

Preface

I. “Judicial activism” is an expression widely used in popular discourse since its introduction in 1947 in a lay magazine by Arthur Schlesinger Jr., who used the term pejoratively to describe a tendency within the US Supreme Court. Although the phrase acquired currency among public opinion both in America and Europe, its translation into a proper legal concept is no easy task, if at all possible or desirable. Several contributors to this book undertake that task and believe that the concept is intelligible and useful.

Notwithstanding the conceptual concerns that run through the volume, the phrase is mostly a pretext for reflection on judicial practice in the European and American contexts, both arguably characterized in these last decades by the introduction of novel normative claims and even policies by judges. That within supposed exercises of practical reason departing from conventional legal method—or legal method as conventionally understood. An understanding of judicial activism around these tenets can be gained from the contributions to this volume.

II. There is inevitably a central question deserving the attention of the different contributors, which concerns the degree in which judicial exercises in practical reasoning may amount to forms of judicial usurpation of the legislative function by courts. Moreover, different views as to the nature and scope of legal reasoning lead to different degrees of tolerance regarding what should be admissible to courts.

Massimo La Torre, on the one side, and Lawrence Alexander, on the other, find themselves on opposite sides of the spectrum. La Torre, rejecting the platonic noble dream (or nightmare, in his view) of judicial reasoning as a matter of mere acknowledgment or cognition, defends that the main rationale of judicial decisions must be understood as argumentative and interpretative, implying a thorough involvement of the judge in practical reasoning. Contrarily, Alexander looks unfavorably at the exercise of what he names as “first-order practical reason” by judges.

Indeed, Alexander utterly rejects any judicial practice—such as the application of legal standards (e.g., proportionality), or the appeal by judges to concepts or principles with a meaning or weight to be determined by themselves—, lacking in “truthmakers” of a cognitive nature. For him, such practices are forms of judicial

usurpation, implying the use of judicial office to legislate under the guise of adjudicating. The virtuous middle point between judicial usurpation and its opposite vice—judicial abdication—is what one should seek when considering judicial adjudication at the theoretical and practical levels.

Sharing a suspicious view of a corresponding exercise of practical reasoning by courts, Steven Smith takes aim at the particular claim that judicial activism is to be endorsed as a form of “reason in governance.” For Smith, a discourse that aspires to an ideal of reason to be carried out by courts degenerates into the opposite of reason, namely in the demonization of opponents. Given the “discursive situation” in which contemporary courts operate, one characterized by radical pluralism and by an inherent incommensurability between premises and conceptions of morality, Smith argues that there is no feasible ideal of practical rationality susceptible of offering an independent standpoint on which courts could base their activist judgments.

Gonçalo de Almeida Ribeiro’s perspective distances itself from the latter and approximates La Torre’s, since it embraces the possibility of practical reasoning by courts bounded by what he takes to be the ultimate criteria of legal justification: justice, certainty, legitimacy, equality, and prudence. Still, for Almeida Ribeiro, activism should be avoided. He uses this last term in a classic pejorative sense that encompasses degenerate forms of judicial practice, which should no longer be considered as forms of fidelity to law—the main purpose of the judicial function—but of judicial usurpation of the legislative function.

On a first approximation, one could say that there is a divide here between a Continental perspective, on the one side—shared by La Torre and Almeida Ribeiro to a degree—and an American perspective, on the other—shared by Alexander and Smith. Jorge Silva Sampaio’s paper points precisely in that direction, claiming that judicial practice should be measured and assessed differently according to the cultural and legal context. In this light, the European context will accommodate practices that would be downright condemned as activist in the American legal culture. Maria Benedita Urbano, however, brings a moderating perspective, adopting a different view on what practices should be accommodated also in the European context, in light of basic principles endorsed by corresponding Constitutions: democracy, the rule of law and the separation of powers. In the same light, Urbano proposes some remedies to tame what she believes to be egregious judicial excesses.

III. One can conclude from the above that a discussion of judicial activism is necessarily a discussion with core implications within the theory of legal reasoning. Contemporary approaches—such as those approving the judicial application of legal standards, or those endorsing balancing or weighing as legitimate methodological tools—will necessarily be more favorable to practices condemned as activist by their adversaries.

It should not be assumed though that activism, understood as judicial policy-making, can only emerge within novel methodological approaches. On the contrary, Pierre Legrand clarifies that activism may emerge within that which appears to be the most conventional of legal methods, named as “grammatication.” Taking into

account the French judicial practice, Legrand concludes that “every judgment is the expression of both a legal and of a political intervention.” even when it apparently is a strictly grammatical exercise.

Conceptions of judicial activism do not play out solely at the practical level. The debate carries important implications at the conceptual level too, which can be clearly inferred from La Torre’s and Almeida Ribeiro’s contributions. Both understand law, not as an object subject to cognition and vocalized by the judge, but as a reason-giving practice. This leads them to develop a conception of fidelity to law that is necessarily different from that which is implicitly endorsed by Alexander.

IV. A discussion on judicial activism would necessarily be incomplete if one did not take into consideration the impact of judicial decisions at the political level or, from a different perspective, the political element of judicial decisions.

Miguel Nogueira de Brito addresses the theme departing from the classical debate between Carl Schmitt and Hans Kelsen on who should be the guardian of the Constitution. The political element that is inevitably present in every judicial decision referred to a Constitution—which Kelsen acknowledged and on which Schmitt fundamentally based his rejection of courts as guardians of Constitutions—is a central part of that debate. For Nogueira de Brito, Kelsen’s defense and Schmitt’s critique of judicial review help us understand the real risks of judicialization of politics present in contemporary constitutional democracies, acutely felt during the ongoing Euro crisis.

This latter context is also considered by Almeida Ribeiro. However, for the latter, any criticism of that activist proclivity—admittedly leading to forms of judicial usurpation—should not lead us to view proper judicial adjudication as politically neutral. On the contrary, it is political, both in its premises, since it inevitably engages each judges’ sense of justice in a context of pluralism, and in its performance, implying balancing judgments—first of all, on the relative weight of the said criteria—that are inevitably complex and controversial.

Almeida Ribeiro’s assumption according to which a political element is a necessary and legitimate part of legal adjudication is not of course shared by all. Smith’s contribution—particularly when pointing out the incommensurability between premises and conceptions involved in each judge’s sense of justice—is relevant here, as is James Allan’s. Allan approaches the theme from the standpoint of moral philosophy, in particular, in light of that branch known as utilitarianism. Accepting its premises—more specifically, the premises of rule utilitarianism—Allan claims they lead to the condemnation of judges who decide not to apply rules in light of their moral and political sensibilities, sense of fairness or otherwise.

The debate regarding the political nature of judicial decisions is not confined to general jurisprudence. It has been the subject of theories of judicial behavior articulated within the field of political science. Tiago Fidalgo de Freitas takes stock of those positive theories, exploring their weaknesses, even if conceding that they pose a standing challenge to normative theories to get fine-tuned.

The above-mentioned contributions, when considering the political element or political impact of judicial decisions, take these as decisions yielded by legal reasoning, even if sharing different perspectives as to the nature and scope of the latter.

Luís Pereira Coutinho explores other possibility: the deployment of political rationality by constitutional courts facing exceptional circumstances of the security, financial or economic type. If admitted, these latter kinds of decisions are unquestionably political, transcending legal reasoning. Correspondingly, according to Coutinho, their admissibility can only be considered within state theory.

V. The bulk of this volume addresses judicial activism at the domestic or state level. There are two other levels in which the charge of judicial activism has been widespread in these last decades—the European and international levels—which deserve specific attention.

In this volume, Lourenço Vilhena de Freitas focuses specifically on the practice of the European Court of Justice, contending that it has developed a weak form of activism—weak since it does not concern primarily material aspects—but still with great impact, since it concerns the formal structure of European Union Law. Complementarily, Francisco Pereira Coutinho focuses on the practice of Member States courts, exploring the reasons leading them to “internalize” European Union Law, even in the absence of enforcement mechanisms of central decisions erecting the European legal federalism.

In the last contribution to this volume, Maimon Schwarzschild addresses in particular the practice of international courts. He argues that judicial activism—taken to be the making or imposition of policies by judges—is all the more concerning as it develops within fragmentary body of law and all the more threatening as it empowers courts acting outside supervision of a responsible body of jurists and whose judges are often appointed following relatively opaque procedures. Schwarzschild considers above all the risks for judicial independence that may derive from extreme forms of judicial activism, named as “judicial hubris,” occurring at the moment in which courts, international or otherwise, are transformed into near culture warriors, i.e., into partisan forces in the great political and cultural disputes of the era.

VI. The book is divided into three parts. The first comprises essays by La Torre, Alexander, Almeida Ribeiro, Smith, and Legrand that are contributions in the area of general jurisprudence. In the second part—which includes essays by Allan, Nogueira de Brito, Fidalgo de Freitas, and Luís Pereira Coutinho—judicial activism is considered from the standpoint of other theoretical fields such as moral philosophy, constitutional theory, and political science. Finally, the third part—encompassing the contributions of Sampaio, Urbano, Vilhena de Freitas, Francisco Pereira Coutinho, and Schwarzschild—considers judicial activism in a variety of landmark contexts.

As can be inferred from their essays, the editors do not share a common perspective. The aim of this book was not to endorse a particular perspective on the theme, but to present and evaluate the state of a contemporary debate of enormous significance.

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Judicial Activism

An Interdisciplinary Approach to the American and
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