The roots of judicial activism

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1. The expression "judicial activism" was coined in the United States, but it crossed the Atlantic and became as much part of our day-to-day experience as blue jeans or Ford motor cars.

In American constitutional law, activism was discussed as part of a more general debate on the powers of the judiciary as opposed to those of the political institutions, in particular Congress and the President. A great deal of literature on American government was traditionally devoted to this general subject: already in the early years of this century it had every appearance of being the main theme of the American constitutional debate. By comparison, it seemed to be only a sideline in European literature on constitutional law, and in some European countries the situation has hardly changed since. Treatises or handbooks on constitutional problems in countries like Britain, France or the Netherlands deal with matters such as the powers of Parliament or of the President, electoral systems and decentralized government, rather than looking at the way courts can contribute to the solution of social problems.

The difference is striking; but it may be explained in terms of historical experience. First, the drafters of the American Constitution took the idea of separation of powers more seriously than the European authors on whose writings they relied, so much so that they saw the powers of the judiciary in the same light as those of Congress or of the President; different chapters in the Federalist papers bear witness to this general attitude.[1] Secondly, the application of the American Constitution gave rise to a practically unbroken tradition of judicial review of legislation; early European observers like TOCQUEVILLE and BRYCE were already impressed by the way in which the American courts had become *"un grand pouvoir politique"* and had brought questions "peculiarly liable to excite political passion, to the cool, dry atmosphere of judicial determination".[2] Thirdly, the American Constitution is a brief document which lays down general principles and is not concerned with detailed regulation of hypothetical cases or situations; it thus leaves ample space for judicial interpretation. And finally – as we shall presently see – the US Supreme Court took the opportunity it was offered by this general constitutional and historical background to intervene in some highly explosive

1 Example: *The Federalist* no. 78 (Everyman's Library, London 1971, p. 394).

2 TOCQUEVILLE, *De la démocratie en Amérique*, tome I, première partie, ch. VI (Flammarion, Paris 1981, p. 167); BRYCE, *The American Commonwealth* (new ed., New York 1924), vol. I, p. 256.

social problems like race relations; the Court thereby contributed to launching a development which generated, in a way, its own dynamics and helped to create a rapidly evolving case-law.

It is fair to add that the situation in Europe has been changing in recent years. After World War II, constitutional courts were created in the Federal Republic of Germany and in Italy, and more recently also in other countries; the case-law of the Federal Constitutional Court in Karlsruhe, in particular, did much to banish the old idea that problems of real importance can only be solved by legislation, and never by the courts. The Court of Justice of the European Communities and the European Court of Human Rights, working in a looser normative texture than national courts, built themselves a reputation of judicial inventiveness which was somehow comparable to that of the American Court.[3] However, the movement in this direction has a more general character. Even in legal systems without judicial review of legislation, the role of courts in solving social conflicts has increased; this evolution is exemplified by the situation in the Netherlands, where political immobilism led the Dutch Supreme Court, the *Hoge Raad,* to accept bold interpretations of existing legislation on such matters as the right to strike and parental authority of unmarried couples.[4]

It is against this general background that the problem of judicial activism should be discussed.

2. The attitude of activism – though not the term – goes back to Chief Justice MARSHALL, who exercised a great influence on the US Supreme Court in the early part of the nineteenth century. MARSHALL helped the Court to build up a comprehensive body of American constitutional law after the federal spirit had begun to wane somewhat in Congress and in public opinion. On the one hand, the Court elaborated some of the vague notions of the Constitution, like interstate commerce, and made them into instruments for promoting values of federalism and of integration; on the other hand, it constructed a certain general view on the extent of federal jurisdiction on the basis of disparate constitutional provisions concerning the powers of Congress.[5]

Chief Justice MARSHALL had a clear conception of what he was doing. "A constitution," he declared, "to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. (. . .) Its nature, therefore, requires that only its

3 A typical example is the case-law on North Sea fishing under EEC rules; see case 804/79, *Commission v. United Kingdom* [1981] ECR 1045.

4 The strike cases are the more fully reasoned; see in particular HR 7. 11. 1986, *Hoogovens v. Industriebond, NJ* 1987 n° 226.

5 See, respectively, *Gibbons v. Ogden*, 9 Wheat 1 (1824); *McCulloch v. Maryland*, 4 Wheat 316 (1819).

outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."[6] There is little doubt that, in MARSHALL's view, this work of deduction and composition should be done by the courts, and more particularly by the US Supreme Court.

This is not to say that the American Supreme Court was and remained an activist court throughout the nineteenth century. It is rather the contrary: by the middle of the century, the Court was very passive, and it may have contributed to shaping the conditions for the outbreak of the Civil War by its sluggish behaviour – its insensitivity, even – with regard to the slavery problems.[7] But the Court was back on a more activist course when it started its line of cases on the "due process clause" towards the end of the century. According to one of the post-Civil War amendments to the Constitution, the XIVth Amendment, nobody can be deprived of his "liberty" without "due process of law", and the Court combined these two expressions to mean that the Constitution protected the freedom of contract. In a long series of judgments, state legislation of a social or economic nature was struck down for not complying with this test. The Court was not unanimous; a dissenting opinion of Justice HOLMES once remarked, in a judgment invalidating New York state legislation limiting the working hours for bakers and their personnel: "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law."[8] Nonetheless, the majority continued its relentless efforts to impose the rule of free contract on unwilling state legislatures. Matters came to a clash, as is well known, when the Court's interpretation of the due-process clause helped to wreck President FRANKLIN D. ROOSEVELT's New Deal legislative programme, thereby nearly sparking off a wide-ranging constitutional crisis. The Court abandoned its view from 1937 on, after the President's "court packing plan" had failed but new appointments had brought some fresh blood to the Court. One of the new appointees was Justice FELIX FRANKFURTER.

At the very moment the Court accepted that the majority had, in HOLMES's words, the right "to embody their opinions in law", the legal climate started to change again. The progressive mood that accompanied ROOSEVELT's New Deal, and the evolution of totalitarianism abroad, seemed to modify the terms of the debate on judicial approaches to legislative choices: protection of individual liberties appeared to be the great task for the immediate future, and it was difficult to see how the

6 In: *McCulloch v. Maryland* (see note 5 above).

7 KELLY and HARBISON, *The American Constitution, its origins and development* (5th ed., New York 1976), ch. 15.

8 *Lochner v. New York*, 198 US 45 (1905).

courts could abstain from participating. There were indeed some indications in earlier case-law that the Supreme Court would not shrink from this responsibility: as early as 1925, it had struck down an Oregon statute obliging parents to send their children to state schools; the judgment was based on "the liberty of parents and guardians to direct the upbringing and education of their children" – a liberty not easily to be found among the freedoms enumerated in the Constitution (Justice HOLMES formed part of the majority).[9] Later case-law seemed to confirm this discovery of basic liberties not expressly mentioned in the Constitution.[10]

The real break through came only after the *Brown* decision of 1954, forbidding racial segregation in public education, had started a tremendous upheaval in the Court's case-law on equal protection, and also contributed to triggering off a comprehensive process of change in American social patterns. Case-law developed step by step: the new view on equal protection was extended from public education to other amenities, from blacks to other groups, from desegregation to racial integration; it brought the Court to fixing itself the kinds of classification which federal or state legislatures were allowed to rely on, other distinctions being considered as "suspect" and "bearing a heavy burden of justification"; it gave its judicial blessing to programmes of "affirmative action".[11] As a result, the Court felt more and more free to apply constitutional provisions in a way consistent with its general view.

This development could not leave untouched the Court's perception of its freedom to deal with constitutional matters in other areas. An extensive scheme of civil rights and individual liberties was actually framed by the Court. Initially, this led to a series of reforms which was long overdue; a typical example was the new law on the rights of the accused, in particular in the fields of police investigations, evidence and criminal procedure; the new rulings were based on Bill of Rights clauses, especially on those ruling out unreasonable searches and seizures and self-incrimination by the accused; but it was obvious to most observers that the Court's rulings amounted to a complete overhaul of criminal law, a reform imposed on the states because directly founded on the federal Constitution.[12] A second important line of cases extended the reach and scope of the basic liberties protected by the Constitution: the Court discovered – again – in the due-process clause certain values it felt it to be its task to protect, and it gradually elaborated the rights that were deemed to form part of the basic liberties. Thus, case-law on privacy engendered the birth and development of different kinds of privacy: it was "marital privacy" which

9 *Pierce v. Society of Sisters*, 286 US 510 (1925).

10 Example: *Skinner v. Oklahoma*, 316 US 535 (1942).

11 See, generally, LUSKY and BOTEIN, "The law of equality in the United States", in: T. KOOPMANS (ed.), *Constitutional protection of equality* (Leiden 1975), ch. II.

12 Typical examples are *Mapp v. Ohio*, 367 US 643 (1961) and *Miranda v. Arizona*, 384 US 436 (1966).

formed an obstacle to the validity of a Connecticut statute forbidding the use of contraceptive devices; and the right to privacy was finally "broad enough to encompass a woman's decision whether or not to terminate her pregnancy", thereby making Texas and Georgia statutes on abortion unconstitutional.[13] It was, in a way, an admirable performance to achieve these results on the basis of texts enacted in 1791 and – as far as the due-process clause is concerned – in 1868.

This impressive evolution took chiefly place under the energetic leadership of Chief Justice EARL WARREN (1953–1969); its principal opponent, in terms of its conception of judicial competence, was Justice FRANKFURTER.

3. FRANKFURTER's dissenting opinions highlight the dilemma of judicial activism. Again and again, he was faced with situations where he agreed with the result the majority wanted to achieve, but recognized that it was not the Court's task to overrule assessments made by representative bodies. As early as 1943, he dissented in a judgment striking down a state statute obliging pupils to salute the American flag, even if this salute would be contrary to their own or their parents' religious convictions. "One who belongs to the most vilified and persecuted minority in history", said FRANKFURTER (he was Jewish), "is not likely to be insensible to the freedoms guaranteed by our Constitution." If his personal attitude were decisive, he would certainly be in favour of the Court's libertarian views. "But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. (. . .) As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard." And in 1951 he warned the Court, in a case involving legislation curbing subversive activities, that rules of this kind are founded on a balance between the relevant factors; choices are to be made. "Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures."[14]

As the Warren Court continued to take an activist stand, FRANKFURTER dug his heels in. His opinions read as a counterpoint to the policy-oriented considerations of his brethren. On some of these occasions he used the word that has served as expressing the opposite attitude – judicial "restraint". Here is one of these passages: "This legislation" (federal legislation under which deserters forfeited American

13 Respectively: *Griswold v. Connecticut*, 381 US 479 (1971); *Roe v. Wade*, 410 US 113 (1973).

14 Respectively: *Board of Education v. Barnette*, 339 US 624 (1943); *Dennis v. United States*, 341 US 494 (1951).

citizenship) "is the result of an exercise by Congress of the legislative power vested in it by the Constitution and of an exercise by the President of this constitutional power in approving the bill and thereby making it 'a law'. To sustain it is to respect the actions of the two branches of our government directly responsive to the will of the people and empowered under the Constitution to determine the wisdom of legislation. The awesome power of this Court to invalidate such legislation, because in practice it is bounded only by our own prudence in discerning the limits of the Court's constitutional function, must be exercised with the utmost restraint."[15]

These and similar opinions did not make FRANKFURTER very popular. There were two difficulties, one of a more personal and one of a more political nature. First, FRANKFURTER was very much a product of enlightened, Northeast-coast, liberalism: when appointed, he was a Harvard professor and a friend and adviser of FRANKLIN D. ROOSEVELT. However, his liberal friends were, at the time, very much in favour of the Court's general behaviour: they looked at the results rather than at the methods – a situation which only changed in the course of the seventies, especially after the abortion decisions which – though initially applauded – went too far for many of the Court's friends.[16] Second difficulty: the FRANKFURTER opinions were very much based on the assumption that the representative bodies would be doing their duty; but the very problem facing the Court in the late fifties and the early sixties was that it was venturing into areas such as race relations, where the record of federal and state legislatures showed nothing but accumulated inaction. Could the courts disregard the underlying political situation? Sometimes, FRANKFURTER seemed to suggest a completely affirmative answer to this difficult question, but he was alone in maintaining this rigid form of judicial restraint. Over the years, a caustic tone crept into his opinions.

The dilemma was symbolized by the reapportionment cases. These concerned complaints about state rules fixing the boundaries of electoral districts in such a way that votes polled in one district had a much greater worth than those in other districts, and that therefore state legislation violated equal protection. In 1946, the Court found that it could not interfere, because of lack of judicially discoverable and manageable standards. FRANKFURTER, speaking for the majority, declared that the remedy for unfairness in districting is "to secure state legislatures that will apportion properly, or to invoke the ample powers of Congress". "Courts ought not to enter this political thicket." But in 1962 the Court reversed a judgment following this precedent; it held that "debasement of votes" was such an important violation of elementary constitutional rights that the courts have to fashion relief when the political institutions fail to act. In a powerful dissent, FRANKFURTER dismissed the majority opinion as an attempt to fix rules in an area where standards for judicial judgment were lacking: the Court could not determine "what a vote

15 *Trop v. Dulles*, 356 US 86 (1958).

16 See LOUIS LUSKY, *By what right? A commentary on the Court's power to revise the Constitution* (Charlottesville Va. 1975).

should be worth", in an electoral system based on majorities in geographical districts, without first defining a standard of reference; but such a definition would actually represent a choice between competing bases of representation, and ultimately between political theories.[17]

A quarter of a century later, the European observer has a mixed reaction. On the one hand, he is touched by the somewhat old-fashioned belief FRANKFURTER professed in the operation of representative bodies: the essential chain in his reasoning is always that the democratic system will work as it should work. On the other hand, one is also impressed by the consistency of his arguments and by the shrewdness of his judgment. Reapportionment, at any rate, proved a bad area for judicial intervention, and the Supreme Court, whatever its power of imagination, was never really able to discover judicially manageable standards and to escape undamaged from this hornets' nest.[18]

4. Efforts have been made to escape from the dilemma of activism versus restraint by delineating areas in which one approach, rather than the other, would be the more appropriate way of looking at judicial freedom. In the early years of the WARREN Court, when the judges still had personal recollections of the 1937 crisis, there was a tendency to respect legislative choices on social and economic matters – always a question of trial and error, as the Court once casually remarked – but to abandon this attitude of restraint when individual liberties were at issue. This distinction, however, proved unworkable: many of the cases on racial integration were closely linked to social and economic legislation, for example in the field of employment. Other, different distinctions have been put forward. According to some opinions, judicial freedom is very limited when the courts have to apply constitutional provisions which give strict definitions of powers or impose specific limitations on the exercise of powers; it would have a wider scope in the interpretation of broad concepts such as "liberty" or "due process". This theory, although stating the obvious, was not very helpful when the question was more and more *how far* the Court could go when using the freedom broad constitutional concepts made available. Attempts at distinguishing between legislation authorizing long-sanctioned and conventional forms of behaviour and legislation introducing new and invidious rules of conduct failed with the increased awareness that case-law aimed at racial integration really struck at the heart of traditional patterns of behaviour.

The farthest the Court ever went in trying to find a rationale for the way it used its powers was to adopt a footnote in a fairly innocuous case decided in a period

17 Respectively: *Colegrove v. Green*, 328 US 549 (1946); *Baker v. Carr*, 369 US 186 (1962).
18 See on Justice Frankfurter: PHILIP B. KURLAND, *Mr Justice Frankfurter and the Constitution* (Chicago 1971).

when its activism was at a low ebb, in 1938: the "*Carolene Products* footnote".[19] After first having stated that legislation cannot benefit from a presumption of constitutionality when it appears on its face to be within a specific prohibition of the Constitution, the footnote goes on to say: "It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the XIVth Amendment than are most other types of legislation", and it cites cases concerning restrictions on the right to vote, interference with political organizations and prohibition of peaceable assembly. It then declares: "Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious (. . .) or racial minorities (. . .) where prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

It is a strange piece of judicial prose: after having used the expressions "it is unnecessary to consider" and "nor need we enquire" it develops in a few words a complete philosophy of judicial activism. This philosophy is based on belief in representative government: the normal way to counteract legislative wrongs is by relying on the political process. But this political process should be in a position to operate: the footnote defines a task of exacting scrutiny for the courts the moment the democratic process is perverted or twisted by the political institutions, whether they try to curtail political freedoms like freedom of the press or whether they avail themselves of existing racial or religious prejudice. To use other terms: the attitude of the Court is "majoritarian", but it allows for a "counter-majoritarian difficulty" which arises when existing majorities use their position in order to prevent minorities from developing into a majority.[20]

Much has been written in American legal literature on the view underlying the Carolene Products footnote. It has a great appeal, probably because it reconciles belief in representative government with wide-ranging judicial interference in some problem areas, and can also be translated into workable standards.[21] Furthermore, it is interesting to observe how the Court looked as early as 1938 at the problem of fixing the limits to the scope of judicial review not in terms of the special value of certain rights but in terms of the vulnerability of those rights to perversion by the majoritarian process – a quite modern approach, even in 1987. There is little doubt that a great deal of the Supreme Court's case-law in the fifties and sixties can be explained on the basis of this view; this is particularly so with regard to many cases on equal protection and on civil liberties, and even the reapportionment cases can be

19 *United States v. Carolene Products Co.*, 304 US 144 (1938), at 152–153.

20 See LAURENCE H. TRIBE, *American constitutional law* (Mineola NY 1978), § 3.6.

21 See, in particular, JOHN H. ELY, *Democracy and distrust, a theory of judicial review* (Cambridge Mass. 1980), ch. 5–6.

considered to fall within the scope of the "counter-majoritarian difficulty". But the ideas expressed in the footnote do not recur in later cases, and the case-law of the seventies, for example on abortion, seems far removed from these ideas.[22]

5. At present, the US Supreme Court is steering a somewhat quieter course. Different explanations have been advanced. The composition of the Court has changed: the conservative Presidents NIXON and REAGAN were somewhat scared of the Court's radicalism (they used this fear in their election campaigns), and they appointed conservative judges once they had the opportunity to do so. The Court had indeed – and this may be a second explanation – made itself immensely unpopular among large groups of the American population, especially by its decisions on race relations. Under President LYNDON JOHNSON, civil-rights legislation helped to implement some of the Court's rulings on racial integration, but where such help was not available, the Court could not always impose its solutions in the long run. The most conspicuous example was busing, i.e. compulsory busing of schoolchildren to neighbourhoods where they could go to multiracial schools; it was a highly divisive issue, and it brought the courts to the brink of the political battlefield.

There may have been a different kind of rebuff, which touched the judges in one of their most sensitive spots, their sense of professional honour. When the Court found that the death penalty was a "cruel and unusual punishment" contrary to the Constitution, and when part of the majority founded its opinion on statistics showing that the number of black convicts sentenced to death was proportionately very much higher than that of whites, critics of the Court were quick to point out that a different jury practice could probably restore the constitutionality of capital punishment.[23] And to make matters worse: somewhat later, the Court retracted, albeit hesitantly, from its earlier stand. A second example consists in the logical contradictions the Court got entangled in because programmes of affirmative action, prompted by the Court's case-law, tended to be "race-conscious" themselves, e.g. in prescribing a certain percentage of black or Spanish-speaking students, or contractors, or workers. Could those who were victims of such a quota regime invoke equal protection against it? The Court hesitated at first, but then it said bleakly no.[24]

All in all, the recent history of the Court's case-law seems to prove that judicial activism finally runs up against the limits traced by the law itself: it cannot escape the question of how much, and what, can be accomplished by the judiciary acting alone. We could perhaps put it in a more provocative way: as the activism of the

22 See also ROBERT M. COVER, "The origins of judicial activism in the protection of minorities", *Yale Law Journal* 1982, p. 1287.

23 The case was *Furman v. Georgia*, 408 US 238 (1972).

24 See *University of California v. Bakke*, 438 US 265 (1978); *Fullilove v. Klutznick*, 48 USLW 4979 (1980).

US Supreme Court tempted that august body into the sin of imposing one among several policies, it was bound to explore the far end of the law, thereby necessarily finding the point where judgments can only be made on the basis of personal predilections rather than legal analysis. The more activism develops, the more it runs the risk of being ultimately self-defeating.

6. The activist wheel seems thus to have come full circle in America. Looking back at the entire episode, it is not easy to say what activism really is. Is it an attitude of individual judges, determined by individual circumstances such as character, professional background, temperament and political convictions? Or is it rather a certain legal climate, a set of conceptions which prevail among lawyers at a certain stage of legal development? Or is it perhaps just an episode, a policy-oriented interlude in a court's life?

The problem of activism has not yet been discussed in these terms. Some authors imply, by their very choice of words, that activism is primarily a quality of certain individuals.[25] American experience suggests that one should not underestimate the importance of underlying social and cultural factors. It may be true that the WARREN Court consisted of exceptionally able and devoted men of strong convictions; but the race issue forced itself upon the Court when it had recognized that the old maxim "separate but equal" was a sham. Once set in motion, the equal-protection impetus generated further movement. Judges, like artists, tend to become prisoners of their own creations.

Similar considerations may apply to the activism of the Court of Justice of the European Communities. When it initiated its series of cases on the nature of Community law as an autonomous legal order, it created a movement which developed its own momentum; moreover, litigants begin to rely on judicial inventiveness after some time, in particular when the legislative machinery – never very effective in the Community anyway – practically comes to a halt.[26] Recent case-law seems to introduce distinctions between areas where the Court feels it can exercise guidance and others where it sends the problem back to the political institutions; however, it is not yet certain how matters will further develop.[27] Nevertheless, it is difficult to apply the same standards as those discussed in the United States: the *Carolene Products* footnote, whatever its merits, does not help in a situation where the role of representative bodies in the legislative process is hard to define and where, more generally, the link between the voters' wishes and the political decisions has become very tenuous. In the short term, this "democratic deficit" confers a legitimate character upon judicial activism which courts lack in developed

25 That seems to be the case with G.J. WIARDA, *Rechterlijke voortvarendheid en rechterlijke terughouding bij de toepassing van de Europese Conventie tot bescherming van de rechten van de mens* (The Hague 1986).

26 For example: case 15/81, *Gaston Schul* [1982] ECR 1409.

27 See case 84/86, *Council v. European Parliament*, judgment of 3. 7. 1986, not yet reported.

democratic systems; but in the long run, such support puts the European Court in a false position as it can never judicially fill the gap created by the democratic deficit.

Therefore, activism can be understood not only as an attitude or as a legal climate, but also as part of the particular setting in which it makes its influence felt. It may have some of its roots in the minds of the judges, but as a historical phenomenon, it is also firmly rooted in society, looking as it does for the balance between the powers of institutions and the challenges of social evolution. And one always hopes that judges know how to strike the balance.