; the constitutional judge has become a key institutional actor in the defense of the most vulnerable sectors, through decisions that correct structural failures of the State and establish standards for public action. The cases analyzed show concrete impacts: improvements in prison conditions, advances in reproductive rights, recognition of rights derived from new family realities, validation of health measures in emergency contexts, and the incorporation of the gender perspective in justice.

However, this expansion of the judicial role is not without risks. The absence of clear boundaries can generate inter-institutional tensions, erode the democratic legitimacy of elected bodies and give rise to

[51] REUTERS, "Swiss women win landmark climate case at Europe top human rights court", 9 April 2024, available at: https://www.reuters.com/sustainability/climate-activists-seek-breakthrough-human-rights-court-ruling-against-european-2024-04-09/

[52] REUTERS, "Why does Switzerland's rebuff of European climate ruling matter?", 12 June 2024, available at: https://www.reuters.com/world/europe/why-does-switzerlands-rebuff-european-climate-ruling-matter-2024-06-12/

[53] LE MONDE, "Climate change: Switzerland's condemnation by the ECHR marks "historic" step", 10 April 2024, available at: https://www.lemonde.fr/en/environment/article/2024/04/10/limate-change-switzerland-s-condemnation-by-the-echr-marks-historic-step_6667997_114.html

excessively expansive interpretations that blur the competences of the legislator and the executive. The comparative literature warns that an overflowing judicial activism can, paradoxically, weaken the democratic architecture it seeks to protect. The constant judicialization of public policies can also produce counterproductive effects if it is not accompanied by an effective and sustained implementation by the rest of the state institutions.

5.2. Proposal of criteria for legitimate judicial activism

To preserve the legitimacy of judicial activism in democratic contexts, it is essential to establish criteria that guide its exercise within reasonable legal and democratic margins. In the first place, judicial activism must be motivated by the need to correct obvious and current violations of fundamental rights, particularly when the State incurs in systematic omissions that affect sectors in vulnerable situations.

Secondly, judicial intervention must be supported by rigorous, coherent and transparent legal argumentation. The quality of reasoning is essential so that judicial activism does not lead to decisionism. As ATIENZA argues, the legitimacy of the constitutional judge does not lie in his political role, but in his ability to offer sufficient, understandable and universalizable public reasons that justify his decisions.[54]

Thirdly, the principle of proportionality must always be observed. The constitutional judge may order the adoption of measures, but these should not completely replace the work of the legislator, but rather guide it. The objective is not to govern from the court, but to guarantee that fundamental rights are effectively respected in the actions of the public authorities.

Finally, judicial activism must be conceived as an exceptional and subsidiary protection mechanism. Only when ordinary channels have failed to comply with constitutional obligations can and should the judiciary intervene. This intervention, however, requires institutional monitoring mechanisms, inter-organizational cooperation and impact assessment so that judicial orders are translated into effective and sustainable transformations.

6. Conclusions

The analysis carried out allows us to argue that the judicial activism exercised by the Constitutional Court of Peru has had a substantive impact on the effective guarantee of fundamental rights, especially in contexts marked by legislative omissions, structural deficiencies or lack of political will. Emblematic cases related to access to health, gender equality, identity, family planning, the prison situation and children's rights demonstrate that the constitutional judiciary has not limited itself to the abstract control of norms, but has acted as a catalyst for relevant institutional transformations.

In this sense, judicial activism is revealed as a legitimate instrument for the protection and development of fundamental rights, aligned with the postulates of the constitutional rule of law and the doctrine of neo-constitutionalism. Its exercise has contributed not only to declaring the unconstitutionality of situations that violate rights, but also to promoting regulatory reforms, specific public policies and jurisprudential standards with a structural vocation.

However, this functional expansion of the judiciary requires clear limits and criteria. Constitutional control over public policies should not translate into a substitution of the role of the legislator, but rather into a guarantee that state measures respect the standards of rationality, proportionality, and fundamental rights. Judicial activism, in order to preserve its legitimacy, must be guided by a solid, public and transparent legal argument, aimed at correcting systemic failures without violating the democratic principle or the separation of powers.

In conclusion, the Peruvian experience illustrates the transformative potential of judicial activism as a way to strengthen the rule of law in contexts of structural inequality. However, this power must be exercised

[54] ATIENZA RODRÍGUEZ, *Siete tesis sobre el activismo judicial*, cit., pp. 92–93

responsibly, within defined constitutional frameworks, so as to ensure a balance between effectiveness in the protection of rights and respect for the institutional design of the democratic system.

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