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CONCEPT AND PRACTICE OF JUDICIAL ACTIVISM IN THE EXPERIENCE OF SOME WESTERN CONSTITUTIONAL DEMOCRACIES

by

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1. 'Judicial activism' and 'judicial restraint' as referred to interpretation. 2. The specific features of constitutional interpretation. 3. Activism and restraint in light of the "counter-majoritarian difficulty". The American model of constitutional justice. 4. The constitutional courts of European democracies and the issue of their legitimacy. 5. The activism/restraint dichotomy and the institutional dialogue.

2. The terms 'judicial activism' and 'judicial restraint' design opposite approaches of judges toward the text they are expected to interpret, whenever the meaning emerging from the words which the text is composed of, or from the intentions of its authors, do not suffice to resolve the case. The more a judge feels himself free, in such hypothesis, of giving the text further meanings, the more is considered 'activist'. Conversely, the more a judge prevents himself from giving the text those meanings, the more is deemed following a 'restraint-based' approach. While focusing on the meaning of the text, these definitions connect strictly the terms 'activism' and 'restraint' with the task of interpretation. Larger definitions refer such terms to further activities of judges. Whether judges should strictly apply the rules of standing, whether judges should not consider a case until the applicant has exhausted other remedies, whether judges should avoid deciding 'political questions', are questions which sometimes are deemed necessary for distinguishing 'judicial restraint' from 'judicial activism'[1]. These definitions, albeit not less correct than that focused on interpretation of the text as such, do not fit for a straightforward comparative account of the experiences of constitutional justice, requiring an inquiry into judicial activities strongly diverging according to single legal orders. On the other hand, as will be further demonstrated, interpretation of the text not only corresponds to the most important criterion for designing a judge's attitude as 'activist' or not, but is also particularly helpful for such comparative account.

3. It has been noticed that "Individual words acquire real meaning only when they are viewed and interpreted within context. Myriad factors may combine to constitute that context: the other words within the sentence; the other sentences within the paragraph; the purpose of the text as a whole; the identity of the author and the expectations which we have of him; the identity of the reader; the social, cultural or political perspective from which he approaches the text, and so on. Thus it is naive to suppose that any text may have a fixed and settled meaning. Any given meaning which is ascribed to a text is, at least in large measure, a product of the external factors which influence its interpretation; the inherent meaning of the words which combine to form the text merely demarcate the parameters within which a range of specific meanings can be ascribed to that text"[2].
This arguing becomes crucial with respect to constitutional interpretation. The fact that constitutional rights provisions tend to be comparatively indeterminate, including general invocations of liberty, equality, due process, freedom of speech, and the like, leaves them more open to judicial interpretation than most statutes, administrative regulations or ordinances. Moreover, since constitutional provisions generally occupy the highest position in the hierarchy of norms within a domestic legal system, decisions of courts in the position of the final arbiter of constitutional claims can be overruled only by a constitutional amendment or by their own subsequent decision. Finally, constitutional rights claim often raise issues that are politically highly controversial[3].

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[1] See e.g. J.Daley, *Defining Judicial Restraint*, in T.Campbell and J.Goldsworthy (eds.), *Judicial Power, Democracy and Legal Positivism*, Ashgate, 2000, 280 ff.

[2] M.Elliott, *The Constitutional Foundations of Judicial Review*, Hart Publishing, Oxford and Portland, 2001, 107-108.

[3] M.Kumm, *Constitutional rights as principles: On the structure and domain of constitutional justice*. A review essay on *A Theory of Constitutional Rights*, by Robert Alexy, Oxford University Press, 2002, *I.Con*, Vol. 2, n° 3, 2004, 574.

These features appear particularly clear in the case of the Constitution of Estonia, whose Article 152, para. 2, states that "If any law or other legal act is in conflict with the provisions and the spirit of the Constitution, it shall be declared null and void by the National Court". While specifying that laws might infringe the Constitution whenever conflicting with its "spirit" not less than with its "provisions", the Estonian Constitution presupposes the literal rule's insufficiency for a correct approach to constitutional interpretation. The "spirit" of the Constitution is in fact unlikely to be incapsulated in single words, and even in the whole text of the Constitution. It can rather be apprehended through adaptation of the text to the diverse circumstances imposed from the passage of time. Rather than requiring a predetermined meaning, the "spirit" of the Constitution admits shiftings of meaning. This is precisely the kind of challenge which constitutional interpretation is expected to meet. It is also the kind of challenge which contemporary constitutional texts are suited for, due to their relatively indeterminate language. It is that language which gives a Constitution the capacity to survive those changings which may impose reform of the ordinary legislation.

On the other hand, constitutional rights claim raise politically controversial issues to the extent that Constitutions mirror pluralistic societies, and at the same time put the premises for their own free development. As Michelman has put it, "The legal form of plurality is indeterminacy – the susceptibility of the received body of normative material to a plurality of interpretive distillations, pointing toward different differing resolutions of pending cases and, through them, toward differing normative futures"[4].

The fact that the literal rule, and the recourse to the intent of the Framers, are frequently insufficient in guiding constitutional interpretation does not mean that courts leave aside those criteria whenever they wish. To the contrary, courts rely on other criteria only after having demonstrated that the language plainly emerging from the text or from the intentions of its authors is insufficient for resolving the case. This is not only a recommendation. It also depicts a current judicial practice. Although 'activism' is sometimes seen as failing to apply a rule at hand in accordance with its meaning, or applying a rule which has no warrant in the existing legal materials[5], it has been convincingly replied that, "understood in these terms, an account of 'activism' is unlikely to be of much assistance. Few judges will knowingly fail to apply a rule in accordance with its meaning, or rely on a rule which has no legal warrant as they see it"[6].

These features appear sufficiently consolidated both in the American and in the European system of constitutional justice. If this is so, contrasting judges using their own moral beliefs with judges following the plain meaning of the words in the law, as many commentators do, appears "a false dichotomy"[7]. The activism/ restraint dichotomy presupposes instead that the language which judges, and constitutional courts especially, have to confront with, is often indeterminate. And it consists in the attitude toward that language. The activist approach tends more easily than the restraint-based approach to rely on criteria, first and foremost the teleological, which are not directly grounded on the text. The before mentioned dichotomy is therefore a matter of degree, being apprehended in quantitative rather than in qualitative terms.

3. Once defined in such terms, it remains to be seen the sense of the dichotomy. Why judges

[4] F.Michelman, *Law's Republic*, in *The Yale Law Journal*, Vol. 97, 1988, at 1528.

[5] T.Campbell, *Democratic Aspects of Ethical Positivism*, in T.Campbell and J.Goldsworthy (eds.), *Judicial Power*, at 14.

[6] A.Glass, *The Vice of Judicial Activism*, in T.Campbell and J.Goldsworthy (eds.), *Judicial Power*, 361.

[7] W.Sinnott-Armstrong, *A Patchwork Quilt Theory of Constitutional Interpretation*, T.Campbell and J.Goldsworthy (eds.), *Judicial Power*, at 316.

should adopt an activist, or instead a restraint-based approach?

According to Posner, three approaches may lie behing the doctrines of restraint: deference, reticence and prudence. The deferential approach consists in avoiding contrasts with the decisions of other branches of government, the reticent approach is founded on the assumption that judges should not be making policy decisions, and the prudential approach is suggested on the ground that judges should avoid making decisions which will impair their capacity to make other decisions[8].

The first two approaches appear directly related to the issue of the legitimacy of judicial decisions in a democratic system. Also the third one is related to that issue, albeit only indirectly, prudence being suggested in order to avoid decisions which would incur political reprisals which would interfere with the judiciary's ability to make other decisions[9]. The approaches suggested by Posner for justifying restraint appear therefore as diverse features of the legitimacy issue.

In the American literature, the most important account of that issue is due to Alexander Bickel. "The root difficulty", wrote Bickel, "is that judicial review is a counter-majoritarian force in our system", since "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it"[10]. At the same time, however, Bickel was convinced that the Court's task consisted in giving principled decisions. Judicial review, he stressed, "brings principle to bear on the operations of government. By 'principle' is meant general propositions…organizing ideas of universal validity in the given universe of a culture and a place, ideas that are often grounded in ethical and moral presuppositions. Principle, ethics, morality – these are evocative, not definitional terms; they are attempts to locate meaning, not to enclose it"[11].

Bickel was also aware that "the Supreme Court touches and should touch many aspects of American public life", but was also convinced that "it would be intolerable for the Court finally to govern all that it touches, for that would turn us into a Platonic kingdom contrary to the morality of self-government"[12]. His solution to the "counter-majoritarian difficulty" didn't consist, therefore, in recommending to the Court an exclusive reliance on the text, or on the intent of the Framers, since this would not correspond with the task of giving principled decisions which he found typical of judicial review. He rather invited the Court to exert, and further enhance, her "passive virtues", which consisted in refraining from deciding cases, through a number of well-known jurisdictional techniques and like devices, whenever principled issues were not at stake. This suggestion corresponded to the conviction that while legislation is both "empirical" and "evanescent", "Principle is intended to endure, and its formulation casts large shadows into the future"[13]. Bickel joined here Marshall in considering the Constitution as "intended to endure for ages to come, and to meet the various crises of human affairs" (*McCulloch* v. *Maryland* (1819)). Bickel's reconstruction of the "counter-majoritarian difficulty" appears almost unique in

[8] R.A.Posner, *The Federal Courts*, Cambridge, Harvard University Press, 1996, 314 ff.

[9] J.P.Roche, *Judicial Self-Restraint*, in *American Political Science Review*, 49 (1955), 771-2.

[10] A.Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, 2° ed., Yale University Press, 1962, 17.

[11] A.Bickel, *The Least Dangerous Branch*, at 199.

[12] A.Bickel, *The Least Dangerous Branch*, 199-200.

[13] A.Bickel, *The Least Dangerous Branch*, 131.

American literature on the ground that it gathers a deep understanding of the specific features of constitutional interpretation, as demonstrated by his defense of the Court's choices in the *School Segregation Cases*[14], with a clear perception both of the substantive power already acquired by the Supreme Court vis-à-vis democratically elected institutions, and of the dangers of a "Platonic kingdom" which an unfettered constitutional jurisprudence might create.

In the following decades the American debate has lost this contextual attention, being polarized from the dichotomy between partisans of the originalist approach[15], whose fear for judicial activism leads to forget the specific features of constitutional interpretation, and defenders of judicial activism, particularly in the Warren Court's version, whose view is that law is an interpretive enterprise guided by a vision of the integrity of the political society to which the law belongs[16], thus denying the very premise of the counter-majoritarian difficulty. Nor has the Supreme Court followed Bickel's suggestion of relying on the "passive virtues" for coping with that difficulty[17].

4. Notwithstanding its scarce impact on the subsequent American experience, Bickel's reconstruction remains a useful basis for inquiring into the issue of the legitimacy of constitutional courts in a democratic system, which lies at the core of the activism/restraint dichotomy. Bickel was careful in giving balanced attention to the two reasons which render constitutional review of legislation a delicate task, namely the fact that the Constitution uses morally controversial concepts in many instances and the fact that the legislative text under review derives a special dignity from its source – a popularly elected parliament[18].

Intended in these terms, the legitimacy issue affects the European not less than the American model of constitutional justice. As it is well known, the former is distinguished from the latter on the ground that European constitutional courts are uniquely empowered to set aside legislation that runs counter to the Constitution, while all American courts have the authority to adjudicate constitutional issues in the course of deciding legal cases and controversies. The choice for courts specialized in constitutional issues was due in Europe both to cultural and institutional reasons. The high value given to the principle of legal certainty in countries adhering to the civil law tradition was likely to be ensured only by a special court in charge of constitutional review of legislation. On the other hand, by giving a special court that task, specific rules could be adopted with respect to the selection and tenure of her judges, thus minimizing the democratic objection, inasmuch as the legislation which constitutional courts are empowered to struck down is the product of a democratic legislature. It is no case that European constitutional judges are frequently elected by Parliament, while ordinary judges are selected through more bureaucratic procedures, and that the constitutional judges tenure is seriously limited, while ordinary judges are usually in charge until the age of retirement[19].

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[14] A.Bickel, *The Least Dangerous Branch*, 244 ff.

[15] See e.g. A.Scalia, *Originalism: The Lesser Evil*, in *Cincinnati Law Review*, 57 (1989), 849, and R.Bork, *The Tempting of America*, New York, Macmillan, 1990.

[16] R.Dworkin, *Law's Empire*, Cambridge, Harvard University Press, 1986, chs 6 and 7.

[17] I have attempted to demonstrate this in C.Pinelli, *La legittimazione della Corte Suprema*, Relazione al Congresso annuale dell'Associazione Italiana dei Costituzionalisti su "La circolazione dei modelli e delle tecniche del giudizio di costituzionalità in Europa", Roma, 26-27 ottobre 2006.

[18] V.Ferreres Comella, *The European model of constitutional review of legislation*, in *I.CON*, Vol. 2, n. 3, 2004, at 475.

[19] On this see V.Ferreres Comella, *The European model*, at 468.

These features, which characterize the European model since the approval of democratic Constitutions after the demise of totalitarian regimes, were anticipated during the 1920s by Hans Kelsen, who is considered for this reason the father of the European model of constitutional justice. Kelsen not only imagined its main structural features, but added that, given those features, and particularly the fact that the effect of a constitutional court's holding that a statute is unconstitutional consists in the formal expunction of that statute from the legal system, the court acts as a "negative legislator", thus distinguished from Parliament's positive introduction of statutes into the legal system[20]. The kelsenian court wasn't a judge, nor a political institution as Parliament. It wasn't a judge because of its specific power of reviewing the legislation, and it wasn't a political institution because the exertion of that specific power had no positive effect on the legal system.

These features appear clearly diverse from those affecting the American model, and this diversity would therefore prevent from comparing the two models even for what concerns the legitimacy issue. But to what extent the European experience of constitutional justice corresponds to the kelsenian model? This correspondence emerges only with respect to structural features such as appointing criteria and tenure of constitutional judges, and the effect of the court's decision. For the rest, the experience of constitutional justice has clearly departed from the kelsenian model, joining for many aspects the American pratice[21].

Constitutional interpretation lies at the core of this evolution. Kelsen's definition of the constitutional court as negative legislator presupposes that Constitutions are centered on distribution of powers among diverse institutions, particularly on the devolution of legislative power to Parliament, and eventually on a list of rights framed in a sufficiently determinate language. Constitutions of the XX century, to the contrary, are value-ridden documents, founded on principles framed in a relatively indeterminate language. This indeterminacy paved the way for interpretation processes far more complex than those imagined by Kelsen. The court's main task would consist in giving appropriate meaning to constitutional principles, rather than in merely ascertaining the compatibility of statutes with the text of the Constitution. Accordingly, the end of constitutional justice would consist in preserving the sense of those principles, rather than in pursuing the value of legal certainty *per se*.

These circumstances have affected the whole model of European constitutional justice, including the role of ordinary judges. The choice for a specialized and centralized court, as we have seen, had resulted from the fear that, given the absence of a doctrine of precedent in the civil law tradition, ordinary judges would endanger the value of legal certainty. But the evolution of constitutional justice has remarkably changed these assumptions. Ordinary judges not only have abandoned that deference which characterized their attitude toward democratically elected institutions since the French Revolution, but, especially in those countries where constitutional review of legislation is made dependent on their own impulse, have become more and more involved in the constitutional interpretation process. On the other hand, the value of legal certainty has lost its crucial significance vis-à-vis the quest for preserving the sense of constitutional principles. Even on this ground, then, the European experience appears far closer to the American than at the moment of its foundation,

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[20] H.Kelsen, *La garantie jurisdictionnelle de la Constitution (La Justice constitutionnelle)*, in *Revue de droit public et de la science politique*, 1928, 143 ss.

[21] This is generally recognized by constitutionalists. See e.g. A. von Brunneck, *Constitutional Review and Legislation in Western Democracies*, in C.Landfried (ed.), *Constitutional Review and Legislation. An International Comparison*, Nomos Verlagsgesellschaft, Baden Baden, 1988, 223 ff.; F.Fernandez Segado, *La justicia constitucional ante el siglo XXI: la progresiva convergencia de los sistemas americano y europeo-kelseniano*, in F.Fernandez Segado (ed.), *The Spanish Constitution in the European constitutional context*, Dykinson, Madrid, 2003, 867 ff.; M.Verdussen, *Les douze juges. La légitimité de la Cour constitutionnelle*, Labor, Bruxelles, 2004, 49 ff.

although the power to set aside unconstitutional statutes remains with constitutional courts.

5. Notwithstanding their diverse historical backgrounds and structural features, the American and the European systems of constitutional justice reveal growing similarities on the ground of their functioning, and are thus likely to be compared also for what concerns the issue of the legitimacy of constitutional courts.

As it has been noticed in a general survey of constitutional justice in Western democracies, "constitutional review proves to have become the irreplaceable counterweight to the supremacy of the majority principle"[22]. However, that counterweight is not without problems, since, as we have already seen, constitutional review of legislation requires criteria of interpretation giving constitutional courts broad discretionary powers, in spite of the fact that, contrary to parliaments, those courts are not democratically elected. Hence derives the fact that the bickelian "counter-majoritarian difficulty", and the restraint/activism dilemma, affects the European not less than the U.S. system of constitutional justice.

These systems differ rather on the ground that the constitutional court's legitimacy issue has emerged, and still emerges, in different occasions. The long-standing Supreme Court's jurisprudence is frequently separated in periods corresponding to the restraint/activism divide. The Lochner era, the period following the New Deal, the Warren Court and, albeit more controversially, the recent decades, are depicted as signalling different attitudes of the Supreme Court toward the legislator. And the difference among such attitudes depends essentially on whether the Court's rulings tend to defer to the legislator or to declare void its statutes.

While turning to the European courts experience, it is very difficult to find something similar. From time to time, constitutional review is reproached as impermissibly interfering in the legislative process – e.g. in Germany in the 1970s and in France in 1986 –, but these tensions appear insufficient for signalling diverse periods of the constitutional jurisprudence along the restraint/activism divide.

In the European experience, that divide emerges rather on the ground of the establishment of positive criteria for legislation. Constitutional courts, the German, the Italian and the Spanish particularly, have abandoned the kelsenian model also with respect to the definition of the court as being a negative legislator[23]. The establishment from the court of positive criteria for legislation poses clearly the question of the court's legitimacy, corresponding to the European version of that question: the more a court dictates positive prescriptions to the legislator, the more it follows an activist attitude which might run counter the democratic principle.

Positive decisions of constitutional courts have met scholarly criticism, to the extent that they anticipate the substantive contents of future regulations. In that case, the court might further the tendency of the legislator to remove from himself the burden of decision. At the same time, the adoption from the court of too detailed prescriptions for the legislative process might undermine the actualization of the constitution through law, which in all democratic countries remains initially with legislative institutions, characterized not only by a direct democratic legitimacy, but also by a larger participation of the general public than that affecting the constitutional review process[24].

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[22] A. von Brunneck, *Constitutional Review and Legislation*, at 250.

[23] F.Fernandez Segado, *La justicia constitucional*, 879 ff.

[24] P.Haberle, *Die offene Gesellschaft der Verfassungsinterpreten*, in *Juristenzeitung*, 1975, 297.

These recommendations are far from revealing some nostalgia for the kelsenian model. They rather reflect the assumption that in democratic countries constitutional courts are expected not to insulate themselves from other institutions and from the general public, but to ensure the openness of the democratic process[25]. This very assumption affords perhaps the best criterion for adjourning the sense of the bickelian countermajoritarian difficulty. An activist approach, particularly that pursued through positive decisions, should be deemed correct until it doesn't impede further political debate and participation of the public on the issue at stake.

[25] A. von Brunneck, *Constitutional Review and Legislation*, at 250; F.Michelman, *Law's Republic*, 1529 ff.; M.Verdussen, *Les douze juges*, 81 ff., and, first and foremost, J.H.ely, *Democracy and Distrust. A Theory of Judicial review*, Harvard University Press, 1980.