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Between Strict Legalism and Judicial Activism

Osayd Awawda[*]

In 1915, the Hon Sir Owen Dixon was sworn in as Chief Justice of Australia. On that occasion he said: "It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no safer guide to judicial decisions in great conflicts than a strict and complete legalism." In response, this paper argues that judges do not adhere to the Hon Sir Dixon's view that strict legalism is the safest guide for judges. The paper avers that judicial activism is currently the norm and there is no room for complete legalism in the modern state's judiciary. The paper explains the reasons behind the current drift from Hon Sir Dixon's view. Then, it demonstrates the current situation of judicial activism as the norm in the judicial practice, and lastly justifies the absence of a place for complete legalism in the modern state's judiciary.

Introduction

In 1915, the Hon Sir Owen Dixon was sworn in as Chief Justice of Australia. On that occasion he said: "It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no safer guide to judicial decisions in great conflicts than a strict and complete legalism."[1]

Many criticisms of the Dixonian principle had been delivered against it. This principle was included in his Honor's former speech, that complete legalism is the safest path for judges in controversial issues to stay reliable. One of these critics claimed that either the Hon Sir Dixon's view is naïve, or it is a "noble lie intended to hide the obvious freedom open to judges when they decide cases".[2] Another saw his view as a belief that judges are obliged to use common law principles as the only external source for their decisions' legitimacy, rather than their opinion about what the law should be.[3]

Judicial Activism is considered the opposite of the complete legalism described above by the Hon Sir Dixon. However, the term is very controversial, and a lot of attempts had been done in order to define it, but for the purpose of this paper, judicial activism is "the

[*] Assistant Professor, Faculty of Law and Political Science, Hebron University, Palestine. E-mail: osayda@hebron.edu

[1] Sir Owen Dixon (1965), *Jesting Pilate: And Other Papers and Addresses,* p. 247, Law Book Co.

[2] John Gava (2010), "Dixonian Strict Legalism, *Wilson v Darling Island Stevedoring* and Contracting in the Real World", *Oxford Journal of Legal Studies,* Vol. 30, No. 3, p. 519.

[3] James Allan (2012), "The Three 'Rs' of Recent Australian Judicial Activism: Roach, Rowe and (No) 'Riginalism'", *Melbourne University Law Review,* Vol. 36, No. 2, p. 743.

conscious development of the common law according to the perceptions of the court as to the direction the law should take in terms of legal, social or other policy."[4] In fact, judicial activism is playing a tremendous role in the contemporary judicial entities.

I argue that judges do not adhere to the Hon Sir Dixon's view that strict legalism is the safest guide for judges. Moreover, I argue that judicial activism is currently the norm and there is no room for complete legalism in the modern state's judiciary.

First, I will explain the reasons of departing from the Hon Sir Dixon's view. Then, I will demonstrate the current situation of judicial activism as the norm in the judicial practice. Lastly, I will elucidate the absence of a place for complete legalism in the modern state's judiciary.

Safeness and Excessive Legalism

The Allocation of Legislative Power

In theory, democratic regimes should have a rigid separation between the powers of the state, especially the biggest two powers which are the judicial power and the legislative one. In practice, this solid separation is impossible, because in the modern state's structure, the legislature produces the majority of the rules that govern people lives.[5] In fact, the legislative power is not completely vested in the legislature, but this power is partially allocated to other branches.

That allocation is required for the applicability of the collaborative functions between these powers of the state. Judges and other judicial actors are obliged to fulfill the fairness and justice between all litigants in disputes. The pre-existing rules sought, supposedly, to apply that fairness.[6]

Judges correctly assume that the legislators could act inappropriately,[7] or refuse to act in the appropriate way. At that moment, judges' duty of fulfilling the fairness pushes them toward interfering in the jurisdiction of the legislative power. The justification of this interference is modifying the legislation to fulfill that fairness. This justification is acceptable because the separation between powers cannot be solid or rigid. In fact, this separation is collaborative to apply the justice between all litigants.

Constitutional courts had been established in order to solve the dilemma of conflicted opinions between the judges and the legislators. Judges in these courts must settle the dispute and give a clear adjudication about the conflict between the legislative power and the judiciary one. These judges use the constitution itself to settle that

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[4] CJ R S French (2009), "Judicial Activism – The Boundaries of the Judicial Role", November 10, available at https://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj10Nov09.pdf

[5] John Ferejohn (2002), "Judicializing Politics, Politicizing Law", *Law and Contemporary Problems,* Vol. 65, No. 3, p. 48.

[6] Frank Carrigan (2013), "The Trivial Nature of Strict Legalism", *Oxford University Commonwealth Law Journal,* Vol. 13, No. 1, p. 1.

[7] *Ibid.,* p. 3.

dispute.[8] However, constitutional courts do not practice negative actions only, striking down unconstitutional legislation for instance. In fact, constitutional courts interpret the constitutional norm and the legislative one, and then these courts show the contradiction between them both.[9] At the end, these courts act positively by modifying the legislation to the *proper limit* in order to make it fit with the constitution.[10]

When judges act in quasi-legislative manner, modifying legislation for instance, they need to offer reasonably justified arguments for their action. Because they are not elected by the people as the parliament, judges obtain their reliability by offering these arguments.[11] For example, when they strike down an Act, they must demonstrate the inconsistency between this Act and the related constitutional provision. In fact, the parliament would be aware of the constitution while enacting any legislation. So the parliament would hardly accept different interpretations of the constitutional provisions done by the judges. However, the parliament has no choice but respecting the decision of those judges, because judges claim justice and fairness as the aim of their ruling.[12] It is inevitable that judges do not interfere in the legislative power, because legislature is fallible. As a result, they will be judicially active seeking fairness, and they will not be able to avoid that by being completely legalistic.

The Response to Political Factors

The judges' ability to legitimatize their interpretations is the core element of their judicial activity. Stripping them of that ability, by asking them to be completely legalistic, will negatively impact the people. Without judicial observation, political agendas will find their way to the legislation enacted by the parliament.

The federalism in Australia, as in other federal countries, fragments the political influence between actors, who are mainly the Australian parties.[13] No matter how much these parties are well-organized and effectively self-discipline, the area for overlapping and conflicting will still exist. That area can be cleaned from disputes by the interference of judicially active judges. As a result of that interference, parties will be able to coordinate their action between each other.[14]

The parliaments' composition depends on the outcomes of the elections between political parties. Consequently, any argument to adopt or propose legislation will be

[8] John Gava (2003), "Another Blast from the Past or Why the Left Should Embrace Strict Legalism: A Reply to Frank Carrigan", *Melbourne University Law Review,* Vol. 27, No. 1, p. 186.

[9] *Ibid.,* p. 188.

[10] John Gava (2004), "Is Strict Legalism the Answer?", *Law Society Journal,* Vol. 42, No. 3, p. 101.

[11] *Ibid.,* p. 102.

[12] John Gava (2009), "Sir Owen Dixon, Strict Legalism and *Mcrae v Commonwealth Disposals Commission*", *Oxford University Commonwealth Law Journal,* Vol. 9, No. 2, p. 141.

[13] David L Weiden (2011), "Judicial Politicization, Ideology and Activism at the High Courts of the United States, Canada and Australia", *Political Research Quarterly,* Vol. 64, No. 2, pp. 1-2.

[14] Kenneth P Miller (2013), "Defining Rights in the States: Judicial Activism and Popular Response", *Albany Law Review,* Vol. 76, No. 4, p. 20.

constructed on the ideology of the political party of the parliament member who proposes that legislation. Parliament members keep in their minds justifying that proposition to people who are subject to that legislation.[15] This fact of justification produces a chain of accountability amongst members from other parties. Additionally, quasi-bargaining process takes place in the legislating process between parties to fulfill their needs.[16]

As a result of that quasi-bargaining process, maltreated individuals have no choice but to seek help from judges rather than parliament members. These individuals ask judges to use their authority to strike down, or at least modify the legislation to protect these individuals' rights. These individuals see the courts as venues where significant values are protected from political abuse. In reality, courts, particularly the constitutional courts, were the only actors who could protect civil rights and other fundamental needs from political influence. The rapid acceptance of constitutional judgments which provide sufficient protection for human rights issues in Italy, Germany, and whole Europe are typical instances.[17] This success diminished the opposition to judicial activism, because the judges proved their efficient role in protecting people's rights from the predominance of the legislative power, and relatedly the executive one.[18]

The constitutional courts showed increasing willingness to expand the circle of protection by the support of popular acceptance. This circle reached rights for specific categories, prisoner for instance. In the same time, the dominant political parties started to consider these courts as anti-majoritarian and overriding their jurisdiction.[19] However, communal distrust of legislators who were completely loyal to their parties resulted in massive confidence in the last hope, which was the constitutional court.[20] This court used its judicial activism to take the obstacles down, and to offer the required protection for the people.[21]

The Judicial Regulation

The fact that there are judicial regulations seems to be rejected the first time, because in theory, all legislative authorities must be vested exclusively in the parliament. However, in practice, judges regulate indirectly when they make a decision that is based on their interpretation of the constitutional provisions. For example, limiting the effect of legislation or expanding its scope is factually a modification of that legislation. This modification is similar to what the parliament could do in respect of

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[15] *Ibid.,* p. 26.

[16] Ran Hirshel (2006), "The New Constitutionalism and the Judicialization of Pure Politics Worldwide", *Fordham Law Review,* Vol. 75, No. 2, pp. 721-723.

[17] C Rodriguez-Garavito (2011), "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America", *Texas Law Review,* Vol. 89, No. 7, p. 16.

[18] Shannon Ishiyama Smithey and John Ishiyama (2002), "Judicial Activism in Post-Communist Politics", *Law & Society Review,* Vol. 36, No. 4, p. 719.

[19] G R Stone (2011), "Selective Judicial Activism", *Texas Law Review,* Vol. 89, No. 6, p. 14.

[20] *Ibid.,* p. 18.

[21] *Supra* note 3, p. 743.

any legislation. As a result, the gray area between the judiciary power and the legislative one is veritable. Constitutional courts use their interpretation authority to solve *conflicting* rules governing that area.[22]

What makes the judicial regulation process more real is the fact that the judges of the constitutional court are not elected, but they are appointed by the parliament and the government.[23] The possibility of appointing *ideologically-wrong* judges could be the end of some political parties' agendas. As a result, the government and the parliament carefully choose judges who are expected to be more active in establishing constitutional doctrines that protect the parties' interest. In fact, parties of the parliament and the government want to have the judicial help, especially when they get trapped in a controversial issue.[24] The parties will delegate that issue to the judges in order to avoid the blame established through the negative impacts of that decision. For example, a conservative government prefers to appoint conservative judges, because it will delegate controversial issues to them. This delegation will help that conservative party to keep itself away from clashing with other parties.[25]

As a result of the fear from unpredictable strike down of legislation, legislators adopt a legislating process similar to the process of adjudication in the courts. The legislators go through all tests that the judges would apply on the legislation to examine its constitutionality.[26] Therefore, judges participate in constructing normative rules, and binding guidelines in respect of the enactment of legislation. Consequently, the judges become de facto *constitutional legislators*.[27]

Requesting judges to be legalistic means, on the flip side of the coin, requesting them to have no ideology at all, or at least being completely impartial and away from their beliefs' influence on their decision.[28] This kind of judges exists only in the fantasy of naïve parliament members. Judges are humans, and no one of them receives the litigants' arguments openly as litigants put it before the bench.[29] Judges, by claiming their duty, will behave in a legislative manner where the parliament had to do so. Moreover, decision-justification process helps the judges bridging the gap between the law how it is, and the law how it ought to be.[30]

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[22] Keenan D Kmiec (2004), "The Origin and Current Meanings of 'Judicial Activism'", *California Law Review,* Vol. 92, No. 5, pp. 1441-1447.

[23] *Supra* note 16, p. 25; Justice Thomas R Lee (2013), "Judicial Activism, Restraint and the Rule of Law", *Utah Bar Journal,* Vol. 26, No. 6, p. 12.

[24] *Ibid.*, p. 16.

[25] *Supra* note 13, p. 42; *Supra* note 23, Justice Lee (2013), p. 26.

[26] *Ibid.*, p. 28.

[27] *Ibid.*, p. 31.

[28] Ian Barker (2005), "Judicial Activism in Australia: A Perspective", *Australian Law Journal,* Vol. 79, No. 12, p. 783.

[29] Suzanna Sherry (2016), "Why We Need More Judicial Activism", *Constitutionalism, Executive Power, and the Spirit of Moderation,* Vol. 16, p. 449.

[30] *Ibid.*

The Status of Legal Activism

Factors of Judicial Activism

As a norm, judicial activism has establishment factors. Where these factors exist, the judicial activism will come to the surface. It is important to assert that judicial activism is primarily the judges' excessiveness of predicted borders in the process of solving disputes that occurred in critical areas. As a result, the existence of these factors will sufficiently cause judicial activism to be the norm. Mainly, the factors of judicial activism are institutional features, judicial behavior, and political determinants.

Starting with the first factor, the institutional features mean the independent abilities of the modern state's judiciary. The courts nowadays are recognized globally as the entities that need independence the most.[31] This need is related to the function of the courts itself, which is solving disputes according to the law. These independent abilities themselves initiate the judicial activism.[32]

Those abilities help judges in defending rights claimed to be violated by legislation. In other words, the rights awareness by the people encourages judges to be more active.[33] People litigate legislation affecting their rights, so the response of the judges will be reviewing these legislations according to the request of the people.[34] Moreover, the integrations between civil litigations and constitutional provisions lead all courts to engage in the discussion of the constitutionality of legislation. This fact helps judges to avoid requiring standing in claim related to constitutional violations.[35]

Moving to the second factor, judicial behavior means the judges' increasing willingness to interfere in the public-policy making process.[36] Judges interfere with quasi-governmental manners, while covering their interference by the judicial authority.[37] Judges achieve that interference implicitly, rather that explicitly as politicians do.[38] The reason of that increase is the hunger of power to enhance the judiciary's authority, independence, and influence.[39] These enhancements are used to face other

[31] Justice Michael Kirby (2006), "Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming to Duty", *Melbourne University Law Review,* Vol. 30, No. 2, p. 576; and A Grimmel (2012), "Judicial Interpretation or Judicial Activism? The Legacy of Rationalism in the Studies of the European Court of Justice", *European Law Journal,* Vol. 18, No. 4, p. 518.

[32] K Ahmed (2012), "Judicial Activism in Bangladesh: A Golden Mean Approach", *Icon-International Journal of Constitutional Law,* Vol. 11, No. 2, p. 547.

[33] Ariel L Bendor (2011), "The Relevance of the Judicial Activism vs. Judicial Restraint Discourse", *Tulsa Law Review,* Vol. 47, No. 2, p. 331.

[34] F B Cross and S A Lindquist (2007), "The Scientific Study of Judicial Activism", *Minnesota Law Review,* Vol. 91, No. 6, p. 1752.

[35] *Ibid.,* p. 1756.

[36] P J DeMuniz (2012), "Overturning Precedent: The Case for Judicial Activism in Reengineering State Courts", *New York University Law Review,* Vol. 87, No. 1, p. 1.

[37] *Ibid.,* p. 8.

[38] S Evans (2008), "Governing with the Charter: Legislative and Judicial Activism and Framers' Intent", *Canadian Journal of Political Science,* Vol. 41, No. 2, p. 521.

[39] *Ibid.,* p. 524.

policymaking bodies in the integrated structure of powers in the modern state.[40] Therefore, judicial activism would be wrongfully understood if it is seen operating in a purely procedural tunnel.[41] In fact, courts are not separated from concrete social views and national norms, especially the views of the importance of rights' discourse.[42]

Finishing with the third factor, political determinants are the fragmenting elements in the structure of the policymaking process between the political powers.[43] Maneuvers and conflicts between political parties are typical instances for these determinants.[44] As a result of this fragmented sphere, the judges become more trustworthy by non-dominant parties, so these non-dominant parties directly head to those judges in order to obtain the constitutional protection they need. This protection is likely to be offered under the cover of judicial responsibility, which by turn is based on judicial activism. In a word, the more dysfunctional the political parties are, the greater the courts assert their position to remedy the effects of such political weakness.[45]

The Australian Context

In Australia, two recent cases show that judicial activism has become the norm, and using interpretative techniques is the judging approach. These cases prove that the judges departed from the alleged complete legalistic function toward a more mature understanding of the nature of the role of the modern state's judiciary, particularly the judiciary's existence in a rapidly evolving global legal system. The first case is *Roach vs. Electoral Commissioner* ('*Roach*') in 2007,[46] and the second one is *Rowe vs. Electoral Commissioner* ('*Rowe*') in 2010.[47]

In *Roach*, prisoners' right to vote was examined, and four of six judges struck down statutory provisions that prohibited all prisoners serving a full-time punishment from voting in federal elections.[48] The majority decided that disqualifying all prisoners from voting was unconstitutional, while the previous legislation that disqualified prisoners serving punishments of three years and above was consistent with the constitution.[49]

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[40] George Gilligan (2014), "Whistleblowing Protections and Judicial Activism in the US Supreme Court", *Law & Financial Markets Review,* Vol. 8, No. 1, p. 4.

[41] *Ibid.,* pp. 6-8.

[42] G R Stone (2012), "Citizens United and Conservative Judicial Activism", *University of Illinois Law Review,* p. 485.

[43] *Ibid.,* p. 486.

[44] M K B Wambali (2009), "The Enforcement of Basic Rights and Freedoms and the State of Judicial Activism in Tanzania", *Journal of African Law,* Vol. 53, No. 1, p. 34.

[45] *Ibid.*

[46] (2007) 233 CLR 162.

[47] (2010) 243 CLR 1.

[48] *Supra* note 3, p. 750.

[49] *Roach* (2007) 233 CLR 162, 68.

In *Rowe*, the time to prevent applicants from being listed in the electoral rolls was examined. Four of seven judges struck down statutory provisions that stripped eligible voters of the right to ask for being listed after seven days of the closure of the electoral rolls.[50] The judges declared that this seven-day grace is a constitutional entitlement to those who were obliged to submit an enrolment claim.[51]

These cases are typical examples of judicial activism. They were based on the following assumption: judges, who are unelected officials, are entitled by the constitution itself to use their interpretations of it to change legislation, in order to make that legislation consistent with the judges' understanding of that constitution. As a result, judges were holding the constitution in their hands as a shield against any claim of exceeding their jurisdiction, or alleging predominance over the legislative power.[52] The judges justified changing the legislation, which was produced by the elected representatives of the people, by the constitution itself.[53]

Judicial activism in both cases established a new understanding of the rule-of-law principle.[54] Judges declared that their interpretations of the constitution suggested changing the enacted legislation. In fact, judges' understanding of the rule-of-law principle did not contain the availability of pre-existing rules to resolve disputes. Judges indicated that these pre-existing rules were unconstitutional.[55]

James Allan perfectly concluded the implications of these two cases regarding unavoidable judicial activism when he said:

> After Roach and Rowe, what form of words—however clear—would ever leave you confident latter-day judges might not inflate them or redirect them or apply them to some purpose neither you nor any other people voting 'yes' in a section 128 referendum (indeed none of those involved in drafting the words either) intended?[56]

The Separation of Power

Constitution-makers strictly apply the separation of powers doctrine in writing any kind of constitution. They believe that it is the best way to protect and enhance the balance between the functions of the state. In fact, those writers are politicians in the first place, and the ideas they adopt are related to the future of the factions in the state themselves. When they write constitutions, they want to make sure that the victorious parties will not be provided with unlimited capabilities that could marginalize other

[50] *Rowe* (2010) 243 CLR 1, 93.

[51] *Supra* note 3, p. 770.

[52] *Rowe* (2010) 243 CLR 1, 76; *Roach* (2007) 233 CLR 162, 67.

[53] *Rowe* (2010) 243 CLR 1, 80; *Roach* (2007) 233 CLR 162, 92.

[54] Dyson Heydon (2004), "Judicial Activism and the Death of the Rule of Law", *Otago Law Review*, Vol. 10, No. 4, p. 493.

[55] *Ibid.*, p. 496.

[56] *Supra* note 3, p. 780.

competitors in the political domain. They want to make sure that when any faction wins the election, it will not oppress the non-dominant factions in the state. To solve that dilemma, constitutional courts were established to provide non-dominant factions with the sufficient protection they need before dominant factions.[57]

When different parties have different views toward what the government should do, conflicts arise in front of the constitutional courts. The constitution gives that court the complete jurisdiction to solve such conflicts. However, what the court should do is subject to the interpretation of these provisions by the judges themselves. Therefore, once again, the court can establish the *proper* decision as to how it thinks. This court is an umpire between two litigants, and they already accepted its authority as that.[58]

The practicality of the constitutions requires limited incorporation between the powers of the state, rather than a rigid separation. The aim of such incorporation is to create a collaborative role between these powers. That requirement is fulfilled by establishing a gray area between each power's borders. However, this gray area is subject to different understanding and interpretations. Therefore, it is the area where the critical conflicts occurred.[59] Consequently, courts are able to use their discretionary authority to differentiate between how parties comprehend that gray area and how it should be comprehended from the courts' perspective. This ability allows the courts to strike down statutory provisions or upholding them.[60]

Like all federal states, Australia has more gray areas in its constitution than non-federal states, as the constitution-makers need to allocate jurisdictions between federal entities and regional ones. Courts are able to interfere further to adjust relationships between the powers of the state vertically between those entities.[61] Court interference is limited to resolving disputes with respect to these constitutional gray areas.[62] As a consequence, courts gain even more support from being the sole player in this adjustment process, and their justifications are easily accepted.[63]

The Possibility of Ultimate Legalism

The Judicial Ideology

Ideology is a fundamental component in the judge's understanding of law. The definition of ideology has been and still is a matter of controversy, especially in the context of the two contradicting norms: judicial activism and complete legalism. This is because judges make their decisions based on what they believe law demands,

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[57] *Supra* note 44, p. 34.

[58] *Ibid.*, p. 38.

[59] M S Williams (2011), "Measuring Judicial Activism", *Journal of Politics,* Vol. 73, No. 3, p. 960.

[60] *Ibid.*, p. 967.

[61] *Ibid.*, p. 970.

[62] C R Yung (2011), "Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts", *Northwestern University Law Review,* Vol. 105, No. 1, p. 33.

[63] *Ibid.*, p. 40.

whereas this belief is based on their own ideological understanding of the theory of law. In this legal sense, an ideology is 'a systematic scheme of ideas, usually relating to politics or society, or to the conduct of a class or group, and regarded as justifying actions, especially one that is held implicitly or adopted as a whole and maintained regardless of the course of events.'[64]

Consequently, judges who use their scheme of legal ideas to justify their decisions are considered ideological judges.[65] As a result, all judges are ideological, because every judge has both legal scheme and duty to justify his decision by reasoning. This fact hinders the possibility to differentiate between ideologically legalist judges, and ideologically activist judges. Take the use of the discretion power to choose between suitable options as a standard, you will find that both of legalist and activist judges will rely respectively on their ideology to choose the best option. In that since, they are equal and any differentiation is hardly accepted,[66] because each one of them adopts a specific method. In the same time, both of them act consistently with the law.[67]

Judicial activism in that sense becomes inevitable, and all self-restraint approaches are exposed as de facto activist approaches.[68] The ideology influences the decision-making process whether the judges were aware of that fact or not.[69] Courts are venues to solve legal issues and answer questions related only to the law.[70] However, because law regulates all relationships including those between parties and people, any question of law is partially political. Courts will drift to answer political questions presented before them, implicitly by alleging the self-restraint approach, or explicitly by claiming the authorization of the constitutional principles to do so.[71]

One of the most important features of the judicial ideology in the judicial activism context is the multidimensional feature. It means that judges may adopt different and sometimes contradicting ideologies in various situations.[72] For example, a conservative judge could use a liberal approach in a case, and may also adopt a moderate approach in another.[73] This change happens according to his understanding of what the law requires in a specific situation. This fact is supporting the view of the inevitability of judicial activism in the modern state's judiciary, because it proves that the judges' understanding of law is not separated or isolated from the social values and communal

[64] John Simpson and Edmund Weiner (1989), *Oxford English Dictionary*, p. 385, 2nd Edition, Clarendon Press.

[65] Mary Ziegler (2012), "Grassroots Originalism: Judicial Activism Arguments, the Abortion Debate, and the Politics of Judicial Philosophy", *University of Louisville Law Review*, Vol. 51, No. 2, p. 201.

[66] *Ibid.*, p. 209.

[67] *Supra* note 29, p. 449.

[68] *Ibid.*, p. 448.

[69] *Supra* note 23, Justice Lee (2013), p. 18.

[70] *Ibid.*, p. 17.

[71] *Supra* note 31, Grimmel (2012), p. 520.

[72] *Ibid.*, p. 524.

[73] *Supra* note 34, p. 1756.

preferences.[74] As humans, judges' understanding of law is changing overtime, leaving no guarantee for steady ideological approach for those judges.[75]

The Triadic Legitimacy

A fundamental need of dispute resolution entities is what we call the triadic legitimacy. It means the structure of dispute resolution process which gives legitimacy for judges' decisions. This structure consists of: disputant A, his rival disputant B, and the judge. This structure gives judges the ability to produce compulsory orders. In other words, both disputants have conflicting needs and requests comparing to the other before the court. Therefore, it is logically impossible that both needs are able to be fulfilled by the judge's decision at the same time. Disputants come to the court, which enjoys a reliable reputation, asking it to declare one of them as a winner, and consequently, the other as a loser. This triadic structure is the main source of the judges' legitimacy to rule in such disputes.[76]

However, when judges make their decision, the structure immediately changes from triadic to dyadic. If judges declare A as a winner, then Judges and A become on one side facing B on the other side, and vice versa. Accordingly, the shift from triadic structure before the declaration of the decision to the dyadic structure after the decision threatens the legitimacy that the court has as, supposedly, impartial and neutral umpire in the dispute.[77]

To avoid losing that required legitimacy, courts use the normative defense and the secured compliance as techniques to fulfill that aim. Moreover, they use them to stay trustworthy in the eyes of both litigants and people affected by the courts' decisions.[78]

In the first technique, the court uses the pre-existing norm to defend its position, and to show itself as completely adhering to the laws of the state. When the solution seems reasonably fair and applicable, both parties will obey the rule of that court. But, what would the court do if it does not have such a norm when the claims are completely contradicting?[79]

In the previous situation, the court does not have a common area of acceptance between the parties interests, the parties completely refuse and attempt to mediate between them, and each party want the full cake and nothing less. In that case, the court will use the second technique, by switching toward its ability to give both parties persuasive justifications behind the lines of the strict legal rules. The court does that in order to maintain its legitimacy and reputation in front of affected individuals.[80]

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[74] *Supra* note 59, p. 962.

[75] *Ibid.*, p. 968.

[76] Alec Stone Sweet (1999), "Judicialization and the Construction of Governance", *Comparative Political Studies,* Vol. 32, No. 2, p. 155.

[77] *Ibid.*, p. 158.

[78] *Supra* note 4, p. 155.

[79] *Supra* note 33, p. 334.

[80] A Wiesbrock (2013), "Political Reluctance and Judicial Activism in the Area of Free Movement of Persons: The Court as the Motor of EU-Turkey Relations?", *European Law Journal,* Vol. 19, No. 3, p. 425.

Being completely legalistic in the triadic structure will lead the court to lose its reputation as an impartial judge, and will terminate its legitimacy as dispute resolver, because that legalistic approach will give one disputant everything and the other will get nothing at all.[81] Moreover, there is no way to use the technique of secured compliance without being an activist judge, because these justifications are behind the rules of the law, but in the same time in the jurisdiction of the interpretative instruments that judges have.[82]

The Rule Making

When judges want to resolve a dispute, especially a dispute related to constitutional provisions, they must discuss at least three issues: first of all, the nature of the dispute, by giving their understanding of the dispute including its reasons and implications; secondly, the main arguments of each disputant, because each one of them has different view how the law should be understood and accordingly applied; and thirdly, how the law should be applied from the judges' perspective. What is really important about these issues is the last one, because judges explain other issues in light of it, and not the opposite.[83]

Explaining all aspects of the dispute by using their understanding of the law means that judges in fact make the rule, not apply it.[84] To elaborate more, if judges use the interpretation provided by one of the disputants, the outcome will be different from the judges' way of explanation. Therefore, the same rule could give different outcomes based on the perspective used to interpret that rule. As a result, rules do not contain their definite outcome inside them, but judges construct their outcome using their authority as dispute resolvers. Accordingly they make the rules by deciding how these rules should be applied.[85]

In fact, judges make rules twice. The first time when they make a decision that is binding over particular disputants, and sometimes with a retrospective nature. This decision will become the constitution of the disputants in respect of that dispute. The second time is when judges justify their decisions.[86] In this time, judges establish general rules deriving them from legal principles to assert the correctness of that decision. While the first type is limited to the disputants, the second is abstract and should apply to all similar situations, only if the similarities are sufficient for that application, which also decided by the judges themselves.[87]

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[81] *Supra* note 18, p. 727.

[82] *Supra* note 14, p. 22.

[83] *Supra* note 32, p. 549.

[84] *Supra* note 36, p. 7.

[85] *Supra* note 38, p. 523.

[86] *Supra* note 22, p. 1443.

[87] John C Reitz (2009), "Toward a Study of the Ecology of Judicial Activism?", *University of Toronto Law Journal,* Vol. 59, No. 2, p. 186.

Based on the above, judicial activism is happening in every time a judge makes a decision.[88] In contrast, a judge who claims that he is completely legalistic suffers a serious problem in understanding the judicial-decision making process.[89] His complete legalism, if factually adopted, will prevent him from making particular rules to lead the disputants, or general rules to justify his decision.[90]

Common law, like any legal system, has defects and contradictions in specific points.[91] Therefore, no judge can allege that the law they should apply to the dispute is an algorithm, which is consistent and completely clear in respect of applying it.[92] This fact leads us to conclude that judges make law when they feel that the legislator abstained from doing so.[93]

Conclusion

The aims of this paper were: first, to decide the position of judges regarding the adherence to the Hon Sir Dixon's view that complete legalism is the safest path for judges in decision-making process; second, identifying the status of judicial activism, whether it is the norm in current judicial practice or not; and third, testing if there is a room for complete legalism in the contemporary judicial institutions.

The paper found that judges do not adhere to the Hon Sir Dixon's view, because of the fact of allocating legislative power to non-parliamentary entities, in order to respond to the different political interests in the state. This allocation resulted in what we can call the judicial regulations.

After that, the paper also found that judicial activism is currently the norm, because of judges' increasing willingness to strengthen their position in front of political conflicts. In addition, the flexible separation of powers also motivates judges to be active. The paper explained two modern cases in the Australian High Court which indicate the adoption of judicial activism in the judges' approaches.

Then, the paper found that there is no room for complete legalism nowadays, because judicial ideologies influence their understanding of the legislative provisions. These ideologies contain seeking for legitimacy as a third part in triadic conflicts. Judges are the third impartial dispute resolver, and they de facto make law when they justify their decision in such disputes.

The implementations of these findings affect the understanding of the judicial functions. The functions are not merely applying rules that had been enacted by the

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[88] *Supra* note 17, p. 1669.

[89] G R Stone, above n 83, p. 1426.

[90] *Supra* note 44, p. 38.

[91] *Supra* note 62, p. 33.

[92] *Supra* note 65, p. 206.

[93] *Supra* note 5, p. 56.

parliament. In fact, there is a serious judicial role in applying that rule according to the personal ideologies of judges.

Further research could be done about judges' appointing methods, to test whether these methods enhance or hinder judges' tendency toward more or less judicial activism. In addition, such research could help us to draw proper borders around judicial activism areas.◈

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