Introduction

Judicial decisions matter. They aim at enforcing social rules, ensuring players about the fairness of the political game, to settle conflicts on the base of impersonal instruments valid \textit{erga omnes}.

By consequence, the institutional setting in which judicial decisions are taken is of utmost importance for the legitimacy of a consolidated demo-constitutional regime and for the stability and the legitimacy of a nascent democracy.

The scope and the target of the judicial decision vary in time and in space. As a matter of fact the last three decades witnessed a spectacular increase of the jurisdiction of the courts and of the issues addressed by judicial actions in nascent and consolidated democracies (Russell and O’Brien, 2001; Diamadouros et al., 1995; Ginzburg, 2003). Several reasons may be recalled to make sense of this trend: the widespread introduction of mechanisms of judicial review (Shapiro and Stone Sweet, 2001; Pederzoli, 2008; Bartole, 1998), the legalization of social interactions (Kegan, 2003), the decline of the political instruments as tools of conflict settlement and the consequent need of alternative mechanisms to settle disputes. The spread of legislation protecting a wide range of citizens on matters such as health, social security, education, labor and family relations, has generated many occasions for citizens to resort to judges for the protection of their rights (Di Federico, 2004). In a way, the trend seems to be exhibited by the large majority of the States, so that at a first glance it may even be difficult to assert whether or not the expansion of the scope targeted by judicial decisions is a feature that marks a specific asset of governance or more likely is a feature exhibited by all democratic countries.

In literature, this phenomenon has been principally described with reference to the United States and to the American political system. However, also in Europe is possible to detect a fairly increasing attention for the importance and weight gained by judicial institutions. The expansion of their range of influence took place at the national but also at the supranational level. On the top of the trends followed by democratic political systems as we mentioned above, the European member States have been affected by a further exogenous factor, the integration of their legal and political systems into the European Union. In this respect, the role played by the European Court of Justice in pushing further the process of European integration has been appreciated by several scholars in political science and in law (De Witte, 2002; De Burca, 2000). The seminal work of Alec Stone Sweet (Stone Sweet, 2000) is the apex of a wide and intensively worked scholarship whose main goal is to disclose and some time to denounce the extremely high significance that the expansion of the judiciary has not
only for the health of the European democracies but also for the health of the European integration process.

Political scientists, sociologists and jurists are more than used with this phenomenon. In order to refer to it, the concept of judicial activism has been put forth and over the years has gained large consensus and appealing among scholars. As correctly pointed out by Bradley Canon, “judicial activism is implicitly ideological … often equated with political liberalism, and restraint with conservatism… Two factors undergird this variety of approaches. First judicial activism is often seen as a significant court-generated change in public policy… The second factor is illegitimacy.” (Canon, 1983, pp. 238-239).

The conceptual texture of the wide scholarship constructed by pivoting both normative analysis and empirical research on the concept of judicial activism is far from being coherent and in a way far from being fully convincing. The concept of judicial activism that came out as the dominant label to refer to the expansion of the judiciary does not make the object of the consent of intellectuals and policy makers. Moreover, and above all, the concept is barely operationalized, which makes the empirical exploration of the different patterns of “judicial activism” followed in different countries more difficult and unlikely. Lastly, and principally, the concept is affected by a semantic Babylon, which seems to justify any use and any meaning. All that proves to be fairly shortcoming in dealing with the complex issue of how and by mean of which mechanisms the judicial activism impacts the quality of the democratic political systems.

Therefore, taking seriously the importance that judicial decisions have for the quality of our democracies, we would like to go beyond the current scientific debate and make a point about the sustainability of the scholarship developed so far for the understanding of the European processes of judicial and political integration. The argument herein developed will go through the following steps:

- it will first critically review the scholarship, trying to excerpt a classification of the different approaches suggested by scholars to judicial activisms;
- it will then treat the issue of the judicial activism in reference to the European member States and the European Union;
- Finally it will put forth an analytical grid which focuses on the factors that set the context, facilitate but also confine the expansion of the judicial decisions.

The main contribution consists into a tentative shift from the concept of judicial activism to the concept of judge in action. This last is deprived of the evaluative connotation of the concept of judicial activism and may be more easily operationalized in view of a comparative exploration of the patterns of interaction that society law and politics have in the European democracies.

We aim at enlarging the existing research agenda on “judicialization” by addressing the question of judicial activism, not only in a new methodological perspective but also in relationship with the quality of democracy. Taking into account that most of the existing contributions are descriptive in nature, our goal is to see which methodological approaches could allow us to study the judicial activism in a broad and comparative perspective.
The semantics anchoring: from the global expansion of judicial power to judicial activism and beyond

The phenomenon called “judicial activism” is part of an increasing literature related to three main topics: the “global expansion of judicial power” developed around the seminal work of Neal Tate and Torbjorn Vallinder; a more diffuse research field related to the recent judicial reforms in the consolidated democracies and changing nations; and the study of interest politics/policy-making at the domestic/European level.

The idea that the “judicialization of politics” is one of the most significant trends in late-twentieth and early-twenty-first century government (Tate and Vallinder, 1995, p. 5) is almost fully accepted within the academic community. While this concept is used to describe the “infusion of judicial decision-making and of courtlike procedures into political arenas where they did not previously involved” (Tate and Vallinder, 1995), the meaning of the “judicial activism” is much more diffuse and difficult to capture. The term has a shifting meaning, according to the context in which it is used. Such a multifaceted phenomenon calls not only for a description of its occurrences, but also for a careful and analytical definition.

Judicial “interventionism” is evoked in the literature to refer to situations when judges have assumed a central role in political controversies (Guarnieri, Pederzoli, 2002). A peculiar attention has been devoted to the Italian case in relation to the operation Mani Pulite in the ‘90 and the pathological levels of corruption (Della Porta, Vannucci, 1999). The spectacles of Italian judges undermining Italy's post war system of musical cabinets, or of French judges hounding prime ministers and presidents, are only the most visible aspects of these developments.

In Italy, the term of “judicial activism” is used in reference to the “large scale operation of judicial prosecution involving almost the entire national leadership of all the parties traditionally in government”. According to Di Federico (1995), in this country, the particular institutional arrangement related to the independence of judges and prosecutors “opens up avenues to a judicial activism which is from and far more ample than similar phenomena we could find in other democratic countries”.

In France the literature is not focused on the concept of “judicial activism”. Sociologists and political scientists use two different words in relation to the political and social role of judges: “passivity” and “mobilisation”. In the French debates judicial activism concerns the interpretation of legal rules and the extent to which they have a single clear meaning or offer a range of possible meanings. When the word “judicial activism” is used, it refers to the fact that French judges tend to be less literal in their interpretation of the law. This “creative interpretation revolution” deserves to be called “acrobatic” (Radamaker, 1988, p. 142). The term refers to the conditions that explain why civil judges create law, why they have to innovate and elaborate a “praetorian” jurisprudence (Lafon, 1995, p. 292). When a judge thinks that a case submitted to him requires an “interpretation”, he analyzes the factors and tries to find a solution considering the legal, economic and social context of the moment (Lafon, 1995, p. 293).

Judicial activism has been equally evoked in Spain, in relation with the (Basque) political parties’ activity and in Germany with regards to the right to abortion. The Courts have issued judgments on controversial issues as abortion rights in Ireland, on administrative review
procedures in Sweden and the Netherlands, on gays in the British military, on torture in Turkey, and on expulsion of Russians from Latvia (Voeten 2005).

In Israel, the High Court of Justice is an important player in the public policy process (Edelman, 1994, p. 181; see also chapter in Tate, 1995) as it exercises powers at the expenses of politicians and administrators.

In transitional countries where rapid social changes and transformations take place, “the judiciary and judges cannot escape from taking more active roles in interpreting or even law making process (Chenguang 2006). In this respect, judicial activism has emerged as a powerful mechanism of social change (Verma 2001). To provide but few examples, the Indian judicial activism has, according to Shate, resonated well in Southern Asia societies, especially Pakistan, Bangladesh and Nepal. It has also impacted judicial interpretation in Tanzania, Uganda, Namibia and South Africa (p. xv).

There is also an increasing need for citizens to resort to judges for the protection of their rights. However, there are also cases of judicial inactivism. Joseph Board explains why judicial activism failed to take roots in the Swedish case. According to the author, the “the political culture of Sweden is characterized by a number of ideas and conditions which are not conducive to an expanded role of the courts”. The political and legal culture in this country are the main obstacle to the judicial activism (Board, 1991: 180). But this is not the rule, this is the exception. (The Swedish case is not the rule; it seems to be the exception).

In Europe scholars disclosed a steady trend toward the expansion of the judicial power. The role performed by judges, ordinary and constitutional, is transforming. They have therefore not only to decide on political matters, such as the legality of some political parties (Henderson 2007), but also on questions related to the private life, as abortion or some sex marriages. They are frequently asked by public opinion and media to go beyond their constitutionally prescribed duties in order to find solutions for specific social needs, to create new constitutional rights, to amend the existing ones, to restore the confidence on the domestic institutions and to protect values within the society... This growing demand for justice entrust judges to solve problems that other institutions are unable or unwilling to deal with effectively (Guarnieri, Pederzoli, 2002). Judges are increasingly asked to take decisions that accommodate different sets of norms, domestic and supranational, and are in constant contact with external jurisdiction – both domestic, as for example the courts of the other European member States, and European.

Putting those examples differently, it could be hypothesised that in a changing political culture there is not only a demand for a more active role of the judges but also a supply for such an active role, as judges themselves have a tendency to interpret more freely and more creatively their role. It is argued in the literature that for instance in international relations “some judges have wrongly taken over the role of the executive...and such activity jeopardise the independence of the judiciary” (Young, 2003). According to this author, it is not only the role of the judge that has changed but also their public participation in controversial political issues. It seems that judicial activism is encouraged every time “the administrative machinery is apatic toward citizens’ problems” and “commits excesses against them” (Verma, 2000, p. 151). Judicial activism emerges to address specific political and social problems that are not solved within the existing system (Verma 2001). In the “rapidly changing nations” (Tate, Vallinder,
1995, p. 524), poor implementation of laws and gross violations of human rights have led many judges to seek innovative mechanisms to address these problems (Verma 2001). When citizens’ needs could not be fulfilled by majoritarian institutions, the judges “must” be actively involved in politics. When it happens, the legitimacy of judges consists in the incapacity of majoritarian institutions to solve social problems and needs. The default of Israel’s democratically elected leadership has produced a vacuum; and the people have turned to the courts to resolve an ever increasing range of problems (Edelman, 1994, p. 184): absorption of the massive influx of the Jewish people from the former Soviet bloc and from the Ethiopia, security arrangements with the Palestinians and the rest of the Arab world (Edelman, 1994, 184). It depends on the way the judge sees his/her role and the consequent choice of self-restraint or activism in response to social demands (Nonet, Selznick, 2001; Zannotti, 1995, p. 181). In some of the Western common law democracies, the newness of this phenomenon contrast with the traditional political and social professional role of judges (Roussel 2007). In other contexts, this political role is much more accepted when it consists in ensuring that “the holders of the administrative and political power do not exceed their responsibilities and that citizen’ rights are respected”.

Thereby, as we can easily observe judicial activism is used to point out different situations. The cases are maybe different but their common bond holds to the fact that judicial activism is evoked every time judges are asked or engaged to change “the rules of the game” within a society.

“Ironically, as the term has become more commonplace, its meaning has become more increasingly unclear. This is so because “judicial activism” is defined in a number of disparate, event contradictory, ways: scholars and judges recognize this problem, yet persist in speaking about the concept without defining it. Thus the problem continues unabated: people talk past one another, using the same language to convey very different concepts” (Kmiec, 2004: 1443).

Whereas it may be somehow instrumental in the political debate, such an ambiguous concept does not offer a solid resort to those who want to engage in scientific research. Indeed, it has become a “catch world” because of its so many different meanings. There is no a single definition which fully captures the pervious examples associated with the term. It is used by political scientists, politicians, and journalists from various countries, each of them appending positive or negative qualifications. In some parts of the world this phenomenon has to be avoided. In other regions the judicial activism is a way to find solutions for various social needs.

The difficulty on working on judicial activism has been highlighted many times (Hagan, 1988), especially because “we have no certain ways of identifying, of naming the points of departure, of judicial activism, nor ways of coherently speaking of points of arrival” (Shate, 2006, p. xii). Another point of controversy is that the concept is embedded in a normative frame of thinking related to the roles the judiciary should play within specific political regimes and societies. The conceptual elasticity of the word is surprising as well as its polysemy. It has equally a strong normative content which guide both the social debates on this phenomenon and the research in this field. It is associated with particular social values. The judicial activism could be betrayed in the name of the quality of the democracy or to be very much in demand for the
same purpose. If it is seen as a mechanism encouraging the social change, it is also associated with a more fire-and-brimstone image about the future of democratic regimes, an image which captures judges forgetting “their place in their constitutional order” and who transcends “the proper limits of their constitutional roles”.

The judicial activism emerges in particular political, social and institutional conditions and could take different forms. It could be “reactionary”, “progressive” (Shate, 2006, p. xiii), “eclectic”, “opportunistic”, “passive”, excessive (Shate, 2006 p. xviii). Judges could be “constitutional defenders”, “task performers”, “ritualists” (Flango et al, 1977, p. 278) or “interventionists” (Guarnieri, Pederzoli, 2002).

The fact that the semantic of the concept of judicial activism has been making dependent on the empirical field to which it is applied and on the case study that is under consideration by the scholars, creates a serious barrier to both the accumulation of knowledge acquired in different studies conducted by social scientists using the same concept with different meanings and the correct operationalization of the concept itself.

Yet, if one wants to conduct a comparative analysis of the relationship that exists between judicial activism and quality of democracy, scholars should go beyond the current Babylon that is surrounding the concept of judicial activism.

Judicial activism, explanans and explanandum

Any decision has a degree of freedom and openness. To what extent shall we know that one decision is activist? Is it in its motivation or rather in its results? Our point of view is slightly different and we argue innovative. Judicial decisions are activist to the extent they rely on extra legal norms and impact on the agenda, the means and the aims of the other structures that perform regulative and normative functions into a social system: legislative and executive branch, but also – as we are going to see – the social morality. They do so to the extent they enter into a different realm or register of interaction, a one based on extra legal norms.

In Luhmannian terms, judicial activism is one way of instantiating the process of de-differentiation that is taking place in post modern institutional settings. In more politological terms, judicial activism is a manifestation of the shift of institutions that had been created and consolidated during the modernity in relationship with the process of State building to cross over the borders that define and justify the scope of their actions. Functional differentiation is pivotal in modern

1 The judicial activism depends on its societal acceptability and the normative theories concerning the judicial role. In brief, judicial activism could be a question of “promises” and “perils”. Is judicial activism good or bad? This question is asked all over the world, in transitional countries, in consolidated liberal democracies, in communist regimes or still hybrids. For this reason, some have sought to distinguish between “proper” and “improper” judicial activism.

2 Depending on the countries, it could be shaped by various factors, such as: the arrangements of constitutional powers, the political significance of the judiciary, the degree of the independence; the social constructions of judicial role and functions; the flows of political events, which determine the times of judicial acquiescence with regimes of power, and the moments of seizure, when judicial voice acquires the capability to confront structures of abuse of public power and the capability of people without rights to name and shame the constitutional clauses (Shate 2006 pp. Xv-xvi).
States. All bureaucracies and all political liberal institutions are based on the idea according to which their scope of actions are defined by mean of formalized rules, which set the limits within which and the instruments by which public officials exercise their role.

Judicial activism puts under hard pressure this way of conceiving the political order and the public administration. It means that judicial activism will be then defined as broad as any use of judicial power based on extra legal norms or in order to enforce under-enforced norms. Judicial power is the endowment of resources – material and cognitive – actors performing roles related to the application, interpretation and enforcement of the legal norms have at their disposal. Extra-legal norms are norms coming from orders whose rationale does not stem from the creation of procedures or formalized rules. Extra legal norms comprise moral and politics.

At a more empirical level, judges and prosecutors who perform their role by mean of a systematic interaction with media, by speaking out in the public discourse, or by reassessing the balance between private sphere and public security (wire tapping), they base their behaviors no longer on the exclusive say of the law.

Activism thought in this way permeates all judicial systems to a higher or less high degree. However, in some countries, judicial actors are expected to behave as “activist”, namely as sources or enforcers of extra legal norms. Our conception on judicial activism follows from the assumption that an act tolerated during a given period in a particular society may not be in another since the values of that society will have changed. On one hand, “practices accepted in a period of prosperity may not be in a context of growing inequality of poverty or increasingly sclerotic public service” (Pujas, Rhodes, 1999: 43). On the other hand, “intolerable practices, which have not been defined as illegal in law, can remain unsanctioned even when citizens consider them scandalous” (Pujas, Rhodes, 1999: 43). Taking into account the statute of norms within a society we consider that “judicial activism” is a process of making, promoting and enforcing “long dormant” or “new” norms.

If judicial activism is the label of a process of making, promoting and enforcing norms, our main concern is to analyze what this phenomenon (the use by judicial actors of extra norms and values and the enforcement of under enforced rules by judicial actors) tells about de state of modern democracies.

Conceptualized in this way, our main focus is not on the changing social, political and moral norms, but on the relationship between the actors of change and the impact of their attempts of change on the political regimes to which they belong. Rather than devoting time and energies to explain the judicial activism, pretending it to be not controversial and not slippery concept, we want to assume that judicial systems expanded their agenda and their rationales, by taking decisions and accomplishing actions that go far beyond the simple application of the law. We want to understand how this expansion in number, means, aims, have affected – and is bound to affect in the very next future – the socio-political democratic systems. We propose to focus on the following questions:

1) To what extent judicial actors perform their functions as they were political actors?

2) To what extent political actors do recognize judicial actors as being political actors (and accordingly involved in partisan conflicts)?
3) To what extent citizens think judicial actors as political actors?

4) To which normative order (morality, public security, public integrity, etc.) are judicial actors making reference when they represent publicly their role or when they justify their behavior before the general public or before policy makers?

5) At a systemic level, what are the consequences of theses changes on the European democratic regimes?

6) What impact does this phenomenon have upon the democratic process?

In order to explore the impact that an increase of judicial activism may have on the quality of democracies, we suggest focusing on:

1) the mechanisms of checks and balances to which all branches are held accountable;

2) the degree of fragmentation of the political system (the more fragmented the opportunities for more judicial activism)

3) the degree of demand of morality and public ethics that emerge from the society (the more demand, the more incentives for personalization of judicial activism);

4) the continuity/discontinuity experienced by the political system (the more discontinuity, the more judicial activism).

References


