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From Ideology to the Common Good: Reconsidering the Critical Theory of Adjudication²

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Abstract

This paper reconsiders the critical (agonistic) theory of adjudication by revising its normative thesis concerning ideology as a source of judicial guidance in cases of genuine indeterminacy. It retains the theory's three descriptive claims – legal indeterminacy, agonism, and the factual role of ideology in adjudication – but introduces a key modification: replacing ideology with the common good as the normative criterion that should guide judges when they confront genuine indeterminacy. However, ideology is not removed from the picture altogether. Rather, understood in line with definitions proposed by political scientists, it becomes a critical tool for evaluating specific judicial decisions, with the aim of identifying instances when ideological preferences stood in the way of recognising the common good. Incorporating the concept of the common good enriches the agonistic theory by supplementing its critical stance with a constructive, substantive dimension. In this way, the (post-)critical theory of adjudication is modified, thereby addressing the objections of subjectivisation and “emancipation” of judges as raised by its critics.

Keywords: critical theory of adjudication, ideology, agonism, common good, post-critique.

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Od ideologii do dobra wspólnego: ponowne ujęcie krytycznej teorii orzekania³

Streszczenie

Artykuł podejmuje na nowo problematykę krytycznej (agonistycznej) teorii orzekania poprzez rewizję jej tezy normatywnej dotyczącej ideologii jako źródła wskazówek dla sędziów w sytuacjach rzeczywistej nieokreśloności prawa. Autor zachowuje trzy deskryptywne tezy tej teorii – nieokreśloność prawa, agonizm oraz faktyczną rolę ideologii w procesie orzekania – lecz wprowadza istotną modyfikację: zastępuje ideologię dobrem wspólnym jako kryterium normatywnym, które powinno kierować sędziami w obliczu rzeczywistej nieokreśloności. Nie oznacza to jednak całkowitego wyeliminowania ideologii. Przeciwnie, rozumiana zgodnie z ujęciami proponowanymi przez nauki polityczne, ideologia staje się narzędziem krytycznym służącym ocenie konkretnych rozstrzygnięć sądowych, w szczególności w celu identyfikacji sytuacji, w których preferencje ideologiczne przeszkodziły w rozpoznaniu dobra wspólnego. Włączenie koncepcji dobra wspólnego wzbogaca teorię agonistyczną, uzupełniając jej krytyczny charakter o konstruktywny i substancjalny wymiar. W ten sposób (post)krytyczna teoria orzekania zostaje zmodyfikowana, odpowiadając na zarzuty jej krytyków dotyczące subiektywizacji oraz „emancypacji” sędziów.

Słowa kluczowe: krytyczna teoria orzekania, ideologia, agonizm,
dobra wspólne, postkrytyka.

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Introductory Remarks

The critical (agonistic) theory of adjudication is a descriptive–normative theory concerned with the critical analysis of the judicial application of law.⁴ It transposes into the philosophy of law insights concerning the concept of the political and social antagonisms developed *inter alia* by Chantal Mouffe,⁵ and draws on Duncan Kennedy's concept of ideology and its application to the domain of adjudication.⁶ It also encompasses the ethical postulates concerning judicial decision-making formulated by Costas Douzinas and Adam Gearey with reference to the ethics of Levinas and Derrida.⁷

The critical theory of adjudication rests on two key theoretical assumptions. First, there is the descriptive **thesis of legal indeterminacy**, which holds that judicial decisions are not fully determined by legal materials, such as statutes or binding precedent. Second, drawing on Chantal Mouffe, the theory relies on the **thesis of agonism**, which posits that modern societies are characterised by structural conflict. This thesis provides the political context for the indeterminate application of law. These conflicts manifest themselves either as **antagonism**, where parties treat each other as enemies outside the political community and seek to destroy each other, or **agonism**, where parties regard each other as adversaries within the same community and aspire to prevail over – but not eliminate – each other.

⁴ See e.g. R. Mańko, *Ideology and Legal Interpretation: Some Theoretical Considerations*, [in:] K. Torgāns et al. (eds.), *Constitutional Values in Contemporary Legal Space*, Riga 2016, vol. I, pp. 117–126; idem, *W stronę krytycznej filozofii orzekania. Polityczność, etyka, legitymizacja*, Łódź 2018; idem, *Methods of Legal Interpretation, Legitimacy of Judicial Discretion and Decision-Making in the Field of The Political: A Theoretical Model and Case Study*, "International Comparative Jurisprudence" 2020, 6(2), pp. 108–117; idem, *The Political as an Analytical Category in the Critical Study of Case Law (Theoretical Model and Case Study)*, "Critique of Law" 2020, 12(3), pp. 90–108; idem, *Judicial Decision-Making, Ideology and the Political: Towards an Agonistic Theory of Adjudication*, "Law and Critique" 2022, 33, pp. 175–94; idem, *On Law, Ideology, and Violence: A Reply to Maciej Pichlak*, "Krytyka Prawa" 2023, 15(1), pp. 326–338.

⁵ C. Mouffe, *The return of the political*, London 1993; eadem, *On the political*, London–New York 2005; eadem, *Agonistics: Thinking the world politically*, London 2013. Cf.: A. Schaap (ed.), *Law and Agonistic Politics*, Farnham 2009.

⁶ D. Kennedy, *A Critique of Adjudication {fin de siècle}*, Cambridge, MA 1997; idem, *Legal Reasoning: Collected Essays*, Aurora 2008; idem, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, "Law and Critique" 2015, 25(1).

⁷ C. Douzinas, A. Gearey, *Critical Jurisprudence: The Political Philosophy of Justice*, Oxford–Portland 2005.

Within Mouffe's political theory, parliamentarism plays a key role in transforming antagonisms into agonisms – that is, in civilising conflict.⁸ This is a normative rather than a descriptive thesis, since she considers modern mass electoral democracies as failing to represent actual societal interests. Within the agonistic theory of adjudication, the courtroom replaces parliament as the forum in which antagonism is transformed into agonism and thus domesticated. From the perspective of the theory, this is primarily a descriptive postulate: **courtrooms are indeed sites of conflict** which, although formally individual in nature, in fact constitute manifestations of structural conflicts.⁹

The **third descriptive thesis** of the agonistic theory of adjudication concerns the significance of **ideology** in interpretation.¹⁰ According to this thesis, in areas where judges cannot reach binding conclusions solely on the basis of legal materials, such as legal provisions or other legally binding authorities – that is, where they possess genuine discretionary power¹¹ in the interpretation of law – they in fact act, whether consciously or unconsciously, **under the influence of specific political ideologies**.

Judges may follow such ideologies consciously. In this case, when faced with several possible interpretive choices, a judge selects the interpretation he¹² considers most consistent with a given ideology. The adoption of a particular ideology by a judge may itself be regarded by that judge as objective: for instance, the judge may hold that the “proper” state ideology is neoliberal or socialist, and therefore, among competing interpretations, choose the one most consonant with that ideology,

⁸ R. Mańko, *The Political...*, pp. 94–95.

⁹ A different matter is the evaluation of the growing scope of so-called juristocracy (judicial supremacy). See, e.g. M. Tushnet, *Taking the Constitution Away from the Courts*, Princeton 2000; J. Waldron, *The Core of the Case Against Judicial Review*, “Yale Law Journal” 2006, 115(6), pp. 1346–1406; A. Czarnota, *Populist constitutionalism or new constitutionalism?*, “Krytyka Prawa” 2019, 11(1), pp. 45–46; A. Sulikowski, M. Wojtanowski, *The Polish Constitutional Court Crisis – Some Remarks on the Political, Liberalism and Culture*, [in:] B. Pokol, A. Téglási (eds.), *The Gradual Emergence of the Juristocratic State*, Budapest 2019, pp. 181–99; B. Pokol, *Jurystokracja. Trendy i odmiany*, transl. by A. Czarnecka, Warszawa 2021. Cf. J. Sawicka, *Does a Democratic Rule of Law Create Opportunity for Civic Engagement?*, “Krytyka Prawa” 2019, 11(1), pp. 150–163.

¹⁰ R. Mańko, *Ideology and Legal Interpretation...*, *passim*. On the concept of ideology, see, e.g. R. Mańko, *Towards an Ideological History of Private Law, or What Legal History Can Gain from Critical Legal Theory*, [in:] A. Machnikowska, M. Gałędek, R. Mańko, *Ideology and Private Law: Polish Experiences in the Long 20th Century*, Leiden-Boston 2025, pp. 30–43 (with further references).

¹¹ According to Kennedy, the question of limits of judicial discretionary power is not absolute, but rather one of the extent of argumentative work that needs to be performed by a judge to achieve a result which diverges from the *prima facie* interpretive result; D. Kennedy, *A Critique...*, pp. 160–166, 181; *idem*, *Legal Reasoning*, p. 158–168. Cf. R. Mańko, *Methods...*, p. 115.

¹² In this text, the masculine pronoun is to be understood as including also women, in line with the Roman maxim: *Hominis appellatione tam feminam quam masculum contineri non dubitatur* (D. 50, 16, 152 – Gaius libro decimo ad legem Iuliam et Papiam).

considering it an approach that favours objectivity.¹³ It is equally possible, however, that the judge will follow the dominant ideology unconsciously, without even reflecting upon it.¹⁴

Alternatively, the judge may consciously or unconsciously follow **his own ideological preferences** – for example, although the judge believes that most of society adheres to a liberal ideology, he nonetheless acts in accordance with the socialist axiological commitments that he personally regards as superior. Conversely, even where the legislature has clearly embedded feminist or queer ideological commitments in a statute, a conservative judge may still seek to interpret the text restrictively, narrowing the meaning of certain statutory concepts so as to align them with conservative values and limit what he perceives as damage to public morality. Again, this need not always be a conscious operation: ideology may be deeply internalised and rarely consciously recognised.¹⁵

The possibility of an **ideological critique of judicial reasoning** follows from this third thesis of the agonistic theory of adjudication. Such critique involves identifying the specific ideological premises that objectively – even if unconsciously – guided the judge's interpretive decision. Such a critique of judicial reasoning is much easier in the United States, where individual judges typically have publicly known ideological stances that directly affect their judicial opinions.¹⁶ In Europe, attempts to analyse judgments ideologically are only beginning.¹⁷

In addition to the three descriptive theses outlined above, the original version of the critical theory of adjudication contained a **normative thesis**. According to this thesis, situations in which judges are guided by ideological considerations within the sphere of genuine interpretive discretion should be approved – particularly where, after applying the interpretive methods recognised within a given

¹³ Cf. L. Rodak, *Judicial Objectivity: Limits, Merits and Beyond*, Berlin 2020, pp. 198–199.

¹⁴ M. Škop, "Preferred Reading" of Legal Texts, "Wrocław Review of Law, Administration and Economics" 2015, 5(1), p. 99.

¹⁵ R. Mańko, "Reality is for Those Who Cannot Sustain the Dream": Fantasies of Selfhood in Legal Texts "Wrocław Review of Law, Administration and Economics" 2015, 5(1), p. 26; *idem*, *Towards an Ideological...*, p. 60; P. Szymaniec, *The Problem of Transhumanism in the Context of Individual Freedom and Dignity: A Lesson from Slavoj Žižek*, "Acta Universitatis Lodziensis. Folia Iuridica" 2025, 113, p. 77–78.

¹⁶ A. Bonica, M. Sen, *Estimating Judicial Ideology*, "Journal of Economic Perspectives" 2021, 35(1), pp. 97–118.

¹⁷ See e.g. M. Bartl, C. Leone, *Minimum Harmonization After Alemo-Herron: The Janus Face of EU Fundamental Rights Review*, "European Constitutional Law Review" 2015, 11, p. 142; R. Mańko, *Symbolic Violence in Technocratic Law and Attempts at its Overcoming: Politicisation Through Humanisation?*, "Studia Erasmiana Wratislaviensia" 2017, 11, pp. 31–64; *idem*, *Dimensions of the Political in Adjudication: A Case Study*, "Acta Universitatis Lodziensis. Folia Iuridica" 2020, 92, pp. 5–16; *idem*, *The Political as an Analytical Category in the Critical Study of Case Law (Theoretical Model and Case Study)*, "Krytyka Prawa" 2020, 12(3), pp. 90–108; *idem*, *The Centre–Periphery Antagonism in Adjudication: A Case Study on the Spatial Dimension of the Political*, "Acta Universitatis Lodziensis. Folia Iuridica" 2021, 94, pp. 121–140.

legal culture, multiple alternative interpretations remain available, each supported by reasonably acceptable arguments rooted in that culture's interpretive tradition.¹⁸

It is precisely this normative thesis that became the target of critique. In a series of publications, Andrzej Bator,¹⁹ Arkadiusz Barut,²⁰ Maciej Pichlak,²¹ Wojciech Zomerski,²² and Mateusz Wojtanowski²³ have emphasised, each from a different philosophical and theoretical perspective, the dangers that could arise from adopting the normative postulate of the agonistic theory – namely, endorsing judicial reliance on personal ideological preferences. While Duncan Kennedy argued that judges should be guided by what he termed the liberal ideology – in the American context, a synthesis of social-democratic economic policies and cultural liberalism – the Polish development of the agonistic theory never explicitly formulated an analogous prescriptive stance.

As a result, the theory, as developed in my earlier publications, came to convey – unintentionally – the impression that it promoted the subjectivisation or even “privatisation” of adjudication through the ideological backdoor. Against the background of this critique, the aim of the present article is to revise the agonistic theory of adjudication by replacing its original normative thesis – endorsing ideological guidance in adjudication – with a new thesis: judges ought to be guided by the **common good** (*bonum commune*). The concept of the common good adopted here follows the framework articulated by Adrian Vermeule in his project of Common Good Constitutionalism,²⁴ which understands law not primarily as an instrument of individual preference or ideological contestation, but as an **ordinance of reason** directed towards the flourishing of the political community as a whole.²⁵

It is true that critical legal and political theory that directly inspired my version of the critical theory of adjudication – as exemplified, for instance, by the works of Kennedy and Mouffe – on the one hand, and Vermeule's constitutional theory,

¹⁸ See, e.g. R. Mańko, *Judicial Decision-Making...*, p. 187.

¹⁹ A. Bator, *Law and Jurisprudence in the Face of Conflict. Between Neutrality and the Political*, “Krytyka Prawa” 2020, 12(3), pp. 7–31.

²⁰ A. Barut, *Problem polityczności orzecznictwa z perspektywy rozumienia polityczności jako sfery wspólnych wartości. Wstęp do neoklasycznej koncepcji prawa*, “Krytyka Prawa” 2020, 12(3), pp. 38–40; *idem*, *Problem praworządności we współczesnej liberalno-demokratycznej i lewicowej filozofii prawa*, [in:] A. Barut, A. Wielomski, *Praworządność*, Warszawa 2022, pp. 212–115; *idem*, *Ideologie liberalnej demokracji a bezpieczeństwo prawa*, Sosnowiec 2025, pp. 85–87.

²¹ M. Pichlak, *Law in the Snares of the Political. Addressing Rafał Mańko's Critical Philosophy of Adjudication*, “Krytyka Prawa” 2020, 12(3), pp. 109–112.

²² W. Zomerski, *W kierunku demokratycznej nauki prawa? Dogmatyka, edukacja, postanalizytyczność*, Warszawa 2023, pp. 159–162.

²³ M. Wojtanowski, *Odczarować zaklęcie? Uwagi na marginesie monografii Rafała Mańko o krytycznej filozofii orzekania*, “Archiwum Filozofii Prawa i Filozofii Społecznej” 2020, 4, pp. 118–126.

²⁴ A. Vermeule, *Common Good Constitutionalism*, Cambridge–Medford 2023.

²⁵ *Ibidem*, p. 3.

on the other, are brought into constructive dialogue in this paper despite their rather different philosophical premises.²⁶ However, I do not think that this difference should frustrate the aim of the present article. Jerzy Wróblewski posited that the relationship between philosophy and legal theory can take three possible forms: first, legal theory may be considered part of philosophy; second, legal theory may be considered a consequence of certain philosophical assumptions; and third, legal theory may be considered autonomous vis-à-vis philosophy.²⁷ In this paper, I adopt the third approach and leave aside the different philosophical roots of critical theory and jusnaturalism. I do not deny their importance, nor do I claim that comparing those philosophical roots would be a futile intellectual exercise; nonetheless, I do consider it possible to bracket out the philosophical difference for the time being and to focus, for the purposes of this paper, on the two theories **as legal theories** rather than as philosophical projects, even though, *qua* legal theories, they cannot be isolated from their axiological commitments.²⁸

Nonetheless, the platform on which the two theories considered in this paper are to meet belongs not to the philosophy of law *sensu stricto*, but to the **political theory of judicial discourse**, that is, an enquiry into the role of judges in making decisions affecting the entire political community. That political theory can, in turn, be used as a point of departure for developing a **political sociology of judicial discourse**, especially where the empirical material of concrete judicial decisions, viewed in its broad socio-economic, political, cultural, and ideological context, is subjected to a sociological scrutiny based on a protocol proposed in earlier publications.²⁹

²⁶ For the critical theory of adjudication, see, e.g. R. Mańko, J. Łakomy, *In search for the ontological presuppositions of critical jurisprudence*, "Krytyka Prawa" 2018, 10(2), pp. 475–485. Duncan Kennedy specifies his philosophical inspirations by referring collectively to 'Jean-Paul Sartre, Herbert Marcuse, and Michel Foucault' and, with regard to methodology, he mentions 'technical legal analysis, jurisprudence, neo-Marxism, Weberian sociology, semiotics and structuralism, psychoanalysis, historicist narration, Lewinian field theory, phenomenology, modernist fiction, and deconstruction' (D. Kennedy, *A Critique...*, p. 3, 15). As far as Vermeule's theory is concerned, it is openly based on philosophical realism, as developed notably by St Thomas of Aquinas and his followers. However, some authors working within the Thomist natural-law tradition have criticised Vermeule's theory as not being sufficiently Thomist – see, e.g. J.A. Pojanowski, K.C. Walsh, *Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule's New Theory*, "Notre Dame Law Review" 2022, 98, no. 1; M.T. Still, *St. Thomas Confronts Vermeule: A Thomistic Critique of Professor Vermeule's Conservative Anti-Originalism*, "Alabama Law Review" 2023, 74(4).

²⁷ J. Wróblewski, *Postawa filozoficzna i afilozoficzna we współczesnej teorii prawa*, „Studia Prawnicze” 1966, 13, p. 64. Cf. K. Opalek, J. Wróblewski, *Prawo. Metodologia, filozofia, teoria prawa*, Warszawa 1991, p. 67; P. Jabłoński, *Polskie spory o miejsce filozofii w teorii prawa*, Wrocław 2014, pp. 92–93.

²⁸ Z. Pulka, *Prawoznawstwo – opis czy optymalizacja prawa?*, "Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji" 2000, 43, pp. 83–94; *idem*, *Struktura poznania filozoficznego w prawoznawstwie*, Wrocław 2004, pp. 29–45.

²⁹ See especially: R. Mańko, *Methods of Legal Interpretation...*; *idem*, *The Political as an Analytical Category...*; *idem*, *Judicial Decision-Making...* The theory, as developed in these papers, goes beyond the purely theoretical approach proposed by Kennedy by putting forward a protocol for the critical analysis of

That protocol makes it possible to move from the **conceptualisation** of the theory to its **operationalisation**. At that stage, the distant philosophical roots of a sociological theory of law are not a crucial point of reference; rather, they belong to the intellectual genealogy of that theory.

Moreover, even if we do consider the philosophical premises important, it is worth underlining that, for practical purposes, they are limited to two crucial theses: 1) the presence of conflicts in society (agonism thesis), and 2) the inconclusiveness of legal materials (indeterminacy thesis).³⁰ Arguably, this does not involve a “grand” philosophical theory but rather is mid-range in character. Turning to Vermeule and his *Common Good Constitutionalism*, it should also be mentioned that it focuses more on the practical implications for constitutional discourse than on a meticulous reconstruction of Thomistic philosophy of law. It is for the latter reason that he has even been criticised by legal philosophers working in the Thomist tradition.³¹

Therefore, the two theoretical projects in question – a pragmatically oriented critical theory of adjudication, and Vermeule’s common good constitutionalism – seem to be sufficiently oriented towards legal rather than philosophical aspects to justify the approach taken in this paper. This enables me to focus on the **implications of the two theories for the practical aspects of the critique of adjudication** and therefore to suspend or bracket out the question of their undoubtedly diverse philosophical underpinnings. Such an approach is justified by analogy to the position of a judge adjudicating a case, who must reach a decision on the correct interpretation and application of law, and – in a modern state – may not justify his judgment by a philosophical or ideological conviction (which might not necessarily be commonly shared), but must base it exclusively on the law which unites society through the predominance of purely formal values.³² This does not exclude, of course, the possibility – and indeed the utility – of further properly philosophical research on ideology and the common good that could potentially lead to the approximation of the two larger theoretical projects from which those concepts are drawn.

Finally, I would like to emphasise that the goal of this paper is not to provide an all-encompassing comparison between critical legal theory (in any of its many

case law, and thereby operationalising the theory. For details, see Section *Modification of the Operationalisation Protocol of the Agonistic Theory of Adjudication*.

³⁰ *Ibidem*, pp. 177–187.

³¹ See, e.g. J.A. Pojanowski, K.C. Walsh, *Recovering Classical Legal Constitutionalism...*, *op. cit.* It is beyond the scope of the present paper to evaluate this critique of Vermeule’s theory. My focus is on its direct implications for the theory of adjudication, not on its (Thomist) purity.

³² Cf. A. Kozak, *Myslenie analityczne w nauce prawa i praktyce prawniczej*, Wrocław 2010, pp. 155, 158–160.

versions) and Adrian Vermeule's common good theory; this would require a book-length treatment. The goal is much more modest, namely to **revise the operationalised version of the critical theory of adjudication** by drawing inspiration from Vermeule's notion of the common good and integrating it *into the framework of that theory*.³³ The goal of the article, therefore, is **constructive, not reconstructive**. It does not seek to reconstruct and compare the views of, for instance, Duncan Kennedy and Adrian Vermeule, but to take a further step in the development of a theory that may be a practical tool for lawyers seeking to subject case-law to sustained critique.

On a more general note, I would like to acknowledge my inspiration by Artur Kozak's juriscenrist theory of law which emphasised the importance of the formal values of law as the basis of its legitimacy.³⁴ Moreover, Kozak emphasised the need to choose between being merely an "expert" in law and a "believer" in law.³⁵ The point of this distinction, and of juriscenrism as a whole, is the assumption that law – understood as *ius* – can be a centre around which our communities can be built. Our role as lawyer-believers, therefore, is to uphold that "legal centre," which, as emphasised above, is ultimately constructed on the formal values of law – on the "legal form."³⁶ As Maciej Pichlak wrote: "Juriscenrism is thus a form of faith that has withstood the test of doubt and scepticism by offering an answer to them. What distinguishes a juricentrically oriented lawyer is not that he remains blind and deaf to the objections that may be raised against law, to the weaknesses of his own object of faith and to the doubts arising therefrom, but that in addition to all these he perceives in the legal order something more – some particular value that makes it, despite everything, worthy of belief."³⁷

³³ This aspect cannot be emphasised enough. The theoretical framework of this paper *remains rooted within the critical theory of adjudication*, and the proposal made in this paper seeks to modify that theory. It is not a project focused on merging Critical Legal Studies and jusnaturalism on a more general level, nor a project that seeks to introduce elements from Critical Legal Studies into Vermeule's theory.

³⁴ M. Pichlak, *Aporie teorie, paradoksy praktyki. O wewnętrznych napięciach w obrębie juryscentryzmu*, in M. Pichlak (ed.), *Profesjonalna kultura prawnicza*, Wrocław 2010, p. 68; R. Mańko, *Artur Kozak's Juriscenrist Concept of Law: A Central European Innovation in Legal Theory*, "Review of Central and East European Law" 2020, 45, pp. 348–349.

³⁵ A. Kozak, *Dylematy prawniczej dyskrecjonalności. Między ideologią polityki a teorią prawa*, [in:] W. Staśkiewicz, T. Stawecki (eds.), *Dyskrecjonalność w prawie*, Warszawa 2010.

³⁶ Although the concept of the "legal form" was devised by a Marxist legal theorist (Evgeny Pashukanis), it does have a strongly juriscentric component in it—see R. Mańko, *Problem autonomii prawa w świetle hylemorficznej teorii J.B. Paszukanisa*, "Archiwum Filozofii Prawa i Filozofii Społecznej" 2024, 2. Cf. C. Cercl, *Impossible Objects of Marxist Legal Theory of Law: The Limits of the Legal Form*, [in:] C. Cercl, G.G. Fusco, P. Tacik (eds.), *Legal Form: Pashukanis and the Marxist*, Abingdon 2025.

³⁷ M. Pichlak, *Artura Kozaka ciepłowość wobec prawa*, "Filozofia Publiczna i Edukacja Demokratyczna" 2014, 3(1), p. 241.

In this light, the critical theory of adjudication as an analytical method and, possibly, also as a source of inspiration for judges,³⁸ should rather be perceived as a potentially integral part of legal discourse, rather than as an appendix to its more or less distant philosophical roots. The same applies to Vermeule's common good theory, which, regardless of its philosophical underpinnings, has a very practical orientation. Ultimately, the argument put forward in this paper boils down to proposing the replacement – within the operationalised critical theory of adjudication – of the component of ideology with the component of the common good, and to modifying the role of the concept of ideology within that theory by making it genuinely a tool for the critique of adjudication.

To this end, the paper will proceed as follows. Section *Adrian Vermeule's Common Good Constitutionalism: Peace, Justice, and Abundance* will briefly outline Adrian Vermeule's common good constitutionalism as being based on the triad of peace, justice, and abundance. Section *Implications for the Agonistic Theory of Adjudication* will directly analyse the possible implications of Vermeule's theory for the critical (agonistic) theory of adjudication as described above. Thus, I do not intend to provide a broad comparison, but to propose a modification of the critical (agonistic) theory in the light of Vermeule's theory, any philosophical differences between them notwithstanding. Section *Ideology and Common Good: Outline of a Comparison* briefly outlines – without seeking to exhaust the topic – the conceptual distinctions between ideology and the common good. Given the importance of operationalisation for the application of any theory in research practice, section *Modification of the Operationalization Protocol of the Agonistic Theory of Adjudication* is of particular importance, as it discusses the possible modification of the operationalisation protocol of the agonistic theory of adjudication. Section *Concluding Remarks* presents the conclusions of the paper.

Adrian Vermeule's Common Good Constitutionalism: Peace, Justice, and Abundance

Although Vermeule's theory arose in the context of debates among American constitutional scholars and frequently refers to controversies specific to the US

³⁸ For instance, drawing inspiration from the critical theory of adjudication, judges could be more open about the social consequences of the various interpretive options from which they choose. Although legal discourse is formal and formalised (and should remain so), it has nonetheless a direct impact upon other social realms, such as that of economy, family life, etc. Therefore, the argument pursued in this paper is that, *ceteris paribus*, judges should choose the interpretive option that better suits the common good of society.

context, it is nonetheless based on theoretical premises that possess a universal character and are capable of generalisation and, hence, application beyond the United States. At the core of Vermeule's system lies the concept of the common good, which he defines as comprising three inseparable elements: **peace, justice, and abundance**.³⁹ The common good, he insists, is indivisible and pertains to the community as such – the organised polity inhabiting a given state.⁴⁰ It is neither the sum of nor the aggregate compromise between individual interests.⁴¹ Rather, it represents the flourishing of the community as a whole.

Vermeule observes that this understanding of the common good is continuous with the European legal tradition, especially the heritage of classical Roman law and the *ius commune*. It can be traced back to formulations by Roman jurists such as Ulpian, for whom law (*ius*) was understood as the art of the good and the equitable (*ars boni et aequi*),⁴² embodying fundamental principles of living honestly, not harming others, and rendering to each what is his own (*honeste vivere, alterum non laedere, suum cuique tribuere*).⁴³

In my view, the three constitutive elements of the common good – peace, justice, and abundance – as identified by Adrian Vermeule, possess an **objective character**, even if they are, by his own admission, “a kind of framework orientation, not a blueprint”.⁴⁴ While the very notions of the “common good,” the “public interest,” or *raison d'État* might appear vague or even function as so-called “empty signifiers,”⁴⁵ peace, justice, and abundance are concepts with **direct and concrete correlates** in the social, political, and economic life of the community.

Peace, in this sense, denotes both internal and external peace, that is, the security and stability of the polity.⁴⁶ The agonistic theory of adjudication, which emphasises the role of judicial processes in taming antagonisms, is fully compatible with this first element of Vermeule's triad. Internal peace is achieved precisely by transforming social conflicts into civilised, peaceful contestation before courts, rather than through self-help, violence, or revolutionary action.

The second element of Vermeule's triad is **justice**. Here, Vermeule draws upon the Digest, which defines justice as the constant and perpetual will to render to

³⁹ *Ibidem*, p. 7, 31.

⁴⁰ *Ibidem*, p. 30.

⁴¹ *Ibidem*, p. 14, 26.

⁴² *Ibidem*, p. 1, 30. (Ulpianus libro primo insitutionum).

⁴³ A. Vermeule, *op. cit.*, p. 30; cf. D. 1, 1, 10, 1 – (Ulpianus libro secundo regularum).

⁴⁴ *Ibidem*, p. 35.

⁴⁵ Cf. E. Laclau, *Emancipations(s)*, London–New York 2007, p. 36.

⁴⁶ G. Botero, *The Reason of State*, Cambridge 2017 [orig. 1589], p. 71.

each what is due to him (*suum cuique tribuere*).⁴⁷ This corresponds to what he terms **legal justice** – justice expressed through law’s institutional rationality. In sociological terms, this captures the stabilising function of law, maintaining order by giving each member of the polity what is rightfully his. Justice also means the repression of crime, especially violence and fraud.⁴⁸ It also requires the speedy, uniform, and law-based *administration* of justice by the judiciary.⁴⁹

The third element is **abundance**. Abundance refers, on the one hand, to economic growth and social prosperity, and, on the other, to the equitable distribution of that prosperity – ensuring that the benefits of material increase serve the whole community rather than a narrow elite.

The focus on attaining these three positively framed goals entails a reorientation away from the “the liberal goal of maximizing individual autonomy or minimizing the abuse of power (...). [T]he emphasis should not be on liberty as an abstract object of quasi-religious devotion, but on particular human liberties whose protection is a duty of justice or prudence on the part of the ruler because protecting them promotes the flourishing of the community.”⁵⁰

Vermeule’s conception also entails, at least in the context of the United States, the judicial virtue of **restraint regarding the review of legislation and administrative action**.⁵¹ He maintains that the American model of separation of powers – featuring a strong executive and an independent legislature – is incompatible with the juristocratic assumption that judges may elevate their own moral or axiological preferences above those of the lawmaking and executive authorities. Although Vermeule articulates this thesis *de lege lata* with reference to the US Constitution, I believe it merits universalisation. The proper task of the judiciary is to resolve conflicts, not to make strategic determinations about how a political community ought to pursue the common good.⁵² The duty to attain the common good rests with all branches of government, the judiciary included.⁵³

Finally, Vermeule identifies the **principle of subsidiarity** as inherent in his conception of the common good.⁵⁴ Under this principle, interference by a higher community (e.g. the state) should take place only insofar as a lower community (e.g. the family) cannot attain its proper goals.

⁴⁷ A. Vermeule, *op. cit.*, p. 30. Cf. D. 1, 1, 10, 1 (Ulpianus libro secundo regularum).

⁴⁸ G. Botero, *The Reason...*, pp. 21–22.

⁴⁹ *Ibidem*, pp. 28–30.

⁵⁰ A. Vermeule, *op. cit.*, pp. 37–38.

⁵¹ *Ibidem*, p. 12–13.

⁵² *Ibidem*, p. 19.

⁵³ *Ibidem*, p. 43, 129.

⁵⁴ *Ibidem*, p. 42.

With respect to the practice of the judicial application of law, Adrian Vermeule introduces an important distinction between *lex* and *ius*.⁵⁵ *Lex* – that is, positive law – consists of the enacted legal norms embodied in statutes and regulations. Regarding *lex*, Vermeule adopts what seems to be a “soft” indeterminacy thesis, holding that, in certain circumstances, the enacted legal provisions may fail to yield a single determinate interpretive outcome. Within the Critical Legal Studies tradition, such indeterminacy was typically taken to imply broad judicial power to decide authoritatively, guided – whether consciously or not – by ideological commitments. The agonistic theory of adjudication, described above, likewise accepted this thesis. In Vermeule’s framework, however, the situation is different: there is no role for ideology, yet interpretive discretion does not automatically default to axiological criteria derived from the common good either.

Above *lex* stands *ius*. In Vermeule’s account, *ius* denotes the body of principles developed through the historical evolution of the European legal tradition, rooted in Roman law and the *ius commune*. At least some of these principles may be described as *ius naturale* in the Roman sense – that is, norms arising from human nature⁵⁶ or the nature of the legal order itself. The ontological status of *ius*, although theoretically significant, should not, in my view, pose an obstacle to the reception of Vermeule’s theory. As Artur Kozak observed, *ius* constitutes the reality of intra-institutional imperatives perceptible to every lawyer.⁵⁷ Observing these imperatives does not require resolving debates about their metaphysical grounding – debates that could otherwise generate unnecessary worldview-based controversies.

Implications for the Agonistic Theory of Adjudication

When the original theses of the agonistic theory of adjudication are compared with those of Vermeule’s common good constitutionalism, it becomes clear that the descriptive dimension of the agonistic theory **is not incompatible** with Vermeule’s framework. In particular, the indeterminacy of *lex*, the existence of social conflicts that lead to litigation, and the fact that judges may be guided by ideological projects are all propositions that can be reconciled with Vermeule’s conception. At the normative level, however, a sharp divergence arises. Whereas the original version of the agonistic theory of adjudication endorses judicial reliance on ideology, Ver-

⁵⁵ *Ibidem*, pp. 3–5, 72–73.

⁵⁶ Cf. J. Hervada, *Historia prawa naturalnego*, Kraków 2013, pp. 18–19..

⁵⁷ A. Kozak, *Myślenie analityczne w nauce prawa i praktyce prawniczej*, Wrocław 2010, p. 248. Cf. R. Mańko, Artur Kozak’s Juriscentrist Concept of Law..., p. 355; *idem*, *The place of legal tradition in Artur Kozak’s juriscentrist theory of law*, “Journal of Modern Science” 2021, 47(2), p. 235.

meule maintains that judges should instead be guided by *ius* and the common good, and he expressly criticises constitutional theories – both progressivist and originalist – for ideologising judicial interpretation of the US Constitution.

As noted at the outset of this article, a number of critics – A. Bator, A. Barut, M. Pichlak, M. Wojtanowski, and W. Zomerski – have identified the dangers that the practical implementation of the agonistic theory's normative thesis would entail – namely, that judicial interpretation under conditions of indeterminacy, if guided by personal ideological preferences, could seriously undermine the coherence and legitimacy of adjudication. This risk is especially acute in our times, when societies are deeply fragmented ideologically, philosophically, and axiologically; the practical realisation of such a postulate would risk deepening social polarisation and causing interpretive chaos. In practical terms, although ideologies do exist in society and judges may profess certain ideologies⁵⁸ privately, when they act as judges they are not expected to guide their interpretive decisions by ideological premises.

However, I do not regard the proposal advanced by Pichlak – that judges should responsively align their reasoning with the ideology of the historical or current legislator, or with the ideological preferences of society – as a realistic alternative.⁵⁹ This appears untenable for several reasons. First, the ideological orientations of the empirical legislator change frequently. Every parliamentary or presidential election introduces new ideological configurations. The composition of the legislature changes, and even if one could ascribe to it a collectively held ideology, that ideology would shift continually – not only after elections and changes in parliament's composition, but even between elections, as individual deputies or governing coalitions alter their political course and, with it, their (implicit) ideological commitments. Moreover, legislators may declare certain ideological goals, while in practice their law-making activity may serve lobbyists, often in concealed ways.⁶⁰

⁵⁸ It is worth underlining here that Kennedy's definition of ideology as a "universalization project" (D. Kennedy, *Critique...*, p. 39) is not *per se* incompatible with the notion of the common good insofar as universalisation is sought for the benefit of the community. As I have written elsewhere, "the notion of universalization [used by Kennedy] should (...) be understood in the sense of a claim towards intersubjective validity, as well as an element of engagement in changing the social reality" (R. Mańko, *Towards an Ideological History of Private Law or What Legal History Can Gain from Critical Legal Theory* in A. Machnikowska, M. Gałędek, R. Mańko, *Ideology and Private Law: Polish Experiences in the Long 20th Century*, Leiden 2025, p. 33) as well as a "continuous, purpose-oriented and engaged activity based on an analysis with claims to intersubjective (i.e. universal) validity" (R. Mańko, *W stronę...*, p. 54). If ideology implies, for Kennedy, an intersubjective and universal dimension, then it is ontologically compatible with the common good. In other words, both Kennedy and Vermeule agree that the common good exists, although they would disagree whether it should be called "common good" and what exactly is its content. See also Section *Ideology and the Common Good: Outline of a Comparison* below.

⁵⁹ M. Pichlak, *op. cit.*, p. 121 fn. 45.

⁶⁰ Cf. P. Chmielnicki, *Pochodzenie, tworzenie i efektywność prawa*, Warszawa 2014; idem, *Geneza specustaw – przykład naturalnej specjalizacji kompletów normatywnych, czy promocji interesów podmiotów dominując*, [in:]

Second, the very idea of adhering to the ideology that could be ascribed to the so-called “rational legislator” would in practice amount to the reconstruction of that ideology by the jurist, since the construct of the rational legislator is, as is well known, a creation of legal doctrine rather than an objective entity independent of the interpreter.⁶¹

Third, adherence to the ideological preferences of the historical legislator – that is, an inquiry into the collective intentions of the legislature at the time of enacting specific provisions – cannot be regarded as an acceptable solution either, as it would inevitably result in interpretive chaos. Given the already noted variability of the legislator’s axiological preferences and the shifting hegemony of ideologies, this approach would lead to a situation in which a given legal institution would have to be interpreted through all the ideological frameworks that had guided successive lawmakers across different epochs. Even if one were to reconstruct a “common ideology” linking the various historical layers of a given legal institution, the result would be an *ex post* creation of such an ideology by the interpreter himself.

Finally, adherence to the ideological preferences of society, even when undertaken in a “reflexive” manner as proposed by Maciej Pichlak,⁶² is both dangerous and, in principle, impossible. Society, as a whole, does not possess a unified ideological, axiological, or philosophical orientation. Guiding judicial reasoning by the views of the majority would compel judges continually to modify their ideological stance in response to every fluctuation in public opinion – also raising the practical problem of how that “majority” should be measured or determined.

It is true that some judges, invoking alleged changes in social attitudes, attempt to justify interpretive shifts or even reversals in jurisprudence.⁶³ However, one could object to such an approach by highlighting that *officium iudicis* encompasses conflict resolution, not the tracking of ideological shifts in society or the adaptation of legal interpretation to them.

For the reasons outlined above, I believe that the agonistic theory of adjudication requires a modification of its normative thesis concerning ideology. The normative thesis affirming ideological guidance in adjudication should, in my view, be replaced by a **normative thesis requiring judges to be guided by *ius* and by the common good**. Accordingly, when interpreting legal provisions, judges ought to be guided by the legal justice embodied in *ius*, as well as by the common

T. Bąkowski (ed.), *Specustawy inwestycyjno-budowlane*, Gdańsk 2020, pp. 25–66.

⁶¹ W. Zomerski, *op. cit.*, pp. 308–309. Cf. R. Piszko, *Granice decyzji sądowych*, Szczecin 2015, p. 268.

⁶² M. Pichlak, *op. cit.*, p. 121 fn. 45.

⁶³ See e.g. K. Lenaerts, *Discovering the Law of the EU: The European Court of Justice and the Comparative Law Method*, [in:] T. Perišin, S. Rodin (eds), *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of Courts in the European Union*, Oxford–Portland 2018, pp. 66–68, 86–87.

good to which *ius* directly and structurally refers. Naturally, as with any judicial interpretive decision, disputes may arise concerning the concrete determination of the common good. Adopting the common good perspective on adjudication (or on public decision-making more generally) entails a **shift in focus from conflicting group interests towards the interests of the entire political community**.⁶⁴

It might be objected that the proposed modification is merely terminological – that it simply replaces the notion of an “ideological project” with the “common good,” without effecting any substantive change. I do not believe this is the case. In my view, the shift in critical inquiry – from the question “Which *ideology* should guide judges?” to the question “What does the *common good* of the community require?” – constitutes a significant and substantive redirection. It focuses judicial interpretation on identifying what follows from the three imperatives of peace, justice, and abundance, rather than from contingent ideological alignments. This does not mean that the determination of the objective content of the common good is free from controversy: in hard cases, there will always be dispute about the proper interpretation of *lex* and *ius*, and about the determination of the *bonum commune*.⁶⁵ Adjudication thus remains a site of conflict and controversy; however, its ultimate stakes are modified in a way that accepts that there is a sphere common to the entire political community, and entrusts, *inter alia*, judges with the task of protecting that sphere. The expectation that judges would favour group ideologies would go against the very essence of the task of adjudication.

Ideology and the Common Good: Outline of a Comparison

Without seeking to exhaust the topic of the relationship between the concept of ideology and that of the common good, I would like to put forward an outline comparison, which is of crucial importance given the centrality of ideology to the critical theory of adjudication, and of the common good to Vermeule’s constitutional theory. The concept of the common good as understood by Vermeule has been addressed at length in Section *Adrian Vermeule’s Common Good Constitutionalism: Peace, Justice and Abundance*. As regards the concept of ideology, I will limit myself

⁶⁴ Thus, in philosophical terms, it entails the countenancing of the existence of a political community and of the possibility of identifying a good that is common to that community as a whole. In my view, this is not per se incompatible with the countenancing of individual and group interests; rather, it affirms that there is something beyond those conflicting interests – something that unites the political community in its entirety. However, a deeper philosophical investigation of the implications of the theoretical move proposed here would exceed the purview of the present paper.

⁶⁵ A. Vermeule, *op. cit.*, p. 20.

to two definitions. For Duncan Kennedy, ideology is “a universalization project of an ideological *intelligentsia* that sees itself as acting ‘for’ a group with interests in conflict with those of other groups” on the assumption that “liberalism and conservatism [are] two primary examples of American ideology.”⁶⁶ This definition is deeply sociological, as it focuses on social actors (members of the “ideological intelligentsia”), their consciousness, and agency. However, despite its appeal, I consider the operationalisation of Kennedy’s definition problematic, not least because of its US-centrism (with only two ideologies, just like the two major US political parties), and because of its unnecessary emphasis on conflicting interests (given that certain ideologies may claim that no such conflicts exist). In a sense, Kennedy’s definition is ultimately too narrow for our present purposes. Instead, following Piotr Eckhardt,⁶⁷ I consider broader (or thicker) definitions of ideology proposed by political scientists such as Andrew Heywood to be more useful for the purposes of the critique of adjudication. Heywood defines ideology in the following terms:

“An ideology is a more or less coherent set of ideas that provides the basis for organized political action, whether this is intended to preserve, modify or overthrow the existing system of power. All ideologies therefore have the following features.

They:

- (a) advance an account of the existing order, usually in the form of a ‘world-view’
- (b) outline a model of the desired future, a vision of the ‘good society’
- (c) explain how political change can and should be brought about – how to get from (a) to (b). (...)

This definition is neither original nor novel, and is entirely in line with the social-scientific usage of the term.”⁶⁸

What is crucial in Heywood’s definition (and in other similar ones, developed by political scientists)⁶⁹ is the emphasis on a “set of ideas that provides the basis

⁶⁶ D. Kennedy, *A Critique...*, p. 39.

⁶⁷ P. Eckhardt, *Socialism under Construction. Law and Ideology in Housing, Construction and Spatial Planning in Poland 1944–1989*, Warszawa 2024, p. 16.

⁶⁸ A. Heywood, *Political Ideologies: An Introduction*, 7th ed., London 2021, pp. 7–8.

⁶⁹ See, e.g. M. Freeden, *Ideology: A Very Short Introduction*, Oxford 2001, p. 32: “political ideology is a set of ideas, beliefs, opinions, and values that[:] (1) exhibit a recurring pattern[:] (2) are held by significant

for organized political action,” which encompasses, on the one hand, “an account of the existing order,” and, on the other hand, “a model of the desired future,” as well as a blueprint for “get[ting] from” the “existing order” to the “desired future.”

The relationship between ideology and the common good is that ideology is considered, by its proponents, to be a means towards an end (the “good society”), whereas the common good is – as far as a political community is concerned – that end itself. Thus, ideology is a programme or roadmap, whereas the common good is the target that this programme is supposed to help reach. Moreover, ideologies are general and abstract – in principle, they propose certain visions that are not specifically tailored to a particular country at a particular time.⁷⁰ Finally, ideologies are relatively durable, whereas the actual needs of a given political community may change quickly.

Thus, binding judges to a specific, predefined political ideology could lead to undesirable results, such as rigidity in legal interpretation or a focus on abstract concepts, rather than a search for the actual common good. This does not mean, of course, that particular legal interpretations do not *coincide* with specific ideologies, especially the so-called “micro-ideologies” that address narrowly defined aspects of social life.⁷¹ As I will argue in the next section, the notion of ideology should not be entirely removed from the critical theory of adjudication; rather, it can still be used – but as a critical tool in its own right, rather than as an end in itself.

Modification of the Operationalisation Protocol of the Agonistic Theory of Adjudication

The operationalisation protocol of the agonistic theory of adjudication, proposed some years ago, provided for the following six steps for the critical analysis of case law:

- (1) identification of the type of social conflict at issue;
- (2) identification of the legal materials at the level of *lex* applicable to the case (legal provisions and, if applicable, also precedents or other sources of legal norms);

groups[.] (3) compete over providing and controlling plans for public policy[.] (4) do so with the aim of justifying, contesting or changing the social and political arrangements and processes of a political community.”

⁷⁰ Even fascism which is *prima facie* very much linked to a specific ethnic community can be grasped as an abstract ideology, with local variants. See, e.g. M. Freeden, *Ideology...*, pp. 90–91; A. Heywood, *Political Ideologies...*, pp. 148–166. Other ideologies are programmatically universal—for instance, conservatism, liberalism or socialism.

⁷¹ Cf. M. Freeden, *Ideology...*, pp. 94–102.

- (3) identification of the alternative interpretations available to judges in the light of the authorities identified in step 2;
- (4) identification of the alternative chosen by the judge;
- (5) critique of the ideological ramifications, even if hidden, behind the judge's choice;
- (6) analysis of other interpretive options not pursued by the judge.⁷²

As is evident, this protocol suffers from a certain deficiency: it provides no criterion (within step 6) for determining how a "better" (or "optimal") interpretation could have been selected. The modification introduced in the present paper allows an objective normative criterion – namely, the common good – to be integrated into the protocol.

Operationalisation would thus involve not only identifying the nature of the conflict, the relevant legal materials (statutory provisions and precedents) considered or disregarded by the court, and the range of alternative interpretations, but also adding an **additional step**: the identification of the common good implicated in the dispute.

The evaluation of the judicial decision would then occur against the background of the identified conception of the common good. This does not, of course, preclude the critique of the judge's ideological premises or the identification of the conflict at stake. Such critique becomes particularly significant where those ideological premises have led to a decision inconsistent with the common good or suboptimal from its perspective. In this way, the revised agonistic theory of adjudication gains **enhanced critical potential**. By introducing the element of the common good, it becomes possible to assess each judgment not only in terms of the interpretive methods employed, but also in terms of the extent to which it realises the objectively determined common good. In this way, the identification of the specific ideological premises that guided the judge's decision, even unconsciously, remains an important step in the operationalised protocol for the critique of judicial decisions. However, under the revised approach, ideology plays the role of a critical tool, rather than being an end in itself.

To sum up, the **modified protocol** would entail the following steps for a critical analysis of case law (modifications are highlighted in bold):

- (1) identification of the type of social conflict at issue;
- (2) **analysis of what is required to attain the common good in this specific sphere of social life;**

⁷² R. Mańko, *Judicial Decision-Making...*, pp. 188–189.

- (3) identification of the legal materials at the level of *lex* applicable to the case (legal provisions and, if applicable, also precedents or other sources of legal norms), **as well as any relevant principles of *ius***;
- (4) identification of the alternative interpretations available to judges in the light of the authorities identified in step 3;
- (5) identification of the alternative chosen by the court;
- (6) critique of the ideological ramifications, even if hidden, behind the court's choice;
- (7) analysis of other interpretive options not pursued by the court **in light of the principles of *ius*, as identified in step 3, and the common good, as identified in step 2.**

Importantly, should step 4 not reveal any actual alternatives (i.e. the judge's interpretive freedom was in any event constrained anyway by *lex*), the analysis should stop at this point, and there is no room for an extra-legal critique of the judgment as such.⁷³ By enriching the last step of the analysis with *ius* and the common good, the analysis will be capable of revealing those instances in which, in the interpretation of positive law (*lex*), ideological premises were given primacy over *ius* and the *common good*.⁷⁴ In this way, the objective of the critique of ideology, inherent in the agonistic theory of adjudication, will be more fully realised. Moreover, the identification of the underlying social conflict (e.g. labour v capital, banks v borrowers), performed in step 1, will become more complete as a means of leading to reflection on the common good (step 2).

Concluding Remarks

The triad of peace, justice, and abundance proposed by Vermeule not only embodies the classical ends of (public) law – and thus those rooted in the European legal tradition – but, more importantly, constitutes a **substantive directive** for interpreting the concept of the common good by linking it to **tangible ends within social reality**. For this reason, it may serve as an exceptionally valuable and authoritative axiological guideline for the legislature, for the executive, and – most crucially for present purposes – for the judiciary.

⁷³ There could be, however, room for critique of the *lex* as such as being incompatible with *ius* or *bonum commune*.

⁷⁴ Cf. A. Barut, *Problem praworządności...*, pp. 249–250.

The incorporation of the concept of the common good into the agonistic theory of adjudication markedly enhances its genuine critical potential. This integration enables not only the **objectivisation** of criteria for the critical assessment of judgments, but also a clearer normative orientation of analysis, one that allows the theorist to transcend the narrow horizon of ideological critique. Thus modified, the agonistic theory of adjudication becomes a more complete and refined model, for it contains not only a critical but also a **constructive dimension**. The criterion of the common good – as a genuinely objective standard – can overcome both the internal limitations of the agonistic theory of adjudication rightly identified by its critics and the broader deficiencies of prevailing interpretive doctrines: those invoking the intentions or axiological preferences of either the fictitious “rational legislator,” the empirical legislator, or even the majority of society. Accordingly, I posit that Vermeule’s conception of the common good deserves not merely to be integrated into the revised agonistic theory of adjudication, but also to be widely disseminated and firmly embedded within contemporary legal and constitutional discourse.

Finally, the shift in focus from ideology to the common good within the (post-) critical theory of adjudication advocated here is justified by its practice-oriented character. A judge who justified their interpretive decision by reference to a specific ideology would certainly be accused of being partial and betraying their office. Impartiality, including with regard to structural conflicts, is built into the very essence of the judicial office. Obviously, there are and will be conflicts concerning the exact content of the common good at a specific time, in a specific place, and with regard to specific aspects of the law. Such conflicts are inevitable, and adjudication will remain one of the channels through which they will be resolved. After all, if we follow Chantal Mouffe and posit the need for “agonism” *within* the political community, rather than “antagonism” *splitting* the political community into friends and enemies, debates on the exact content of the common good are not only inevitable, but even *per se* desirable.⁷⁵ Indeed, under this theory, the Schmittian figure of the enemy is transformed into that of an adversary, with emphasis placed on proceduralism.⁷⁶

⁷⁵ C. Mouffe, *On the Political*, London–New York 2005, pp. 14, 19–21.

⁷⁶ Cf. J. Smoleński, *Chantal Mouffe vs. Carl Schmitt: The political, democracy, and the question of sovereignty*, “Hybris” 2012, 16, pp. 67, 74–75, 78.

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