

PARALLELS BETWEEN JUDICIAL ACTIVISM IN BRAZIL AND AUSTRALIA: A CRITICAL APPRAISAL

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Abstract

Judicial activism is a phenomenon that is increasingly growing in importance in both common-law countries like Australia and in civil-law countries like Brazil. This article analyses these legal systems and explains the nature of judicial activism in light of both Roman-Germanic and Anglo-American legal traditions. This is followed by a critical analysis of the techniques of judicial legitimacy as applied by the late legal-political philosopher John Rawls.

I INTRODUCTION

Judicial activism is a phenomenon that is increasingly growing in importance all over the world, including in common-law countries like Australia and in civil-law countries like Brazil. However, if one takes into account the essentially different nature of these legal systems, could one possibly argue that both Brazil and Australia are facing the same sort of legal-political phenomenon?

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This article provides a comparative analysis of the legal-political concept called judicial activism in light of both Roman-Germanic and Anglo-American legal traditions. A critical appraisal of judicial activism is presented, followed by a discussion of whether or not certain techniques of judicial legitimacy should be applied, which are based on the theoretical assumptions of the late American philosopher John Rawls.

II DIFFERENCES

Obviously, Australia and Brazil do not share the same legal system. Such as the vast majority of people in the world, Brazil is ruled by a legal system called civil law. Theoretically, the civil law system differs from the common law in the following aspects:

1. Law, in practice, is almost exclusively what is called ‘statutory law’ in common law, that is, the basic formal source of law is the positive law, enacted by the legislative branch or by any administrative branch exercising its regulatory power;
2. Judges are not bound to precedent; and
3. Legal concepts are frequently outlined by academics and renowned jurists.

As one may infer, the work of legal practitioners differ a lot from system to system. I had to deal with the common law on one occasion while working as an attorney at Petrobras, the Brazilian state oil company. I drafted and analysed international contracts ruled by English Law, which at that time appeared to me as lacking in proper law because of my experience with Brazil’s strict regulation of contracts by statutory law. The parties chose to be ruled by English law as it afforded more contractual liberty for them than the Brazilian law.

In Brazil, when a legal practitioner wishes to learn about a specific kind of contract, he or she seeks first to frame it in a contractual category as defined by the Brazilian Civil Code, or any other body of legislation, such as the *Tenancy Act*, the *Corporations Act*, the *Consumer's Protection Code*, etc. In these statutes he or she will find what contracts may or may not provide and, in particular, the type of clauses these contracts are not allowed to contain.

The lawyer resorts to any reputable doctrine in the field to clarify any possible doubt. Statutory provisions are analysed in such a manner as to provide the legal practitioner with elements for a better comprehension of the subject matter. Finally, and only to make sure of its practical validity, he or she also resorts to precedents, though fully aware that they are not binding and are often dissonant. What is more, precedents themselves often follow the steps above.

By contrast, in the common law system statutory provisions seem to me to succumb before the binding nature of precedent. Legal practitioners resort to judicial compendia, conscious as they are that judicial decisions therein shall be followed by the lower courts. Specific textbooks indeed are not as common in civil law jurisdictions as in common law jurisdictions.

This civil law obsession for legislation is grounded in its historical origins. The system stems from the Roman-Germanic medieval law whereby, from its very beginning, all the relevant laws were those enacted by the legislator. The first Roman statute known to us is the Law of the Twelve Tables (*Lex Duodecim Tabularum*), dated 449 BC.

Some others Roman statutes from about the same age were also enacted, including the *Lex Canuleia* (445 BC; which allowed the marriage — *ius connubii* — between patricians and plebeians), the *Leges Licinae Sextiae*

(367 BC; which imposed restrictions on possession of public lands — *ager publicus* — and also made sure that one of the consuls was a plebeian), the *Lex Ogulnia* (300 BC; providing plebeians access to priestly posts), and the *Lex Hortensia* (287 BC; about verdicts of plebeian assemblies — *plebiscita* — now binding to all people).

Almost two centuries after the enactment of the Law of The Twelve Tables, but still during the Roman Republic, the *Lex Aquilia*, a Roman Law of Torts, was enacted in 286 BC. And the great compound of Roman law was positivised only in the sixth century AD by the *Corpus Iuris Civilis* (Body of Civil-Law), issued by order of the Eastern Roman Emperor Justinian I. And yet, after the debacle of the Western Roman Empire, around the fifth century AD, barbarian forms of law mingled with the Roman tradition.¹

In the Modern Era, when rationalism assaulted the hearts and minds of people, codification was expected to generate legal rules that would predict every human situation. This trend began around the eighteenth century and reached its apex during the Napoleonic period. Accordingly, the French Civil Code of 1804, frequently referred to as ‘Napoleonic Code’, explicitly prohibited judges from creating general norms, thus restraining the judicial ruling only to positive law related to any specific case brought to the attention of the courts. Thus it declared:

Art 5. *Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.* (The judges are forbidden to pronounce, by means of general and legislative determination, on the cases submitted to them.

Art 1351. *L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même ; que la*

¹ HOLMES, Oliver Wendell. *The Common-law*. PDF Books.

demande soit fondée sur la même cause ; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité. (The authority of *res judicata* has no place, except with respect to that which formed the object of the judgment. It is necessary that the case involved should be the same; that the demand should be founded on the same cause; that the demand should be between the same parties, and made by and against them in the same capacity.)

This in France is called '*arrêt de règlement*' (regulation halt). In Brazil this principle has been more and more mitigated, since the judiciary is turning towards increased activism. I will comment on this shortly. In brief, every judgment shall be grounded in a positive command of the legislator in the civil law system. In Brazil, judgments grounded in equity are permitted only in special instances as prescribed by the positive law. Let us see then what the Brazilian Civil Procedural Code provides:

Art 127. *O juiz só decidirá por equidade nos casos previstos em lei.* (The judge shall apply equity only in the cases allowed by legislation).

Besides, magistrates can only resource to analogy, usages and general principles of law when there is a real or perceived 'gap' in the positive law. This is explicitly stated by the *Introduction to Brazilian Interpretation Act (1942)* which declares:

Art 4. *Quando a lei for omissa, o juiz decidirá o caso de acordo com a analogia, os costumes e os princípios gerais de direito.* (When the legislation is silent, the judge shall decide according to analogy, usages and general principles of law).

In this case the civil law system is remarkably self-deceptive. As sagaciously explained by the Austrian-born jurist Hans Kelsen, one of the greatest civil law jurists ever, there are actually no gaps in the law. According to him:

Since a legal order is always applicable and is actually applied even when the court must dismiss the action on the grounds that the legal order does not contain a general rule imposing upon the defendant the obligation asserted by the plaintiff, so therefore the supposition, on which the cited rule is based, is a fiction. The fiction consists in this: a lack, based on a subjective, moral-political value judgment, of a certain legal norm within a legal order is presented as the impossibility of its application.²

Although this argument may, technically speaking, be regarded as self-deceptive, it actually contains some practical applications as its goal is to limit the temptation of judges to expand their law-making power, by telling them what they are not supposed to do, when, as a matter of fact, that is precisely what they are doing. Regarding existing legal gaps in both systems, the Italian Professor Pierluigi Chiassoni commented:

On the one hand, Civil-law theorists look at gaps as watch-repairers would. They think they have to deal with a clumsy conceptual machinery laid down by tradition and embodied in lawyers' common sense. They think their job is taking it to pieces, polishing it, and giving it back to practitioners, in a glittering, improved, shape, for everyday use. On the other hand, Common-law theorists cast on gaps the highbrow look of legal philosophy. From their perspective, gaps are just one issue of detail, among others, pertaining to what they perceive as the real, big, theoretical (and practical) issues at stake: namely, the inter-related issues concerning judicial discretion, the existence of right answers to legal problems, and law's determinacy (or indeterminacy).³

² Hans Kelsen *The Pure Theory of Law* (University of California Press, first published 1967, 2005 ed) 247.

³ Pierluigi Chiassoni, 'A Tale from Two Traditions: Civil-law, Common-law, and Legal Gaps' (Paper presented at the American-Italian Seminar on Relations between the *Ius Commune* and English Law, Facoltà di Giurisprudenza, Genova, 18-19 September 2006).

III CONVERGENCE

Now that we have seen the conceptual differences between the civil law and the common law systems, it appears to me that many of those assumptions above mentioned are no longer entirely accurate. The civil law system has changed remarkably, drawing this system nearer and nearer to the common law system. Of course, the same could be said about the common law. In other terms, these two legal systems are converging, with one embodying features of another as if the small dots of the Yin Yang were spreading out onto their opposite's fields.

Let us take a look into what is taking place in the area of criminal law in Australia and England. Statutory offences are increasingly replacing common law offences. The proliferation of statutes in Anglo-American countries has inexorably softened the judge-made character of the system.

By contrast, in countries with a civil law legal system, the role of precedents is getting more and more remarkable. There are several reasons for this. Firstly, it is important to consider the increasingly growing number of cases brought before the courts. The more numerous the cases are, the bigger the chances of stumbling over a new situation that is not anticipated by the legislation. In civil law countries, judges are expected to resolve disputes in a reasonable way. Sometimes the mere reliance on specific statutory provision is not enough for the court to reach a minimally reasonable solution.

As long as cases of this nature become more and more recurrent, superior courts will inevitably bring about legal decisions that are often voluntarily followed by the inferior courts. But even if first-level judges do not follow them, these judges' sentences may be overruled by appeal, so that deciding differently becomes useless. Besides, recent changes in the procedural

legislation have allowed Brazil's Supreme Court to bind inferior courts in certain circumstances.

Now let us get into the very core of this presentation.

IV JUDICIAL ACTIVISM

Judicial activism is a phenomenon that is increasingly growing in importance all over the world, both in common law countries and in civil law countries. It is a position taken by magistrates that stems from the substantive due process of law theory adopted by the US Supreme Court since the late 1930s.⁴ Accordingly, there are some acts against life, liberty and property that are beyond the reach of governmental regulation, no matter whether rules for their enactment were observed or not.

Justice Dyson Heydon of the High Court of Australia describes judicial activism as follows:

Using judicial power for a purpose other than that for which it was granted, namely doing justice according to law in the particular case. It means serving some function other than what is necessary for the decision of the particular dispute between the parties. Often the illegitimate function is the furthering of some political, moral or social program: the law is seen not as the touchstone by which the case in hand is to be decided, but as a possible starting point or catalyst for developing a new system to solve a range of other cases. Even more commonly the function is a discursive and indecisive meander through various fields of learning for its own sake.⁵

⁴ Robert M Cover, 'The Origins of Judicial Activism in the Protection of Minorities' (1982) 91 *Yale Law Journal* 1287.

⁵ Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 47 *Quadrant* 9.

Curiously, the American economist Thomas Sowell, an African-American conservative, reminds us that judicial activism has served in the past to legalise gross violations of human rights. He cites the notorious case of *Dred Scott v Sandford*⁶ to state the following:

It is at least equally important to recognize that neither logic nor history inevitably ties the Issue of judicial activism to a particular political or social creed ... When Chief Justice Taney said, in the *Dred Scott* case, that a black man ‘had no rights which the white man was bound to respect’, he was ruling on the basis of substantive values, not process—and so must be classed with the judicial activists, however much modern liberals might resent the company.⁷

Although this sort of exercise in judicial activism would be unthinkable today, the transformation of the due process clause from a procedural to a substantive requirement was an obvious instance of judicial activism. According to Robert Bork, the concept of substantive due process developed by Justice Taney in *Dred Scott*, ‘has been used countless times since by judges who want to write their personal beliefs into a document that ... do not contain those beliefs’.⁸ Naturally, an activist – or substantive value-based – judicial decision is not tied to any particular ideological perspective but it can serve many different political outcomes.

In the same way, Jean-Christophe Agnew stated that the US Supreme Court, during the ‘Lochner Era’, in the beginning of the twentieth century,

⁶ 90 US (19 Howard) 393 (1856).

⁷ Thomas Sowell, *Judicial Activism Reconsidered: Essays in Public Policy No 13* (Hoover Institution, 1989) 26-7.

⁸ Robert Bork, *The Tempting of America* (New York/NY: Touchstone, 1990), 31.

‘played a judicially activist but a politically conservative role’, striking down state statutes on workers’ behalf.⁹

V CRITICS

To put in another way, judicial activism today is a self-conscious school of thought whose connections with a certain ideological *Weltanschauung* is rather obvious. The so-called ‘progressists’, are broadly identified as being leftists or (in the United States political language) as liberals who believe that their ideal of justice must always prevail and that society should not dress a straitjacket in the name of their long-dead ancestors’ ideals. This argument has been convincingly refuted by Thomas Sowell, who reminds us that what is really at stake is not so much whether the change should be accepted or not, but *who* is allowed to implement it. As Sowell puts it, ‘the more fundamental question is not what to decide but who is to decide’.¹⁰

Although the arguments provided by enthusiasts of judicial activists are altogether remarkably weak, they nonetheless raise some practical problems that should not be disregarded. In fact, there are some matters that demand undisputed changes but because of some practical obstacles regarding the nature of the legislative process, they do not occur in a timely manner. That is why I have tried to outline a sketch of methodological criteria to deal with it. This is my modest attempt to rescue what is reasonable in terms of judicial activism, so that we can put away the rest and exorcise all sores carried with it.

⁹ Jean-Christophe Agnew and Roy Rosenzweig, *A Companion to Post-1945 America* (Wiley, 2006) 386.

¹⁰ Sowell, above n 6, 16.

Judicial activism is usually used as an antonym for judicial restraint. Supporters thereof use to argue that a legalist interpretation is, besides impossible, inconvenient to social interests. They believe that some legal changes cannot wait for the legislative process, which sometimes, according to them, do not meet people's aspirations in a timely and satisfactory manner.

This argument ignores – or pretends to ignore – that one of the basic postulates of politics is that *not to take a decision to change is actually to take a decision to maintain*. They speak as if maintenance were not a legitimate option, or even a valid option. Disregarding malicious intentions, it is obvious that this view is grounded in an ideology of permanent progress, so common in our current Western societies. On this basis, human history would be in a constant path towards enlightenment. Taking a look back in history, we must conclude that there are no reasonable motives for us to believe in it. There were plenty of changes that have caused a great deal of pain and suffering to peoples and that are deemed quite serious mistakes by future generations.

Judicial activism overrides the democratic debate that takes place in the proper spheres of political deliberation, taking the decision by storm. It is manifest that this attitude circumvents the democratic principle of majority rule, extrapolating the counter-majoritarian (constitutional) right of veto, which is inherent in the judicial branch. In countries ruled by the Roman-Germanic system, judicial activism becomes even more astonishing precisely because judges are explicitly forbidden by the law to create abstract and general norms.

That way of judging may also create problems concerning public budget, as mentioned by Justice Heydon.¹¹ He cites two examples of that in Australia: *Brodie v Singleton Shire Council*,¹² related to the liability of councils for defects in roads and footpaths, and *Dietrich v R*,¹³ permitting the criminal trial of a person accused of a serious offence to be stayed if that person could not obtain legal representation.

The Brazilian Government endures similar kinds of challenges. Perhaps the most notorious examples of judicial activism are the decisions ordering the government, whether at federal, state or municipal level, to pay for health treatments, even abroad if necessary, and also for the paying of any kind of medicine no matter its cost. Undoubtedly, such decisions undermine any budget planning. On the other hand, article 196 of the *Brazilian Constitution* clearly provides that healthcare must be guaranteed for every citizen by the government. That provision was adopted by virtually all Brazilian courts, but now the matter is pending a decision of the *Supremo Tribunal Federal* (Brazil's Supreme Court), which will probably decide in the same way.

But the most controversial instance of judicial activism has occurred during a recent decision by the *Supremo Tribunal Federal* involving a case related to family law. The court legalised same-sex civil unions explicitly violating the *Brazilian Constitution*. In art 226, paragraph 3, the *Brazilian Constitution* states:

Para efeito da proteção do Estado, é reconhecida a união estável entre o homem e a mulher como entidade familiar, devendo a lei facilitar sua

¹¹ Heydon, above n 5.

¹² (2001) 206 CLR 215.

¹³ (1992) 177 CLR 292.

conversão em casamento. (For the purpose of governmental protection, it is recognised the civil union (only) between a man and a woman as a family entity, thus having the legislation to facilitate its conversion into legal marriage.)

So it is quite clear in this case that the *Supremo Tribunal* has actually legislated on matters of family law, overruling a constitutional provision that was not altered by means of amendment. That decision was actually grounded in the defeated theory of the German jurist Otto Bachof about unconstitutional constitutional norm, or the supposed unconstitutionality of certain constitutional norms.¹⁴ Bachof advocated that there was a set of underlying values beneath the German Constitution (*Grundgesetz*) text, and that some less important aspects or provisions of the constitution could eventually conflict with them. In that case, the former should prevail over the latter. The German Federal Constitutional Court (*Bundesverfassungsgericht*) has emphatically rejected this kind of theory and assured the integrity of the German Constitution as well as the legitimacy of all its formal provisions.¹⁵

As for the Brazilian situation, eminent local jurists have emphatically remarked that ‘there are hermeneutic limits to keep the judiciary from turning itself into legislator (*há limites hermenêuticos para que o Judiciário se transforme em legislador*)’.¹⁶ It is certain that those limits were crossed in the same-sex civil unions case.

¹⁴ K L, ‘Review of Otto Bachof, *Verfassungswidrige Verfassungsnormen?*’ (1953) 11 *Cambridge Law Journal* 495.

¹⁵ Lênio Streck. Rafael Tomaz de Oliveira and Vicente de Paulo Barretto, *Normas Constitucionais Inconstitucionais?* *Revista Consultor Jurídico*, July 29th, 2009.

¹⁶ *Ibid.*

VI DIFFERENT KINDS OF JUDICIAL ACTIVISM WITHIN THE SAME LEGAL SYSTEM

I believe judicial activism is not definite enough for a theoretical approach, or to put it in Eric Voegelin's terms, there is not enough 'critical clarification'.¹⁷ So much in common law as in civil law, different judicial measures are equally called judicial activism. For instance: when the judiciary imposes liability to city councils for damages caused by defects in roads, it is said to be activist. The same was said when the US Supreme Court overturned California's constitutional amendment to ban same-sex marriage,¹⁸ which is completely different from the former case.

In the first situation, judges are applying general clauses of civil liability. It is not properly a usurpation of or an interference over the executive branch. The judiciary is supposed, whether in civil law as in common law, to enforce the law even against the state. What is criticised in decisions of this kind is that they promote unexpected changes that derail budget planning, and that is true, although I would not feel comfortable to say that they are completely inappropriate or deprived of reason. In other terms, in *executory judicial activism*, what is at stake is not the separation of powers, but the legal certainty, which is one of the bases of the rule of law as well.

In the Brazilian case of health treatments, we have seen that there is constitutional basis for the decisions of that kind. In the Australian case, I am not able to endorse or criticise decisions-makers' motives, but I guess that they are at least acceptable in light of some general liability principles,

¹⁷ Eric Voegelin, *The New Science of Politics: An Introduction* (University of Chicago Press, 1987).

¹⁸ *Perry v Brown*, 671 F 3d 1052 (9th Cir, 2012).

specially by culpable negligence (*culpa in omittendo, in negligendo* or *in non faciendo*).

Those cases of alleged interference in administrative affairs are what I call *executory judicial activism*, in counter position to another species I am going to talk about right after: the *legislating judicial activism*. The *Perry v Brown*¹⁹ case and the Brazilian Supreme Court's ruling on same-sex unions are good examples thereof.

I think this second type of judicial activism is more perilous and more insidious. In those cases, the judiciary is crossing the line, exceeding its powers, because it is not enforcing the law, but actually *making* the law. To some extent, it is expected from judges in the common law tradition, but it would be totally strange in a civil law context, if it was not for its approximation to the common law.

VII SUBSTANTIAL DIFFERENCE BETWEEN JUDICIAL ACTIVISM IN AUSTRALIA AND IN BRAZIL

But in what aspect do both forms of activism differ? Aristotle stated that the substance is composed by matter and form. Matter, a chaotic aspect, is what something is made of, whereas form is the thing's logical-theological scheme.²⁰ If judicial activism in common law systems must, at least nominally, involve forms and procedures, perhaps we may be allowed to say that the difference lies in the form rather than the matter. Concerning the matter, I believe that it is the same in both activisms, and the identity point should reside therein. What would that matter be? I suppose it lies in its political intent.

¹⁹ 671 F 3d 1052 (9th Cir, 2012)

²⁰ Aristotle, *Metaphysics*.

Is it mere coincidence that supporters of judicial activism in both traditions have advocated the same substantive political agenda, namely same-sex marriage, abortion, and minority rights? I am not able to find too many conservatives advocating judicial activism, not even to support the causes that are regarded as very important for them. On the contrary, conservatives are those who have stood up against judicial activism as much in countries ruled by civil law as in those ruled by common law.

I suppose that only the *executory judicial activism* is quite the same phenomenon in Australia and in Brazil. In both cases, it is based on the law of liabilities, whether specific or general. However it may cause political or administrative trouble, it is somehow the judiciary's role, in Brazil and in Australia. Maybe the only thing needed is some parsimony, for practical reasons.

But what to say about the *legislating judicial activism*? It could be said that ruling general situations is also an activity of the judiciary in the common law, so much as enforcing the law, thus this kind of activism is deemed legitimate according to the common law principles. It only raises complaints when judges rule on controversial issues, deciding autocratically what is supposed to be decided according to democratic principles, that is, by the majority's (or its representatives') suffrage. I guess nobody here in Australia would rise against or even call judicial activism precedents that formed the Australian tort law. Some may disagree with courts' wits, but virtually nobody denies their right to do so. Thus, if courts are allowed to rule on tort law, why are they not equally allowed to rule on abortion, for instance? That is a question a civil law jurist might ask.

From my point of view, as suggested above, in the common law system there is a tacit agreement by which some strictly juridical or technical subjects are left to the courts' discretion, whereas controversial or political-biased issues are decided by the people, according to democratic principles. That appears to me a wise formula, except for the fact that the very judiciary is the one which is going to decide what is going to be ruled by itself. This has an inconvenience of a judge judging in his own cause, a situation that John Locke used to advise against.

Anyway, if there are no express limits or definite criteria to determine what judges can rule, then this also means that they are not technically exceeding their powers. Unwritten traditions such as the common law exhibit this kind of fragility.

On the other hand, in the civil law, as said elsewhere, judges are not supposed to rule on general situations, and it is expressly written in legal documents. Judges are altogether bound to concrete cases submitted to them and their wits are not binding on other judges. Thus, the legislating judicial activism subverts the whole system in the civil law. It is not about pushing a vague line in a tacit gentlemen's agreement. It is about actual usurpation of power, no matter how many moral, political, ideological alleged arguments one may posit on its behalf. So, what would be called 'activism' in common law, in the legislating sense, could perfectly be called 'abusism' in civil law.

The great paradox is that whereas the application of judicial activism in civil law countries have approximated them to the common law, the application of judicial activism in common law countries is said to substantially depart it from their own legal tradition! One may therefore conclude that they cannot be the same phenomenon. How can something

steer others in one direction and against it at the same time? Identity is possible only at one or some aspects.

VIII ACTING LEGITIMATELY

Democracy entails submission to the majority's will. And, except for some eccentric personalities, this regime is accepted and desired both in common law and in civil law countries. Thus, the adoption and the maintenance thereof is an undisputed point.

The legitimacy of a legal system and its footstools lies on their accordance to democratic principles. Any kind of judicial review will face, in some degree, the counter-majoritarian dilemma, but some kinds thereof are deemed acceptable in light of democratic principles, others are not. Modern democracies learnt to live with it, because it can usually solve problems brought by flaws of the representative system.

Constitutionalism also taught us that there is a set of basic rights – civil rights in Australia; fundamental guarantees or rights in Brazil – that must remain untouchable, no matter what the majority says, directly or by its representatives. That marks Hans Kelsen's historical victory over Carl Schmitt.

Thus, democracy, such as it is understood today, is much more than the more-than-a-half simple formula. One might argue that this way too complicated formula is an artificial mental apparatus, but would it not apply to the simple model? As widely demonstrated by the French Philosopher Bertrand de Jouvenel,²¹ both are far-fetched, but the former is more sophisticated.

²¹ Bertrand de Jouvenel, *Du Pouvoir: Histoire Naturelle de Sa Croissance* (Hachette, 1972).

Furthermore, those forms of majority restraint are not completely contradictory with the majority's will. If one observes carefully, he or she will find that any individual has several layers of opinions and desires which frequently contradict each other. It can be said about individuals, let alone collectivities.

Concerning *executory judicial activism*, so much in common law and as in civil law countries, recommendations and suggestions must be addressed to the executive or legislative branch – the one responsible for the government expenditure. If some liability is foreseeable for any governmental action or omission, this must be taken into account during budget planning. Of course that judges should seek to ease so much as possible the disastrous effects on public finances, protracting terms or permitting alternatives, but the individual's rights cannot be dismissed. We are not at the *fait du prince* era anymore, when the state was not chargeable for its acts.

On the other hand, if courts convert the state into a universal insurer, they will be changing tort law significantly. Thus, we are not before the *executory judicial activism* anymore, but before a case of *legislating judicial activism*.

Concerning these methods of judicial activism, I understand that in the common law the judiciary may have the power to improve the law. By comparison, in the civil law system a general ruling or an innovation of the law by the judiciary to adapt the law to the changing needs of society may be deemed a violation of the doctrine of separation of powers.

Despite those differences, *legislating judicial activism* should be confined to consensual changes, so much in civil law as in common law countries. In both systems, the virtual consensus – a perfect consensus is impossible – repels the possibility of abuse of the judiciary's counter-majoritarian

prerogative. So, if there is no way for the subject to be decided otherwise in the proper instance, there will be no risk of circumventing or violating the democratic principle. It does not matter if procedural rules were not respected because their purpose was achieved.

The expectation of the majority is not enough to legitimise judicial activism. It would make no sense for a judge to mentally simulate a plebiscite. On the other hand, the honestly presumed consensus entails the certainty that majority rule is not being damaged or violated. This attitude meets what the American philosopher John Rawls called ‘overlapping consensus’²².

Rawls tried to reach some basic supra-moral grounds for democracy’s exercise. I believe this pursuit of Kantian universal standards is done in vain, if our goal is to achieve an objective criterion to identify reality, which may be rather useful if taken merely as a practical technique. In other words, Kantian – and, accordingly, Rawlsian – methods may be quite hazardous or innocuous if taken in the dimension expected by their formulators. But if we manage to narrow their scope, such methods can actually be good instruments to deal with significant matters of practical justice.

It is important to be clear, however, that what meets the Rawlsian ‘overlapping consensus’ is the previous decision to only submit to judicial activism the matters that are virtually consensual, not every concrete decision. The overlapping consensus would take place only to provide room to questions of unquestionable social consent.

²² John Rawls, *A Theory of Justice* (Harvard University Press, 1971).

As for the solution for legal gaps, the method exposed here would be meta-judicial in nature. It would nonetheless be an inoffensive juridical concession to a necessarily practical convenience. Thus, urgent aspirations for legal change would be quenched without putting at risk the very integrity of the entire judiciary.

That attitude is what I call *turning the overlapping consensus into an actual consensus*. In other terms, we put aside some procedural rules on behalf of their very goal, which consists of maintaining and strengthening the democratic principle. On the other hand, if the change is controversial, the judiciary must abstain to implement it and leave the door opened for the people to decide.

Let us take a look at the *Perry v Brown*²³ case. When the US Supreme Court held that the Californian constitutional amendment, passed by ballot, was unconstitutional before the US Federal Constitution, it denied to the entire American people the right to decide differently. This understanding is based on the constitutional value of liberty, but it overlooks the equally important value of popular sovereignty. Which one must prevail? It is not up to me to arbitrate which one is more important, but it seems clear that referring to same-sex marriage as an expression of liberty is a verbal contortion, even out of an originalist interpretation. This sort of judicial manipulation can be quite an easy exercise. Every claim can be fit in a constitutional substantive value. One could claim for instance the right of walking naked on the street grounded in the right of liberty, which would contravene *Criminal Code (WA) s 203*.

Basing decisions on a virtual consensus, we can avoid those silly and tricky sophisms and dodge from interpretation discussions because it was as if the

²³ 671 F 3d 1052 (9th Cir, 2012).

majority decided. It is not about construing legal texts anymore: it is about choosing. Judges are not allowed to choose in our names, but if a virtual consensus does exist, what would be the harm?

IX CONCLUSION

It seems to me that a judicial activist ruling, to be deemed lawful in light of the principle of separation of powers, and legitimate in light of the democratic system, ought to be virtually consensual. Apart from the losing party's opinion, such ruling should therefore substantiate a decision that must be accepted by virtually the community as whole. In that situation, there would be no abuse of the court's counter-majority (and constitutional) prerogative. The idea is difficult to define but easy to apply, and somehow tautological.

Judicial activism reaches for the limbo where the boundaries separating the branches of power are evanescent. And sometimes it tries to stretch them unlawfully. Since judicial activists hold a different worldview as in relation to supporters of judicial restraint, some democratic values or principles may be put aside on behalf of other values that are more estimated by the former group. That posture does not fit in the 'overlapping consensus' concept brought up by the American philosopher John Rawls, without which democracy may be not possible. Accordingly, if we want to preserve democracy, we must first abandon values that are based on democracy's fragilities and then support what is grounded in its intrinsic virtues. In order to attain that, judicial review must be used parsimoniously: it is the remedy for the sores of democracy that can kill the patient if excessively administered.

To conclude, the judiciary is the branch that traditionally must restrain its own power on behalf of the others because it always has the last word in

matters of legal interpretation and adjudication. Judges need therefore to be extremely scrupulous. Otherwise, the entire institutional building is in jeopardy, risking being demolished by a still unknown but presumed spooky monster: the rule of judges rather than the rule of law or, in other words, the tyranny of the judiciary. And who on earth would benefit from it? Certainly the members of the small judicial elite and all those who make up the judges' minds.