Chapter 11
Politics and the Judiciary: A Naïve Step Towards the End of Judicial Policy-Making

Maria Benedita Urbano

11.1 Introduction

In the last decades state powers have significantly thrieven and expanded as a result of the development of the interventionist and regulatory State. As regards the judiciary, that expansion posed relevant problems of rationalization, both at the levels of judicial administration (i.e., of courts' structure and work organization) and judicial activity. In this paper, we are mostly interested in this later dimension, more precisely, in the phenomenon of judicial policy-making, also known under the name of judicial activism.

We believe that judicial policy-making constitutes a dangerous challenge for the basic and universal principle of the separation of powers and thus for the rule of law. Indeed, we believe that the empowerment of courts with political decision-making causes great harm, not only to the other branches of government, but also to the independence, impartiality and integrity of the judiciary itself. In that sense, the relation between judicial policy-making and the rationalization of judicial activity becomes self-evident. To put it briefly, rationalizing the judiciary might fight off that phenomenon.

11.2 Judicial Policy-Making

Our first priority will be to define 'judicial policy-making'. Additionally we will examine the conditions that favor this phenomenon.

M.B. Urbano (✉)
Universidade de Coimbra, Pátio da Universidade, 3004-545 Coimbra, Portugal
e-mail: mburbano@fd.uc.pt

L.P. Coutinho et al. (eds.), *Judicial Activism*,
Ius Gentium: Comparative Perspectives on Law and Justice 44,
DOI 10.1007/978-3-319-18549-1_11

11.2.1 Defining Judicial Policy-Making

Broadly speaking, by 'judicial policy-making' we mean the active political involvement of judges. To be more specific, the term 'judicial policy-making' is employed to describe the judiciary acting as a political branch, playing an active role in the political process, intervening in the political decision-making at the expense of the policy-making prerogatives of both the legislature and the executive, the majoritarian political institutions.

This inroad into political activity usually occurs via constitutional review. In truth, when controlling the constitutionality of legislative and executive acts, constitutional judges are increasingly interfering in policy matters, undermining majoritarian decisions.

In what concerns 'judicial policy-making', we believe that a feasible and useful distinction can be made between, on the one hand, the phenomenon per se (i.e., the practice in itself), and, on the other hand, the judges' behavior, guided by their own attitudes, orientations or philosophy. The practice in itself could be named, precisely, as 'judicial policy-making' or 'government by the judiciary'.[1] The judges' behavior could be named as 'activism' or 'judicial activism'. However, for convenience and brevity's sake, we will generally refer to both phenomena as judicial activism, in spite of the difficulties involved in defining the term "judicial activism"—even Schlesinger[2] offered no clear definition of it.[3]

The judicial interference in politics usually takes the form of lawmaking. It follows that the activist judge tends to be a judge who legislates. We don't intend to deny, of course, that on modern judicial practice, judging implies inevitably some kind of judicial creativity. But, as Cappelletti once pointed out, the problem with judicial activism lies not merely in the creation of law by judges, but rather in the degree of that creation.[4,5] So, the crucial question is how much and how far judges are legitimate to accomplish such judicial lawmaking. It is safe to say that judges go way too far on lawmaking when they shape and set new legal dispositions, both actively, i.e., intentionally—upholding social, economic and political regulation against the political branches' will or in the absence of that will—or passively.

Active direct lawmaking consists in creating new legal statutes (*innovative activism*) or in amending or rewriting already existing legal statutes (*corrective*

[1] 'Government by the judiciary' (Boudin) or 'Government by judges' (Chief Justice M. Walter Clark). See Boudin (1911).

[2] The term 'judicial activism' was coined by Arthur Schlesinger Jr, in a 1947 article in Fortune magazine.

[3] Various authors highlight the difficulties in defining 'judicial activism'. See, e.g., Kmiec (2004: 1451), Young (2002: 1143–1144), Sowell (1989: 1), Sunstein (2005: 41–43). In any case, judicial activism might be consider both a normative and political phenomenon. Surely not the mere disagreement with particular judicial outcomes. See Young (2002: 1142).

[4] See Cappelletti (1990: 25, 28).

[5] And then, there are different degrees of judicial activism, from a shy or reluctant activism to an "overactivism" (term used by Vipin Kumar). See Kumar (2014: 23).

activism). This type of judicial activism mostly reflects political ambition or even political arrogance. This doesn't necessarily mean that constitutional judges wish to become professional politicians, but only that they willingly see themselves as political actors. Whatever their (un)declared intentions are, the point is that constitutional judges are interfering in public policies, acting against or at least in competition with the legislature and the executive.

Active undirect lawmaking occurs when a court's decision "leads to a legislative reaction of the Parliament". As underlined by Tate and Vallinder, legislators "alter desired policies in response to or in anticipation of the pronouncements of constitutional courts".[6] Actually, the mere presence of the court would seem to inhibit certain kinds of legislative activity and frequently legislators shape their bills to anticipate court decisions.[7]

Aside from active lawmaking, we may refer the existence of passive lawmaking. In fact, occasionally the creation of law by the judiciary is not fully intended: this is particularly the case for the declaration of partial nullity of a norm with expansive legal effects. Consequently, in these situations, constitutional judges usually don't have an hidden political agenda.

As we've said above, in treating the concept of judicial activism it is important to underline the lack of strict coincidence between judicial activism and judicial lawmaking. In fact, judges might do politics by merely nullifying norms or by finding rights contained within the penumbra of specific guarantees as demonstrated, for example, in the practice of the Warren Court.

11.2.2 Conditions for Judicial Activism

Even if the conditions for judicial activism differ from country to country, some of them can explain the increasingly expansion of the policy role of constitutional courts and alike. What is more, they can explain judicial activism. Some are objective conditions, other are rather subjective. Some correspond to a consensus view, whereas other might be accused of oversimplification. They may be described as follows:

1. **Objective conditions**

(a) Public confidence in the judiciary. Nowadays, in many countries, the judiciary has a better reputation than the majoritarian political institutions. Indeed, in some countries courts are famous for their pro-human rights, and especially pro-social rights stance. In contrast, people widely distrust the power of political branches. In many countries, a significant part of the population has

[6]See Tate and Vallinder (1995: 4).

[7]The German experience offers a clear example of that phenomenon. See Landfried (1995: 313).

negative perceptions of elected representatives' ability to wield a good and effective governance. This is due, among other things, to the fact that representatives are often viewed as ineffective, self-involved and corrupt.

(b) The growth of the Welfare State with the concomitant implementation of an extensive social security system and the strengthening of social rights (such as food, health care, housing, and social security). Most social rights are not self-enforcing and depend on social policies and on corresponding executive actions to become effective. In some cases constitutional judges, when reviewing social policies, claim that the legislator and/or the executive failed to meet their obligations towards the attainment of social rights and therefore commit themselves to enforce these rights.[8,9]

(c) The inability of the majoritarian political institutions to protect minority rights. According to a traditional view, they don't provide adequate protection for the rights and interests of minorities. Once that the minorities failed to obtain the protection of their rights and interests through the ordinary political process, they turn themselves to the judiciary, which very often commits itself with the task of protecting the rights and interests of minorities against the (tyranny of the) majority.

(d) The inefficiency of the majoritarian political institutions, usually due, according to some scholars, to party fragmentation and weak parties, leading to weak and unstable governmental solutions and therefore to poor and unsatisfactory governance. Allegedly, there is an inverse relation between a vigorous party system and judicial activism. Whether this thesis should be regarded as accurate or not is beside the point of this paper.

(e) The open-texture of constitutional norms and its incompleteness, namely of those related to principles and human rights. In truth, low normative density and incompleteness allow judges ample opportunity for legislative creativity and policy-making.[10] A few decades ago, Benjamin Cardozo stated that courts could legislate only interstitially. Unfortunately, that is not very consoling when the interstices of constitutions are far too wide.

2. **Subjective conditions**

Turning now to the subjective conditions, let us assume that the expansion of judicial policy-making is not just the product of objective facilitating conditions, but also the product of subjective states of mind.

In the first place, states of mind related to judges. According to Tate "It seems highly unlikely that judicialization could proceed very far in the absence of these [objective] conditions".[11] And yet, even in the presence of very favorable

[8]For a discussion of the social rights enforcement by the judiciary, see, generally, Landau (2012).

[9]See Urbano (2010: 626, 627).

[10]See Urbano (2010: 628, 629).

[11]See Tate (1995: 33).

facilitating conditions, the actual development of the judicialization of politics ultimately depends on personal attitudes of judges. Indeed, even under a very favorable set of facilitating conditions, restraintist judges should be expected to resist participating in policy-making, silencing their own political values. By contrast, activist judges are more likely to take every opportunity to use their decision-making to expand their own political values, unless, of course, they conform to the ones dominating majoritarian institutions.

Secondly, states of mind related to the majoritarian institutions, i.e., the traditional policymakers. Allegations have been made that frequently majoritarian institutions implicitly delegate or leave basic political and policy choices to the judiciary. This occurs especially regarding the resolution of highly sensitive issues, such as social rights, abortion, gay marriage and gay adoption, surrogate mothers and so forth.

The reason for that is eventually to be found in political and electoral calculations. In fact, very often the reason appears to be that the political/electoral costs of dealing with politically sensitive issues are too great to risk to rule them.[12] In that sense, the attractiveness of implicitly allowing the judiciary to settle such issues is very strong.

Delegating political and policy choices to the judiciary may also indicate the ineffectiveness of majoritarian institutions regarding the resolution of delicate and divisive issues. Undeniably, these issues usually paralyze the majoritarian bodies, making it difficult for them to decide and to ensure any policy effectiveness.[13]

An 'implicit delegation of powers', however, does not provide a valid justification for the judiciary to overstep its constitutional role.

11.3 The Judiciary and the Legislative Function

This leads to my next point.

11.3.1 Judicial Activism and the Separation of Powers

In the past decades the division and balance of powers has shifted notoriously. The legislative branch is no longer the dominant branch of national government. The most prominent example of this political-institutional rearrangement is the displacement of lawmaking power from the legislature to the executive. In fact, it has for some time been acknowledged that the executive branch is taking part to the exercise of legislative power. A question which then may arise is why do not

[12]See Tate (1995: 32).

[13]See Tate (1995: 32, 33).

formally to bestow the judiciary with a share of lawmaking function, reflecting the allocation of different responsibilities in new fields within a revised or reconceived theory of separation of powers.

Arguably because empowering the judiciary, or at least constitutional judges, to partake in the exercise of legislative power has proven to be a far more problematic idea.[14] The debate has been cast in terms of legitimacy (i.e., on the unelected judges' lack of democratic legitimacy), in terms of capacity (i.e., on the judges' inability or unsuitability to rule the country) and in terms of checks and balances (i.e., on the proper scope of the principle of separation of powers). We will focus on this latter issue.

The question of judicial activism must be addressed within the context of the doctrine of separation of powers.

The decision of the judiciary to intervene in the political decision-making process has consequences for the role of the third branch of government. Actually, it has consequences for the entire system of government. From the viewpoint of state stability, it's quite an evidence that the development of a stable governing structure requires that any exercise of political power should be submitted to control by other bodies. However, this leaves us with two problems to face.

Firstly, despite parliamentary and governmental democratic legitimacy and political accountability, the validity of legislative and executive actions also depends on a strong, focused and independent judiciary. According to the traditional tripartite separation of powers, the judiciary is empowered with significant responsibility for providing an effective check on the actions of the legislative and the executive branches of government. Its guardianship role is crucial to moderate the exercise of power at all levels of government. The functional separation of powers reflects somehow a division of labor according to expertise. And the judiciary, for its independency, neutrality and impartiality is especially suited to perform that task.

Well, the direct or even indirect involvement of the constitutional judges in policy functions and lawmaking would undermine the judiciary's capacity to wield properly its function, being therefore inappropriate.[15]

This brings us to another observation that should also be taken into consideration.

An overall structural transformation of the arrangement of powers, setting forth a redistribution of political power and allotting a share of it to the judicial branch, would be inconceivable without the implementation of a new system of checks and balances guaranteeing a new institutional equilibrium and thereby preventing the tyranny of that branch of government. Indeed, a truly and well-functioning democratic political system always matches power with institutionalised counter-power.

[14]See Urbano (2010: 625).

[15]Kumar (2014: 23) believes that judicial encroachment on legislative and executive domain will boomerang in the form of political class stepping to reach the bench. Thus, one may argue that the more politicised constitutional or hight courts are, the more likely it is that a political partisan appointment of constitutional judges will occur.

Institutional counter-powers are the only instruments able to prevent, in the long run, a dangerous and unhealthy concentration of power. Accordingly, if the judiciary is commited with political decision-making, its actions will require the same kind of oversight dedicated to the actions of the governing bodies. Then, a question that may arise is: Which body/entity is supposed to exercise control over the judiciary's performance of its own political functions? *Quis custodiet ipsos custodes*?

Unfortunately, up to now this major question remains unanswered.

11.3.2 Judicial Activism as a Pathological Phenomenon

With the above in mind, we argue that judicial activism is a pathological phenomenon, which immediately and severely challenges the principle of separation of powers, and harms the rule of law and democracy more than it helps.

It is a pathological phenomenon in the sense that it implies an undue intrusion of the judiciary in the legislative and the executive branches, eventually determining a fusion of state functions and inherently a dangerous concentration of all power in one single branch (or, even worst, in the hands of just a single body: a constitutional court or a supreme court). The hypertrophy of the judicial power is strengthened by the aggravating circumstance that this super-power knows no real legal control, neither by other bodies nor by the people through elections. Last but not the least, it can damage its guardianship role.

One may claim that judicial activism constitutes a pathological phenomenon only accordingly to an inadequated and outdated version of the theory of separation of powers, utterly ignorant of today's realities.

This line of reasoning takes for granted that judicial activism doesn't fit the traditional understanding of the judicial power. Furthermore, it seems undeniable that separation of powers is an important principle of liberal constitutionalism. But we have to accept too that the principle of separation of powers identifies with a series of long-standing values that are not innate or exclusive of liberal ideology, but characterize instead any balanced and stable democratic government. These long-standing values are as following: division of functions, checking and counterbalancing. All of them deserve full support, for they both underpin the quintessential idea that no power is superior to another.

11.4 Remedies for Fighting off Judicial Lawmaking

Taking into account the previous sections, we would like to propose now some remedies aimed to prevent judicial lawmaking. It's not too hard to think of some remedies, but undeniably the great majority of them correspond to mere wishful thinking. Besides, beyond that, some of them most possibly are not feasible or are

probably unrealistic. And yet, let us come up with some, most certainly naïve, recommendations. We do so at risk of being subject to severe criticism.

(a) Promotion of judicial self-restraining. [16] The meaning of judicial self-restraint was defined by Chief Justice Stone, who supported this judicial attitude in US v. Butler (1936). According to Stone "The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and the legislative branches of the government is subject to judicial review, the only check upon our exercise of power is our own sense of self-constraint".
In this 'structural or separation of powers sense',[17] judicial self-restraint indicates a deferential attitude towards the political branches of government (and therefore towards the Constitution), not to be confused with a passive posture. The judge's role is to interpret and enforce the law, not to make it. In brief, the rule of law cannot and must not be replaced by the law of the judges.

(b) Empowerment of the majoritarian institutions. To some degree, judicial activism is itself the result of problems and failures of regulation. In other words, judicial activism is often seen as a remedial measure for the supposed deficiencies of the ordinary political process, such as ineffective, inadequate and erroneous policies adopted by legislatures and executives; inability to address the problems concerning the population, and therefore to protect their rights, interests and needs; and lack of communication.
If the legislature and the executive wish to remain viable and central policy-making institutions, they ought to perform their constitutional functions effectively; they must be responsive to popular needs and they must foster their representative capacity; and they most certainly should not systematically eschew the highly controversial and sensitive policy issues of the day.[18]
It can be reasonably anticipated that, if parliament and governmental actions meet with popular approval, there will be no much room left for judicial involvement in politics, mainly in the lawmaking function. If the opposite occurs, the willingness to freely accept parliamentary and governmental decisions will decline sharply, with serious consequences for the legitimacy of the entire political system.

(c) Imposition of unanimous or near-unanimous judicial decisions on sensitive, controversial and highly divisive constitutional issues. In order to avoid the political, ideological or personal content of judicial decisions, whether this is the result of a personal and conscious call or the result of the manipulation of

[16] In truth, the term 'judicial self-restraint' is as open to a wide variety of interpretations as the term 'judicial activism'.

[17] See Posner (1999: 332).

[18] As Landfried puts it, "The more political questions are decided by the Constitutional Court, the more political alternatives are reduced". See Landfried (1995: 307).

constitutional control by the opposition parties, we should consider imposing an unanimity or near unanimity rule for deciding upon the constitutionality of acts of the legislative or the executive.
Some clarification is needed here. This unanimous or near-unanimous judicial decisions rule would be valid:

- Only for sensitive, controversial and highly divisive constitutional issues, such as social rights/Welfare State issues, financial and economic issues and major ethical issues, which are more likely to engage judicial activism;
- Only in relation to invalidating decisions, meaning that only the overturning of acts of the legislature or the executive would require unanimity or near-unanimity.

(d) Implementation of systems of case selection. When courts are called upon to determine the validity of legislation whose constitutionality is challenged, what's really is at stake is frequently a political disagreement or a strong dissatisfaction with some political choices taken by the majority. A system of case selection would allow the court not to be left in the uncomfortable position of settling a political dispute.

(e) Reinforcement of the presumption of constitutionality of laws. This particular presumption, established in 1937 (West Coast Hotel Co v. Parrish), constitutes one of the principal limitations to the power of judicial review. Indeed, this presumption imposes judicial deference towards the legislator. According to it, judges should seldom invalidate legislation, as their power to strike down statutes is understood to be exceptional and therefore to be only used when 'unavoidable'. From this perspective, courts should wield their power of judicial review very sparingly, nullifying statutes only upon a plain showing of their unconstitutionality. As said by Alexander Hamilton in The Federalist n. 78, the courts should strike down only those laws "contrary to the manifest tenor of the Constitution".

(f) Reaffirmation of the duty of justification of judicial decisions. The duty upon judges to justify their decisions, providing reasoned arguments, is also important to neutralize judicial activism, as the availability of reasons allows the public at large to realise whether or not judges are deciding cases according to their own personal, political or ideological views.

(g) Avoidance of the mediatization of constitutional justice and of justices in particular. The arcanic justice system is long extinguished and we are obviously not propounding its return. We also have not in mind restrictions to the freedom of the press or to the public's access to court hearings and proceedings, nor some other kind of blackout. We believe, however, that excessive media exposure—as evidenced in TV programs such as Court TV, providing live and daily televised coverage of court proceedings, mainly Supreme Court or Constitutional Courts proceedings—is counterproductive. Indeed, it may encourage people to believe that constitutional judges would take care of them and that courts make right what the political branches have

done wrong. Put in other words, it could induce a veneration of judges and it could foster the judges' personal desire to be prominent national political actors, therefore promoting judicial activism.

11.5 Conclusion

"Government by judiciary, as Boudin once called it, is—and it is most markedly where constitutional questions are concerned—far more a government of men, not laws, than of laws, not men".[19]

With this quotation of Fred Rodell, which concisely and sharply expresses our own (negative) view about judicial activism, we would like to conclude with a few final thoughts.

As observed, in these last decades, judges, mainly constitutional judges (those assigned with constitutional review tasks), were transformed, from mere mouths that pronounce the law into the constitution's mouth, in particular the social rights' mouth. In truth, they are having a quite important role in the enforcement of social rights, mainly in those countries with constitutions that don't provide for social rights or in countries with weak social policy-making capacity (for instance, in South Africa, India, Colombia and Brazil).[20] That explains why so many people believe that judges are using their powers to correct injustices, especially when the political branches do not act to do so.

In reality, however, judicial activism is a very complex and multifaceted phenomenon, influenced by multiple factors (such as social, political, legal, cultural) and expressed in multiple ways.[21] Notwithstanding, at the risk of oversimplification, we should distinguish the activist posture of the 'lower judiciary'—inspired by constitutional humanism—that, mostly in 'weak states', is leading a 'rights revolution'[22] (a social rights revolution), from the activist posture of the 'higher judiciary', basically inspired by judicial populism, sometimes embodied in grand gestures, made primarily (but not exclusively) in the social rights realm.

We may also distinguish judges who use the bench to "give a single remedy to a single plaintiff for provision of a treatment, pension or subsidy",[23] from judges who use the bench to enact social, moral and political changes. In both cases, judges argue that they are merely filling the gaps in the laws, shaping legal solutions (and at times setting legal rules) in light of constitutional meanings. In fact, sometimes they are, and sometimes they are not. Plainly, judicial activism is not a myth and at times it may not even be reprehensible by itself. But in the short run, if not

[19]See Rodell (1962: 700).

[20]See Landau (2012: 403).

[21]See Shapiro (1995: 43).

[22]Using Dobbin and Sutton's terms—'weak states' and 'rights revolution'—on a different context.

[23]See Landau (2012: 404).

refrained, it constitutes a threat to the other branches of government within the system of checks and balances, and therefore to the rule of law and to democracy. This is precisely why a set of remedies should be put forward in order to prevent the erosion of the political branches of government and the concomitant overgrowth of the judiciary. In the past, both the executive and the legislative overstepped their functional limits. Why should we trust a politicised judiciary and accept its candid nature?

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