

JUDICIAL ACTIVISM AND THE INTERNATIONAL COURT OF JUSTICE

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Judicial Activism and its correlative or antonym, Judicial Self-Restraint, entered into scientific-legal parlance in the late 1950s as a by-product of the larger, public political debate in the United States over the proper role of the US Supreme Court in exercising judicial review of constitutionality: whether the Court's judges should restrict themselves, in classical, analytical jurisprudential terms, to deliberately abstract, un-fact-oriented, grammatical or logical interpretation; or whether, instead, they might opt for a more flexible, historically developmental approach based on identifying claimed rules and precedents in the space-time context in which they had first emerged and then assessing their relevance and capability of creative adaptation to contemporary societal conditions and expectations. The US debate was picked up very early by the judges of the new Constitutional Court [Bundesverfassungsgericht] established under the West German constitution of 1949 with its own obvious intellectual-legal debts to US experience. From the West German judges it entered into general Continental European Civil Law thinking. It was inevitable that it would pass on to the International Court of Justice.

The ICJ, founded in 1946 as direct lineal successor to the old pre-War Permanent Court of International Justice, seemed disposed, naturally enough, to continue in the classical, rigorously analytical style of its predecessor, as an essentially Continental European tribunal with a then similarly restricted client-State base. The Austro-German Customs Union cause celebre, in which the old Court had insisted, with its 1931 decision, in making an absolute divorcement between Law *stricto sensu* and Politics, in a ruling with major political consequences for its times, is a high-water mark in classical European jurisprudence-of-concepts. With the ICJ however, the rapidly unfolding events of the early post-World War II years--the onset of the Cold War and, not least, the momentum for Decolonisation on a World-wide scale,-- meant some entirely novel legal problems, and also new legal players in increasing numbers in a new, far more representative and inclusive in cultural terms, World Community. The collision between the "old" classical legal thinking and the "new" came out spectacularly in 1966 with the ICJ ruling, by 8-to-7 vote achieved only on the second, tie-breaking vote of the Court President, refusing to intervene to strike down the white minority government of South Africa's imposition of its racial segregation Apartheid laws to its League of Nations Mandate [now UN Trust Territory] over South West Africa. The angry political reactions against the Court and its judges soon produced a concerted and successful drive in the United Nations, spearheaded by Third World and Non-Aligned countries, to bring new blood into the Court's ranks. The 1966 decision was effectively overruled with five years, and some very interesting new judges had joined the Court, which, in the 1970s and the 1980s, had the opportunity for breaking some new legal ground and also trying out a pragmatic balance between liberal activist innovation and the still conservative, classical thinking.

By the opening of the 1990s however it was once again a new World public

order system. The final ending of the Cold War meant that some major historical tension-issues that had been effectively contained or controlled by the East-West bipolar working consensus on peace and security questions, including nuclear armaments, over the years during which Cold War had ripened into Détente and then Cooperation, came into the open again. The decade-long War of the Yugoslav Succession of the 1990s and the inability to resolve the continuing Nuclear Proliferation danger are examples where a timely substantive engagement of the Court in pro-active fashion might have helped and should certainly have been attempted directly. The dissolution of the Soviet Union itself removed the essential bipolar balance of power on which Détente itself had been predicated and may have contributed to the descent into Unilateralism and the 2003 invasion of Iraq outside Chapter VII of the UN Charter and Charter-based International Law.

It seems that the strong, politically experienced as well as legally accomplished cadre of scholar-jurists who gave the Court a distinctive liberal activist impulse in the 1970s and 1980s may have given way to rather more technically oriented, Foreign Ministry lawyers, as the Court's 2010 Advisory Opinion ruling on the Legality of Kosovo Independence would appear to confirm. The Activism/Self-Restraint antinomy has however by now become a constant in the international judicial decision-making process, and with the ever-increasing impact of the Multiculturalism factor in determining representation on international institutions and the policy choices they may make, one can expect the debate as to the ICJ's proper role and the manner of its exercise to remain alive in the Security Council and General Assembly and also within the Court itself.