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## Are the Courts Running Wild? – Judicial Activism in a Comparative Analysis

### Abstract

The following article is about the phenomenon “judicial activism”. The phrase “judicial activism” originates from the Anglo-American legal terminology. It plays an important role when discussing the importance and influence of the respective highest judicial authority in a country. However, also lower courts can become judicially activist. Through a comparison of the judicature of the US Supreme Court, the German Federal Constitutional Court and the European Court of Justice, this article points out the characteristics of judicial activism, differences and similarities among the three different courts and evaluates judicial activism. At the same time, the article provides an overview over some of the most important judgments of the courts belonging to this matter.

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## I. Introduction

Are the courts running wild? This question relates to judgments and decisions especially by the supreme courts of many countries nowadays. It was raised in this formulation in a book by *Hjalte Rasmussen*<sup>1</sup>. He was convinced that specifically the European Court of Justice as an activist court was running wild.<sup>2</sup> In more and more recent cases, the courts have been criticized for exceeding their powers. Some judgments reach highly political levels, such as the recent *Bush v. Gore* judgment by the United States Supreme Court which even decided the American presidential elections in the year 2000. Constitutional or supreme courts have also overturned parliamentary legislation, decided issues of great impact for the societies concerned, and laid down detailed rules on how to govern particular areas of a country's social and public life. But are the courts really straying to the fields of other governmental branches? What is this phenomenon described as "judicial activism"?

Generally, this topic is deeply intertwined with questions about democracy, constitutionalism, and the sovereignty of parliament. Seldom does one find academic works treating judicial activism alone. On the other hand, especially in the US, judicial activism has become a term used for blaming judges for bad decisions and to classify them as being radical or extremely conservative.<sup>3</sup> This essay will try to examine judicial activism and to shed light on its roots and reasons for such a development. Since judicial activism seems to be a feature especially of supreme or constitutional courts worldwide, I will attempt to get a grasp on this topic by means of comparison. Due to limited space, I will focus on the United States Supreme Court (USSC) and the German Federal Constitutional Court, the Bundesverfassungsgericht (BVerfG). Additionally, I will also look at a rather young yet extremely powerful institution, the European Court of Justice (ECJ), i. e. the juridical branch of the European Community. This court, as a supranational entity, underscores the globality of the issue. Ultimately, I will attempt to answer the question whether the courts really are running wild or just fulfilling their genuine purpose.

## II. The US Supreme Court

The USSC is the first court in modern western civilization to have actually defined and used a concept of judicial review that eventually was connected with the notions of judicial activism and its antonym judicial restraint<sup>4</sup>, although there were certain

1 *Rasmussen*, On Law and Policy of the European Court of Justice. A Comparative Study in Judicial Policymaking, 1986.

2 *Ibid.*, p. IX.

3 See, for example, the website <http://www.judgesgonewild.com>.

4 *Brugger*, Demokratie, Freiheit, Gleichheit. Studien zum Verfassungsrecht der USA, 2002, esp. pp. 174 et seq. (activism), pp. 169 et seq. (restraint); see also: *Rau*, Selbst entwickelte Grenzen in der Rechtsprechung des USSC und des BVerfG, 1996.

European predecessors<sup>5</sup>. Through judicial review, courts exercise a controlling function over the legislature. This regularly involves political disputes and therefore is the major gate through which judicial activism can unfold.

### 1. Marbury v. Madison

The USSC laid down the foundation for judicial review in its famous 1803 *Marbury v. Madison*<sup>6</sup> judgment. Although the Court did not grant the petitioner *Marbury* his right to become a federal magistrate, Chief Justice *Marshall* gave the reasons and arguments for judicial review of federal legislation. Through this decision, *Marshall* managed to preserve and strengthen the authority of the USSC after the election of the new Republican government while avoiding a confrontation with the new president, *Thomas Jefferson*.<sup>7</sup>

The main arguments *John Marshall* brought forward to prove the supremacy of the Constitution and the final competence of the courts to decide in matters concerning constitutional law were:

The act of creating a constitution generated certain fundamental and permanent principles. Those principles lay down that each branch of government has certain powers which may not be exceeded. A written constitution is intended to set the limits to those powers. It is the province and the duty of the courts to interpret and apply the law, including the Constitution, and therefore to determine if a law is contrary to the Constitution. The courts are bound by the Constitution; Art. III § 2 U.S. Const. provides for jurisdiction of the federal courts. Judges swear an oath to the Constitution which strengthens this bond under Art. VI Cl. 2 U.S. Const. In the same Article, the supremacy of the Constitution is declared.<sup>8</sup>

While all those arguments in favor of a constitutional state seem quite normal or even natural for us today, back then this decision was groundbreaking. Under the impression of the separation of powers doctrine, that was essential in drafting the American Constitution, nobody had thought of the courts as controlling the legislature. In the following years, the USSC was able to further develop the doctrine of judicial review. This doctrine not only applied to the USSC itself, but also to all other American courts. Each of them has the competence to check governmental acts with respect to their constitutionality while the USSC retains the highest authority over constitutional interpretation. However, it took several decades until the USSC used this tool to again declare an act of the legislature void. Decisions that were activist in the sense that the Court tried to resolve political disputes were e. g. the *Dred Scott*<sup>9</sup> case, which

5 See *van Caenegem*, Historical Considerations on Judicial Review and Federalism in the United States of America, with Special Reference to England and the Dutch Republic, 2003.

6 5 U.S. 137 (1803).

7 *Brugger*, Kampf um die Verfassungsgerichtsbarkeit: 200 Jahre *Marbury v. Madison*, JuS 2003, p. 320, 325.

8 5 U.S. 137, 175 et seq. (1803); *Brugger*, Einführung in das öffentliche Recht der USA, 2<sup>nd</sup> ed., 2001, pp. 9 et seq.

9 *Scott v. Sandford*, 60 U.S. 393 (1856).

attempted to settle the slavery question by declaring slavery constitutional, and several decisions concerning economic matters issued at the end of the 19<sup>th</sup> century and through the beginning of the 20<sup>th</sup> century.

## 2. *Lochner v. New York*<sup>10</sup>

Especially in the period between 1905 and the 1930s, the USSC struck down nearly 200 legislative acts under the notion of substantive due process.<sup>11</sup> Substantive due process is a principle that is taken from the fifth and 14<sup>th</sup> amendments to the US Constitution. There it says that neither a state nor the federal government can deprive a person of life, liberty, or property without due process of law. While this looks like a procedural limit at first glance, it is a substantial limit to governmental power in certain areas, as well. All the cases in that period concerned government measures aimed at bringing order into the economic world by establishing, for example, working hour limits. At that time, the Court was strongly influenced by old liberal ideas of the self-regulating market and, thus, it created several new fundamental rights such as freedom of contract to declare the measures null and void under the Constitution. This application of the due process clause became known as "economic due process". In the *Lochner* case, a baker challenged a law of the State of New York limiting the working hours of his employees. Applying strict scrutiny, the majority of the USSC held that preserving the health of both employees and other citizens was a legitimate purpose for the measure but regulating the labor market was not. Additionally, that purpose could be achieved otherwise in a less restrictive way; therefore, the means used were not constitutional.

Among the dissenters, Justice *Harlan* argued that the freedom of contract was not absolute, that there were certain limits in which the states could legislatively regulate and that it was not a matter for the Court to decide those issues.<sup>12</sup> Rather, the Court was criticized for being activist in this case by imposing itself as a superior legislator. This would in later cases become known as "lochnerizing". However, as stated above, the Court continued to use this approach in many following decisions.

During the years of the Great Depression, namely in the 1930s, the Court changed its attitude. In the 1934 *Nebbia v. New York*<sup>13</sup> and 1937 *West Coast Hotel Co. v. Parrish*<sup>14</sup> cases, the Court abandoned the *Lochner* principle, exercised judicial restraint and granted the legislatures a wider discretion in regulating economic matters. Regularly, this is related to President *Roosevelt*'s court-packing plan, although it is unclear if this really was the reason for the change in the jurisdiction of the Court. *Franklin D. Roosevelt* tried with his Judiciary Reorganization Bill from 1937 to appoint one extra justice for every sitting justice over the age of 70. This bill was mainly targeted at two conservative justices who upheld the majority in the

10 198 U.S. 45 (1905).

11 *Brugger* (fn. 8), p. 109.

12 198 U.S. 45 (1905), 68 et seq.

13 291 U.S. 502 (1934).

14 300 U.S. 379 (1937).

Court against Roosevelt's New Deal measures. By appointing additional justices, Roosevelt thought himself to be able to turn the tide in the Court in his favor. However, the bill did not pass Congress. So there definitely was a great amount of political pressure on the Court to stop its blocking attitude towards the measures of the New Deal.

### 3. After Lochner – New Objects for the Court's Activism

After the USSC abandoned its previously strong position on economic substantive due process, its activism did not really stop. Rather, the Court shifted its attention to new objects. In the further development of the substantive due process doctrine and other constitutional clauses such as equal protection, the USSC managed to shape many new activist decisions. Among those are the famous civil liberties judgments, foremost of all, the *Brown v. Board of Education of Topeka*<sup>15</sup> case. In this case, the USSC ended racial segregation within the US school system and, by implication, the segregation which had spread to all areas of civil life. The former *Plessy v. Ferguson*<sup>16</sup> decision, which established the separate-but-equal doctrine, was revised; the Court explained that decisions made in the nineteenth century were no longer valid under modern circumstances.<sup>17</sup> With those circumstances, the Court meant both developments in the society of the US and developments in psychological knowledge. For the Court, education had become one major function of the state and indispensable to the upbringing and personal development of the children. Again, the Court faced heavy criticism, especially from conservatives and the white population of the southern states. The desegregation programs which followed in fact led to major problems in many parts of the US.

One can find the same line of reasoning in the abortion cases such as *Roe v. Wade*<sup>18</sup>, where the Court also rejects views from the past and emphasizes modern developments and the contemporary public opinion. In this case, the Court thoroughly investigates the history of antiabortion legislature and the public opinion in the US regarding this topic. This is brought in context with developments in medical techniques, which had become much less hazardous to pregnant women than in the times when antiabortion legislature was enacted. Additionally, the Court even considers the views of the leading American medical associations. It takes note of other judgments of federal courts in favor of abortion, too. In the end, the USSC comes to the conclusion that under the right to personal privacy pregnant women have to be able to terminate their pregnancy. However, this right is limited by the compelling interest of the state in preserving the health of the mother and the unborn. In additional cases, the USSC specified this interest with several criteria as to when and how long abortions have to be allowed.

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15 347 U.S. 483 (1954).

16 163 U.S. 537 (1896).

17 347 U.S. 483 (1954), 492 et seq.

18 410 U.S. 113 (1973).

In more recent cases, such as *Lawrence v. Texas*, 2003,<sup>19</sup> concerning rights of homosexuals, the Court even refers to international standards of human rights to argue for a public understanding of what the fundamental rights in the Constitution actually contain. This reference was heavily contested by the dissenting Justice *Scalia*, who was joined by Chief Justice *Rehnquist* and Justice *Thomas*. This line-up of important justices shows that this far-reaching approach is not widely accepted, even in the Court itself.

#### 4. Bush v. Gore<sup>20</sup>

In *Bush v. Gore*, the presidential candidate of the Republicans, *George W. Bush*, sought to stop a manual recount of the votes cast in the state of Florida. After problems with voting machines in several counties of Florida that left many votes (several thousand) uncounted, a manual recount was ordered by the Supreme Court of Florida. Arguing that this manual count takes too long and that the gain in votes of his competitor *Al Gore* of the Democrats was negligible, *Bush* turned to the USSC. *Bush* saw his rights under the equal protection and the due process clauses violated by the Supreme Court of Florida. On reasons that the standards for the recount were not sufficient, the USSC reversed the judgment.

The dissenters, especially Justice *Breyer*, who was joined by Justices *Stevens*, *Ginsburg* and *Souter*, and many voices in the legal literature<sup>21</sup> opposed this judgment. They all brought forward the argument that the Court had disregarded the limits to its powers such as the political question doctrine. Additionally, the questions presented by the petitioners concerned matters of state, not of federal law as the rules on how the presidential electors are elected in each state are made by the states. Moreover, there are federal statutes in combination with the Constitution which reserve to Congress the right and power to resolve disputes about the electors. Those rules go back to an 1886 statute. Thus, it is obvious that the democratic representatives of the Congress should have the say in matters concerning the presidential elections. This is emphasized by the intents of the Framers of the Constitution. *Madison* thought a decision by the USSC over that matter "out of the question"<sup>22</sup>.

This judgment shows very drastically how flexible the Court handles its jurisdiction. Whatever its motivations are, the USSC is able to expand its jurisdiction to areas where it seemed not to have been before.

#### 5. Judicial Activism in the US

In all of these decisions, though, one cannot find a specific written reference in the Constitution which directly expresses the rights recognized by the Court. However,

19 *Lawrence et al. v. Texas*, Nr. 02-102, decided 6/26/2003.

20 *Bush v. Gore*, Nr. 00-949, decided 12/12/2000.

21 See e. g. *Dershowitz*, Supreme Injustice: How the High Court Hijacked Election 2000, 2002, p. 173 et seq.

22 5 Elliot's Debates on the Federal Constitution, 2<sup>nd</sup> ed., 1876, p. 363.

as explained in *Marbury v. Madison*, it is the Court's task to interpret the Constitution. From this premise, the Court has managed to get into a very powerful position controlling the other branches of government. The greater the power of a legal system's highest court, the more likely it is that this court will render decisions in the area of public policy.<sup>23</sup> Several USSC justices have claimed that this power has to be used with utmost restraint. The most famous of these was Justice *Frankfurter*, who said that this power is in practice only bound by the Court's own prudence in discerning the limits of its constitutional function.<sup>24</sup> Nevertheless, many decisions still have had a tremendous impact on society.

At one point, the Court tried to state its review standards in a footnote, saying that legislation affecting the provisions of the first ten amendments would be subject to higher scrutiny, as would other legislation affecting rights under the 14<sup>th</sup> amendment, under certain circumstances, and laws hindering the political process or discriminating against minorities.<sup>25</sup> In the case itself, the USSC lessened its standards of review by presuming the existence of facts supporting the legislative decision.<sup>26</sup> The footnote would make a law only unconstitutional when there was a breach of a specific constitutional prohibition, of one of the other approved fundamental constitutional interests or when it is discriminating against minorities. This footnote has to be seen in the context of the post-*Lochner* era. With it, the Court indicated that it would now use restraint in economic matters but not refrain from continuing its supervision of the legislature.<sup>27</sup> However, later cases again proved this to be not entirely correct. Several cases concerning the death penalty as well as the abortion cases could not be seen as conforming to such standards.<sup>28</sup>

Another standard that was introduced to limit the Court's ambitions to decide political disputes is the political-question-doctrine. "Political question" has become a term of art in US constitutional law. It refers to a test that is applied to examine the justiciability of a case. The classic definition of the political question doctrine was given in the *Baker v. Carr*<sup>29</sup> case. Baker was a voter in the State of Tennessee who thought his vote had been diluted by a failure of the state to reapportion the voting districts and thus violated his rights under the equal protection clause. The federal

23 *Jacob/Blankenburg/Kritzer/Provine/Sanders*, Courts, Law and Politics, 1996, p. 7.

24 In a dissenting opinion in *Trop v. Dulles*, 356 U.S. 86 (1958).

25 *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), footnote 4: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. (...) It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."

26 *ibid.*, p. 152.

27 *Riecken*, Verfassungsgerichtsbarkeit in der Demokratie, Schriften zum Öffentlichen Recht, Band 916, 2003, p. 49 et seq.

28 *Koopmans*, Courts and Political Institutions, 2003, p. 54 et seq.

29 369 U.S. 186 (1962).

district court turned him down on grounds of non-justiciability because the case presented solely a political question. According to the USSC in this case, the political question doctrine is set to uphold the separation of powers. Therefore, a political question arises when a matter is supposed to be decided by another branch of government than the judiciary. However, the Court has the ultimate authority to interpret the Constitution and has to clarify if the other branch has the power to do so under the Constitution.<sup>30</sup> There are several provisions in the US Constitution that reserve powers to the legislature or the executive branch; examples are foreign affairs and executive war powers. Most matters involving those are political questions. The second part of the doctrine is more important. If there is a lack of judicially discoverable and manageable standards for solving the problem at stake, it is a political question.<sup>31</sup> It also depends, therefore, on the ability of the courts to find a solution in a reasonable way. The third step on the way to determine a political question controls the obvious political nature of a decision by the court. A case is non-justiciable if it is impossible to decide without an initial policy determination of a kind that is clearly for non-judicial discretion. The fourth part of the definition bars the jurisdiction of a court when it is impossible for the court to take an independent resolution without paying due respect to the coordination of the branches of government. Next, non-justiciability arises when it is unusually necessary to adhere to a political decision without questioning that is already made. This goes hand-in-hand with the last part where it says that a potential embarrassment by multiple declarations with different content by different departments of government is to be avoided. The whole test can be seen as a standard to avoid a mingling of the Court's powers with those of the other branches. However, it leaves the Court a measure of discretion as to whether a case really is non-justiciable. Only the definite and obvious cases are sorted out. The case at hand, *Baker v. Carr*, was judged justiciable and referred back to the lower court to decide. In fact, Justices *Frankfurter* and *Harlan* dissented in this case with the allegation that the Court was activist rather than exercising restraint in defining limits to its jurisdiction.<sup>32</sup>

Confronted with all kinds of cases in which people seek protection for what they think are their rights, the Court cannot totally avoid political disputes. The difficulty is how to deal with those cases and to find an approach, by which interference with other branches of government is reduced to a minimum while constitutional values still are upheld. Especially in the US, many people who feel that they cannot achieve their goals in the political arena turn to the courts. Additionally, the great number of interest groups and political activists in the US lets many issues that were processed in Congress come before the courts.<sup>33</sup> Ignoring the limits pointed out by Justice *Frankfurter*, the Court will from time to time issue decisions that are not in line with the opinions of the other branches of government. Carried by the momentum of such decisions, the Court will continue to maintain its views, such as in the abortion

30 *Ibid.*, p. 211.

31 *Ibid.*, p. 217.

32 *Ibid.*, pp. 265 et seq.

33 *Jacob/Blankenburg/Kritzer/Provine/Sanders* (fn. 23), pp. 17 et seq.

cases like *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>34</sup>, where the Court affirmed *Roe v. Wade*. Only where public opinion and, therefore, the political pressure on the Court have massively changed, is reconsideration likely.

### III. The German Bundesverfassungsgericht

The German Basic Law, adopted after World War II, has put a strong constitutional court beside the legislature and the executive to guard the provisions of the Constitution. Unlike the USSC, the BVerfG is not the highest court of appeals. Instead, it specializes in interpreting the Constitution and only decides on constitutional matters. Notwithstanding, it can be seen as sitting atop of all other courts as the Constitution is the supreme law and breaks the ordinary law. Judicial review of legislation is one of the primary tasks of the BVerfG and explicitly provided in Art. 93 of the Basic Law. Although German history is imprinted with many major political breaks and changes, the judiciary strongly adheres to the principles of continuity and the rule of law.<sup>35</sup> Therefore, the term “judicial activism” does not really exist in German legal terminology. Rather, the terms “richterliche Rechtsfortbildung” and “Richterrecht” are used, which mean the development of the law through judges and judge-made law. As with judicial activism, there is not necessarily a negative connotation connected to those terms. Rather, within certain limits, it is seen as the task of the judges to fill the letter of the law with life through interpretation and, thus, to elaborate on the law’s exact meaning. This can obviously lead to new developments not envisaged by the original legislator. However, politics should stay out of the law. As Blankenburg put it: Democracy comes *before* the law, but it does not belong *in* the law.<sup>36</sup>

#### 1. Activist Judgments

In one of its first judgments, the BVerfG stated that it is not a lawmaking body, and it is not its purpose to act in place of the legislature.<sup>37</sup> There were several judgments in the more than 50 years of the Court’s existence that came close to legislative acts, though. In some judgments, for instance, the BVerfG gave the legislature almost no discretion as to how to fulfil the requirements of a constitutional law. In 1983, the BVerfG had to decide upon the constitutionality of a census based upon the Volkszählungsgesetz<sup>38</sup> of 1982. Through creating the right of informational self-determination out of Art. 2 para. 1 and Art. 1 para. 1 of the Basic Law, the BVerfG laid down specific rules on how to collect, administer and use personal data.<sup>39</sup> Only if those specific requirements were met, could the Bundestag pass a new census law.

<sup>34</sup> 505 U.S. 833 (1992).

<sup>35</sup> Jacob/Blankenburg/Kritzer/Provine/Sanders (fn. 23), pp. 252 et seq.

<sup>36</sup> *Ibid.*, p. 250.

<sup>37</sup> BVerfGE 1, 97 (108, para. 20).

<sup>38</sup> I. e. a law ordering a census.

<sup>39</sup> BVerfGE 65, 1 (71).

This judgment had far-reaching consequences for all areas which concerned the collection of personal data.

Additionally, the BVerfG contributed with its decisions to certain constitutional developments that were not envisaged by the authors of the Basic Law. Thus, the doctrine of indirect effect of the fundamental rights in the Basic Law on all other fields of law, in the sense that provisions must be interpreted in the light of the fundamental rights, was clearly developed by the BVerfG and is now commonly recognized. In 1958, the BVerfG decided in the *Lüth case*<sup>40</sup> that the fundamental rights form an objective order of values which is applicable in all fields of law. This order of values must be respected and its violation can be prosecuted before the BVerfG. Thus, the BVerfG made itself the highest guardian of the values of the state to which virtually everybody is subject. This is also the view the general public has of the Court.<sup>41</sup>

Although confronted very recently with highly political questions, the BVerfG also practices certain forms of judicial restraint, just as the USSC. In 2003, the question of whether one of the *Bundesländer* could prohibit female Muslim teachers from wearing headscarves in schools was answered positively in principle.<sup>42</sup> In the case itself, there was no legislative prohibition, but rather just an order by executive officials. According to the BVerfG, this was not constitutional; the legislature, however, was found to have such powers. Surprisingly, this time many scholars and the media wanted the BVerfG to decide the case, rather than passing it back to the legislature.<sup>43</sup> This was also the main critique in the dissenting opinion. Thus, there is a certain expectation of the BVerfG in Germany to give guidance in matters involving complicated political problems.

Areas in which the BVerfG met this expectation (whether the result was criticized or not) are, for example, military deployments of German troops in international campaigns, social security, taxes, *Rechtschreibreform* (reform of grammar and spelling), the European communities, television and radio and, as in the US, abortion. The development of the abortion cases in Germany was somewhat different, though. First, in 1975, the BVerfG declared that unborn life independently enjoyed the protection of the Basic Law.<sup>44</sup> Therefore, the state had to protect it even against the interests of the mother for the whole term of a pregnancy, which made abortion in principle unconstitutional. Later, in 1993, the executive and the legislature wanted to liberalize the provisions governing abortion. The BVerfG, in its new decision<sup>45</sup>, stated clear conditions for such liberalization. While abortion was still prohibited, and the basic attitude of the Court towards unborn life had not changed, an abortion became possible in the first months of pregnancy and with the prior consultation of the mother. Again, the BVerfG dictated to the legislator how to make a law constitutional.<sup>46</sup>

40 BVerfGE 7, 198 (230).

41 See *Darnstädt*, Mir hat keiner was zu sagen, *Der Spiegel*, 5/17/1999, p. 206, 207.

42 BVerfGE 108, 282 (340).

43 See *Zuck*, ZRP-Rechtsgespräch, ZRP 2003, pp. 420–422.

44 BVerfGE 39, 1 (95).

45 BVerfGE 88, 203 (366).

46 For a comparison of the German and US abortion cases see *Brugger* (fn. 4), §§ 7, 8.

## 2. Judicial Activism in Germany

In Germany, the BVerfG is not easily called activist. As one of the justices' assistants, Dr. *Ulrich Palm*, told me, none of the justices would accept being called judicially activist without protest. However, the justices themselves are very conscious about their power and their role in the German constitutional system.<sup>47</sup> And, as stated above, sometimes they are even expected by the public majority to decide political disputes. Several peculiarities of German constitutional law contribute to this. Political parties and parts of the government, such as factions of the Bundestag (the parliament), the Bundesrat (the house of the representatives of the *Bundesländer*) or other top-level federal organs can bring actions before the Court to challenge legislation under Art. 93 para. 1 Basic Law. Thus, matters on which a political compromise could not be achieved often end up inevitably before the BVerfG. This leads to a strong informal impact of BVerfG jurisprudence, as in many legislative initiatives the Court is informally consulted or its expected opinion is respected.<sup>48</sup> On the other hand, the jurisprudence of the BVerfG is regarded not as "man made" or artificial but as reflecting objective legal theory within the scope of the *lege artis*, which includes recognized methods of interpretation. In giving very detailed reasonings for its judgments, the BVerfG tries to adhere to this perception.<sup>49</sup>

Another reason for the different assessment of judicial activism in Germany is the relatively easy access to the Court. Under the simple condition that one claims that one's rights have been violated, a constitutional complaint can be filed. In fact, such constitutional complaints by citizens make up for the major part of the BVerfG's caseload. The feeling that every act of government can be challenged somewhere and that there is an impartial institution watching over the foundations of the state creates a lot of public trust in the BVerfG. Nevertheless, there is also loud opposition to some of the Court's more activist judgments, voiced by scholars and even judges of other courts complaining about the amassing of competences by the BVerfG and its far-reaching decisions. The BVerfG should, according to this opinion, confine itself only to matters of constitutional law.<sup>50</sup> This accords with the view that it is the courts' task to apply the law and the legislator's task to create it. However, especially in constitutional law, this distinction cannot be as easily made as the constitution is relatively vague and needs special interpretation.<sup>51</sup> Therefore, matters of constitutional law can easily be extended and may have influence on other areas of law, too.

47 Former President of the BVerfG *Jutta Limbach* in: Das letzte Wort, *Der Spiegel*, 10/1/2001, p. 62, 68.

48 *Jacob/Blankenburg/Kritzer/Provine/Sanders* (fn. 23), pp. 310 et seq.

49 *Kissel*, Grenzen der rechtsprechenden Gewalt, *NJW* 1982, p. 1777, 1779; *Kommers*, The Constitutional Jurisprudence of the Federal Republic of Germany, 2<sup>nd</sup> ed. (1997), pp. 38 et seq.

50 *Bettermann*, Die Aufgabe: Fachgericht für Verfassungsrecht, *Frankfurter Allgemeine Zeitung*, 12/20/1996, p. 13.

51 *Haltern*, Verfassungsgerichtsbarkeit, Demokratie und Misstrauen, *Schriften zum Öffentlichen Recht*, Band 751, 1998, p. 219.

Unlike the USSC, the BVerfG does not use a test like the political question doctrine to determine the justiciability of a case.<sup>52</sup> Under the guarantee of effective judicial protection of Art. 19 para. 4 Basic Law a case involving an injury of individual rights must be heard by the courts. Only if an injury is obviously and inevitably out of the question, justiciability is denied. Therefore the justiciability is not a problem in "political" cases. However, the BVerfG, too, has used similar language as in the political question doctrine to exert a flexible way of dealing with political disputes in such cases. The BVerfG limits its jurisdiction by using a lesser standard of review.<sup>53</sup> Furthermore, the requirement of an injury of personal rights limits the jurisdiction to individual cases. Popular actions are not possible in German constitutional law.

## IV. The European Court of Justice

Both the USSC and the BVerfG are the highest courts in their respective national constitutional systems. The ECJ is in a very much different position. Created to give the European treaties legal effect, it sits at the top of the judicial branch of a supranational organization. It hears cases from all the European Member States and its judges come from all those Member States. However, its functions are comparable to those of a constitutional court. Therefore, the problem of judicial activism also can be found within its decisions. Indeed, the critique of being activist has been raised quite often against the ECJ.

### 1. Forming the European Community

During the first years of the European Community, it was mainly the ECJ which defined the scope of the new entity and the impact it would have. In the early 1960s, the ECJ defined the EC as a "new legal order" with its "own legal system"<sup>54</sup>. This special position of the European Communities is also based on the fact that Community measures can be adopted even against the vote of a Member State. This is a one-of-a-kind situation in international law, where unanimity is the standard. It clarifies that the EC is a supranational entity. Through those and later judgments incorporating the principle of the rule of law, the ECJ formed the idea of the treaties as a kind of constitution for Europe and acted itself as a constitutional court. None of the founding Member States can be said to have had envisaged such a development. The main goal of the ECJ in its judgments is to ensure the effectiveness of the treaties.<sup>55</sup> In an opinion concerning the draft agreement on the European Economic Area, the ECJ established itself as the exclusive defender of the Community legal order.<sup>56</sup>

52 *Brugger* (fn. 4), p. 95.

53 See *Schlaich*, Das Bundesverfassungsgericht, 2<sup>nd</sup> ed. (1991), pp. 267 et seq.

54 *ECJ*, cases 26/62, *van Gend en Loos*, 1963 ECR 1; 6/64, *Costa v. ENEL*, 1964 ECR 585.

55 *Craig/DeBúrca*, EU Law, 3<sup>rd</sup> ed. (2003), p. 97.

56 *ECJ*, opinion 1/91, 1991 ECR 6079, p. 35.

## 2. Removing Barriers

One group of cases that led the ECJ to become activist are those in which Member States put barriers in front of community goals. One example is the *Cassis de Dijon* case<sup>57</sup>. In this case, German law prohibited the import of alcoholic beverages under a minimum alcohol content, arguing that this measure was needed to further public health. Under the procedure of Art. 234 EC, the German court referred to the ECJ the question if such a measure was legal under the free movement of goods clause of the EC treaty. The ECJ answered that there was no general interest whatsoever in fixing a minimum alcohol content. Neither public health nor consumer interest in fair trade would be protected by this; the regulation was void in regard to community law. There are several other cases in which the ECJ struck down Member State barriers to the Common Market.

## 3. Expanding Effectiveness

For the ECJ, as the main motor of integration<sup>58</sup> in the EC, not only the barriers the Member States put up were hindering Community law and trade. Also problematic was how the application and interpretation of Community law could be assured on the same premises in all Member States. The first step the court took in that direction was in the *van Gend en Loos* judgment<sup>59</sup>. In this case, the question was whether a treaty provision, namely Art. 12 EEC, was directly applicable in Dutch law. Arguing that the treaty is intended to establish a Common Market and that the functioning of this is of interest to all Member States and their peoples, the ECJ found it, therefore, establishes more than an international agreement (see IV.1. above); it must also confer obligations and rights upon the Member States and even individuals living in the Member States. Art. 12 EEC, as a negative obligation which is sufficiently clear and precise, must have direct effect in the Member States without any further legislative action on the part of the Member States. While partly arguing based on the text of the treaty, the strongest arguments of the ECJ derived from its vision of the kind of Community the treaty meant to create.<sup>60</sup>

In later cases, this direct effect was, under certain conditions, expanded to regulations<sup>61</sup>, decisions<sup>62</sup>, directives<sup>63</sup> and even to some international agreements into which the Community entered<sup>64</sup>. However, the direct effect of Community law was only applicable in the relationship between Member State and individual. There was

57 ECJ, case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein*, 1979 ECR 649.

58 Stein, Richterrecht wie anderswo auch? Der Gerichtshof der Europäischen Gemeinschaften als "Integrationsmotor", in: FS 600 Jahre Jur. Fak. Heidelberg, 1986, p. 619, 620.

59 ECJ, case 26/62, *van Gend en Loos*, 1963 ECR 1.

60 Craig/DeBúrca (fn. 55), p. 184.

61 ECJ, case 39/72, *Commission v. Italy*, 1973 ECR 101.

62 ECJ, case 9/70, *Franz Grad v. Finanzamt Traunstein*, 1970 ECR 825.

63 ECJ, case 41/74, *Van Duyn v. Home Office*, 1974 ECR 1337.

64 ECJ, case 162/96, *Racke v. Hauptzollamt Mainz*, 1998 ECR I-3655.

no horizontal direct effect between individuals. To give Community measures even greater effect, the ECJ first applied a broad concept of the state in determining the existence this relationship (state-owned companies, for example<sup>65</sup>). Then it developed the doctrine of indirect effect, which forces Member State authorities (also courts) to interpret Member State law in the light of Community law.<sup>66</sup> This doctrine was based on the duty of the Member State to do everything possible to comply with Community law. Indirect effect even applies in relations between individuals and was only limited by the principle of non-retroactivity and the interpretability of the legislation in question.<sup>67</sup> Furthermore, under the concept of incidental horizontal effect, the direct applicability of directives became possible in cases involving only individuals when directives do not directly impose obligations.<sup>68</sup>

The last step the ECJ took to ensure the uniform application of Community law and to make the Member States comply with it was to create state liability for the non-implementation of a directive.<sup>69</sup> From now on, a Member State was liable for its failure and had to pay damages to individuals, although this was not based on any textual provision in the treaty. While it is still the national courts that award such damages and not the ECJ, the procedural rules and measures such as interim relief are closely watched by the ECJ.

#### 4. Finding new Concepts of Law

While Art. 220 of the EC treaty gives the ECJ the task of observing the law in application and interpretation of the treaty, it does not say what the law is nor can another textual basis for this be found in the treaty (except for the mentioning of "lawfulness" in Art. 230 EC and the non-contractual liability of EC institutions in Art. 288 para. 2 EC). However, the ECJ has been quite inventive in using this provision to fill gaps that opened up in Community law.<sup>70</sup> Through this article, the ECJ was able to use its notion of the general principles of law that had to be observed.

Over the years, and by drawing on the legal orders of the Member States and inspired by their common constitutional traditions and interests<sup>71</sup>, such as common treaties they signed, the ECJ developed a set of principles including proportionality<sup>72</sup>, legal

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65 ECJ, case 152/84, *Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)*, 1986 ECR 723.

66 ECJ, case 14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen*, 1984 ECR 1891.

67 ECJ, cases 334/92, *Wagner Miret v. Fondo de Garantia Salarial*, 1993 ECR I-6911; 80/86, *Kolpinghuis Nijmegen BV*, 1987 ECR 294.

68 ECJ, case 194/94, *CIA Security International SA v. Signalson SA and Securitel SPRL*, 1996 ECR I-2201.

69 ECJ, case 6 & 9/90, *Francovich and Bonifaci v. Italy*, 1991 ECR I-5357.

70 Hirsch, Der EuGH im Spannungsverhältnis zwischen Gemeinschaftsrecht und nationalem Recht, NJW 2000, p. 1817, 1820.

71 ECJ, cases 7/56 and 3-7/57, *Algera e. a. v. Common Assembly*, 1957 ECR 89.

72 ECJ, case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Futtermittel und Getreide*, 1970 ECR 1125.

certainty<sup>73</sup> -which includes non-retroactivity and legitimate expectations, fundamental rights<sup>74</sup>, procedural rights<sup>75</sup> and non-discrimination<sup>76</sup>. Several of those principles have later been incorporated into the treaty. Among them are e. g. non-discrimination (Art. 3 para. 2 EC) and proportionality (Art. 5 para. 3 EC). In matters of fundamental rights there have been several declarations by Community institutions such as the Commission indicating the Commission's obligation to respect the ECJ's application of such rights. Recently, a Charter of Fundamental Rights has even been adopted, which complies with the ECJ's rulings but does not have any binding legal effect. Being also based on the European Convention on Human Rights, it was integrated in the draft constitutional treaty and is likely to stay part of an eventual new treaty.

## 5. Judicial Activism

The ECJ has been one of the most, if not the most, criticized courts. On one hand, this is due to its many "clients" in the form not only of the Member States of the EC but also of all the individuals who are affected by its judgments. The court's critics have claimed that the use of those new principles and the application of guidelines which were essentially political amount to an illegitimate usurpation of power.<sup>77</sup> Additionally, a court usually faces criticism by those who lose the cases<sup>78</sup>, which is, in the case of the ECJ, quite often the Member States. They are afraid of losing more of their sovereignty and so their critique is especially loud. They have fought tenaciously to retain their positions and, for example, not to become subject to paying damages, which is not provided for in the EC treaty.

A handful of national High Courts have been very cautious about this development, too. Especially the BVerfG but also the Italian highest court, for example, have very slowly accepted the supremacy of the ECJ. In its *Solange I* and *Solange II*<sup>79</sup> decisions, the BVerfG first denied the supremacy of Community law over the German Basic Law, as long as there was no protection of fundamental human rights in the EC that was comparable to the protection in Germany. Then it stated that the protection on the European level had become sufficient and as long as it remains sufficient, the BVerfG would refuse to challenge Community law on grounds of violation against the Basic Law. This has become known as the "*Kooperationsverhältnis*"<sup>80</sup>. While the BVerfG still regards itself as the final authority to declare acts void or inapplicable in Germany if they violate the protection standard of the Basic Law (which is nearly

73 ECJ, case 47/84, *Sideradria v. Commission*, 1985 ECR 3983.

74 ECJ, case 4/73, *Nold v. Commission*, 1974 ECR 491.

75 E. g. ECJ, case 17/74, *Transocean Marine Paint Association v. Commission*, 1974 ECR 1063.

76 ECJ, case 117/76, *Ruckdeschel v. Office National D'Immigration*, 1977 ECR 1753.

77 *Rasmussen* (fn. 1), p. 62.

78 *Gusy*, Parlamentarischer Gesetzgeber und Bundesverfassungsgericht, Schriften zum Öffentlichen Recht, Band 482, 1985, p. 16.

79 BVerfGE 37, 271; 73, 339.

80 I. e. relation of cooperation.

impossible nowadays because of the high standards of the ECJ), it has accepted the jurisdiction of the ECJ. This development can be seen as showcase for other Member States, as well.

There are supporting voices, too. Advocate General *Jacobs* sees the Court as essential in preserving the balance between the Community institutions and the Member States; without the Court, the functioning of the Community would not be guaranteed.<sup>81</sup> Additionally, as we have seen, the Community institutions all have accepted the Court's rulings and given supporting opinions<sup>82</sup> and in several cases these rulings have been adopted in the text of the treaty. This, of course, can be attributed to the strengthening of the position of the Community institutions in contrast to the weakening of the Member States' position.

The main argumentative line of the ECJ in all its decisions is teleological: The court has to preserve the "effet utile" of the treaty.<sup>83</sup> The functioning and practicability of the treaty have to be assured. Otherwise, it would, as so many other international treaties, soon become meaningless. Since there are exceptionally many gaps or open formulations in the treaty, the court can only attempt to distill the aims and goals of the community. The few anchors there are, may be found in the preamble and the first few articles. This leaves the treaty open to a wide interpretation. And it left the ECJ with a choice: To be activist, but consolidate the power of the Court for the aim of an ever closer union in Europe, or to be passive, letting the Member States dictate what is going on, as it is common in international law. Obviously, the Justices of the Court opted for the first alternative. Being more in the French tradition, the ECJ still sees its development of new concepts as interpretation, even when it goes beyond of what can be found in the text.<sup>84</sup>

## V. The Comparison

In the following comparison, I will first try to compare the forms of judicial activism shown by the three courts examined here. The question will primarily be: Are there differences? In the second part, I will figure out how those differences, if any, came into existence, or if there are certain common grounds for the development of judicial activism that can be found for each of the courts.

### 1. Forms of Judicial Activism

Taking the USSC as starting point, we have seen that the Court dominated the public polity in the US in several areas. Many major political changes have been brought on

81 *F. Jacobs*, Is the Court of Justice of the European Communities a Constitutional Court? In: *Curtin/O'Keefe* (eds), *Constitutional Adjudication in European Community and National Law*, 1992, pp. 25, 32.

82 *Cappelletti*, Is the European Court of Justice Running Wild? *E. L. Rev.* 12 (1987), p. 3, 13.

83 *Craig/DeBúrca* (fn. 55), p. 98.

84 *Ukrow*, Richterliche Rechtsfortbildung durch den EuGH, 1995, pp. 72 et seq.

their way and have been supported by the USSC. This holds true for the end of racial segregation, the recognition of abortion as constitutional, as well as many other fundamental rights the USSC found in the American Constitution. The other branches of government had not much of a say in those processes, even if they tried (*Roosevelt* and the court-packing plan constitute an exception). The judicial activism found in the US is a very political one, influenced by the visions of the Justices on how society should be under the Constitution.

While there are similarities in Germany, such as in the case of the creation of new rights (right of individual self-determination) and with respect to the highly political impact of the Court's judgments (creation of the public broadcasting institutions, decisions on military deployments) and also to the development of the objective function of the fundamental rights culminating in the notion of the objective order of values of the Basic Law, the BVerfG stands for a different activism than the USSC. Concerning the objective function of fundamental rights, the BVerfG can be seen far more activist, as the USSC does not have such a conception. Having said that, in other fields the USSC is more willing to take a step forward. The judgments of the BVerfG generally have more of a theoretical or scholarly nature with long reasonings. Thus, the reception of those judgments is different, too. Developments such as the indirect effect of fundamental rights have been disputed heavily in the academic world, but, in the end, the practice of the BVerfG has been regularly accepted also on dogmatic grounds. The BVerfG adheres strongly to the classic methods of interpretation. Especially the grammatical and systematic interpretations play an important role in its judgments. Those objective methods are used to circumvent extreme results in the interpretational process.<sup>85</sup> The BVerfG is seen as a kind of mediator which tries to find acceptable compromises in a pluralistic society according to the values of the Constitution.<sup>86</sup>

To limit the USSC, the political question doctrine was introduced in US constitutional law. Under this doctrine, the USSC may not accept cases that present solely political questions (see II.4. above). Still, since the USSC is the highest appellate court, many different cases reach it, not all of which are concerned with constitutional matters. In Germany, the BVerfG only treats constitutional cases. This has not limited the cases it hears to apolitical ones, though. The BVerfG (and the USSC) has been very inventive in taking on cases it wanted to decide or rejecting them if not (e. g. the *Rechtschreibreform* case). Concerning the style of its judgments, the USSC follows a historic approach. This is a consequence of the common law system where the principle of stare decisis and thus the precedents have to be taken heed of. This implicates a different kind of doctrine, not so much centered on the text but more on the history and tradition of former judgments. The USSC starts its judgments with listing the precedents for the specific case and explaining them. In the next step it

85 *Bernhardt*, Zur Auslegung des europäischen Gemeinschaftsrechts, in: FS Kutscher, 1981, p. 18.

86 *Gusy* (fn. 78), p. 19; *Klein*, Gedanken zur Verfassungsgerichtsbarkeit, in: Festschrift für Klaus Stern zum 65. Geburtstag, 1997, pp. 1135 et seq.

brings the new decision in line with the older ones. In several cases, the USSC has been very inventive in claiming that a case belongs to a certain line of precedents and has been heavily contested for this in return.<sup>87</sup>

The ECJ hears a totally different set of cases. It is primarily concerned with referrals from national courts asking for clarifications about EC law. Financial and commercial cases form the majority. The cases become political if the ECJ sees a connection to how the EC should be administered or how the relationship of the Member States to the EC should be constituted. And at this point it has been extremely active in forging its ideas into Community law. As with the other courts, the ECJ forms a kind of watchdog over fundamental values that have to be obeyed. On the other hand, it has been a mediator who brings the opposing parties together. Despite being so activist, the ECJ has brought forward changes slowly, case by case. Some scholars speak of this development as dynamic interpretation of the treaty, with the ECJ constantly adopting it to the conditions in the Member States and looking for the latest developments in the legal systems of the Member States. The other two courts have ruled on more "big" cases in which a matter was settled once and for all. This might be connected with the fact that the ECJ publishes rather short opinions and leaves many issues unclear that are not necessary for deciding the actual case at hand. In fact, the ECJ's way to decide just the individual case has been a justification for its activist judgments that expanded the effectiveness of the European Community. By deciding only individual cases and emphasizing this point, the ECJ could prevent the accusation of creating its own Community administrative law.

Another important difference is the principle of *stare decisis*. While this principle is essential and generally recognized in the USA, the BVerfG and the ECJ are not bound by their prior decisions. While there are certain conditions under which the USSC can depart from prior judgments, the BVerfG and the ECJ enjoy more freedom in this matter and can more easily tread new ground or break with their old lines of judgment.<sup>88</sup>

In comparing the activism of all three courts, one finds a common purpose to watch over the respective society and to form it according to certain ideals. The ECJ reveals an inventiveness similar to that of the USSC in creating new rights and adding to the Constitution. The BVerfG seems to be more restrained and more willing to reach compromises, but still capable of acting strongly to promote its views of the Constitution.

## 2. Development of Judicial Activism

To find out what conditions there must be for judicial activism to develop, we must examine the relevant Constitutions themselves. These Constitutions provide for the

87 See the dissenting opinion of Justice *Scalia* in *Lawrence v. Texas*, Nr. 02-102 decided 6/26/2003.

88 See *Seyfarth*, Die Änderung der Rechtsprechung durch das Bundesverfassungsgericht, Schriften zum Öffentlichen Recht, Band 754, 1998, pp. 293 et seq.

courts that ultimately engage in judicial activism. The EC treaty will be treated here just like the other Constitutions since it fulfils nearly the same purposes.

All three documents are relatively vague. The US Constitution is, even with amendments, the shortest and therefore the vaguest. The three sections of Art. III establish the USSC and its jurisdiction. 28 Articles of the EC treaty establish the two Community courts, and provide for their jurisdiction and the actions before those courts. In the Basic Law, 13 Articles regulate the judiciary. Additionally there is a statute governing the BVerfG. Those regulations do not tell us much about judicial activism, although they do indicate that the courts do not have legislative powers. The US Constitution gives the USSC the widest competence, but all these courts are limited in the kind of procedures they can adopt and they depend on the parties to bring forward the cases, all of which limits the competences of the courts.<sup>89</sup>

*Cappelletti* has suggested several other reasons that could lead to judicial activism. Among them are the activism or passiveness of the legislator, the density of regulation, the hierarchy of laws which he calls a “pluralism of legal sources” and the federalistic structure of a system.<sup>90</sup> All these factors create a lot of tension between different legal institutions and sources of law. As the highest court in each system, the court tasked with constitutional matters has to have the final say in resolving these tensions. This requires extreme creativity, leading to more activist judgments.

These above-mentioned reasons are true for the three courts and can explain their activism in part. There are particularities for each court, however. In the US, the USSC can look back to a long history of continuous jurisdiction, even in times of war and crisis. This gives the justices great confidence in exercising their powers and issuing judgments. Additionally, the extreme shortness and vagueness of the US Constitution make it necessary for the court to reinterpret it from time-to-time in response to changed circumstances. Naturally, this encourages a certain activism in dealing with new situations. Another factor coming from the Constitution itself is the way and the probability of changing and amending it. The US Constitution may be changed by adding amendments, Art. V US Const. This process rests solely on the legislature. However, a two-thirds majority is needed in both houses or in the states to propose an amendment. So far, none has been proposed by the state congregation but 33 by the two houses of Congress. After the proposal, the amendment has to be ratified. This, again, is done via two different ways: Either the legislatures in three-fourths of the states have to ratify the amendment to become effective or there may be conventions in three-fourths of the states which ratify the amendment. So far, only 26 amendments made their way through this process. This shows the high hurdles put on changing the US Constitution. This leads, on the other hand, to an extended need for adapting the Constitution to present day conditions, which can further judicial activism. The life tenure of the American justices also adds to this; while the holders of political offices in Congress and the presidency change quite often, the justices

89 *Knies*, Auf dem Weg in den “verfassungsgerichtlichen Jurisdiktionsstaat”?, in: FS Klaus Stern (fn. 86), p. 1155, 1160 et seq.

90 *Cappelletti* (fn. 82), p. 3.

generally remain on the bench quite long, thus increasing the possible frictions between the branches.<sup>91</sup>

This is not the case in Germany or in the EC. In Germany, the judges are elected by representatives of the Bundestag and the Bundesrat in a manner that advances the highest compromise in finding the candidates. The Wahlmännerausschuss (Judicial Selection Committee) of the Bundestag elects half of the members of the BVerfG. Its members are usually high ranking party officials. It is interlinked with both the Federal Judges Committee, which is responsible for choosing the non-constitutional federal judges, and the Judiciary Committee, both committees of the Bundestag. The other half of the Justices are elected by the Bundesrat. Although it is supposed to act as a whole with a two-thirds majority, the actual decisions have usually been made before. This whole process requires a fine-tuning of party interests and a high degree of compromise.<sup>92</sup> Therefore, and because of the shorter terms of office, the candidates' party affiliation does not play as much of a significant role. In the EC, party affiliation is also less important; what counts primarily (still) is the nationality. The ability of every Member State to select one justice also reflects a kind of compromise that eases possible friction.

The composition of a constitutional court is a means to ensure balance, independence and effectiveness of the court.<sup>93</sup> But, to what extent have the influences of the courts on each other affected their activism? Each of the three courts under consideration, as the highest in their respective system, is proudly independent and rejects the idea of being influenced by others.<sup>94</sup> However, the USSC has left an imprint on all newer European courts. The Founders of the EC had the USSC in mind, when they created the ECJ, and the BVerfG itself has referred to the USSC in its judgments as a help to interpreting the Basic Law.<sup>95</sup> The constitutional values protected by all three courts and their institutional positions are comparable.<sup>96</sup> Thus, it is more than possible that the USSC has also influenced its two European counterparts with regard to judicial activism and this Court's attitude towards it.

Finally, the personalities of the judge, themselves, play a part in the development of judicial activism. Interpretation is always dependent on personal ideas and beliefs. Juridical decisions are not completely rational; judges will always also express their personal values, which have to be as far as possible rationally structured and transparent to make them controllable.<sup>97</sup> In acquiring these values, both the culture and

91 Schmidhauser, Judicial Activism and Congressional Responses, in: *Landfried* (ed.), Constitutional Review and Legislation, 1988, pp. 39, 41.

92 Degenhart, *Staatsrecht I, Staatsorganisationsrecht*, 18<sup>th</sup> ed. (2002), para. 598.

93 European Commission for Democracy through Law, The Composition of Constitutional Courts, Science and Technique of Democracy, No. 20, 1997, p. 30; Harutyunyan/Mavcic, The Constitutional Review and its Development in the Modern World, 1999, p. 261.

94 E. g. *BVerfGE* 2, 79 (84).

95 *BVerfGE* 39, 1 (73).

96 *Ukrow* (fn. 84), pp. 73 et seq.

97 *Riecken* (fn. 27), p. 291.

education of the judges play a major role.<sup>98</sup> In Western societies, the judges are educated to uphold constitutional values in an atmosphere that is pervaded by the belief in fundamental human rights and values. This will obviously influence their decisions, too.

## VI. Conclusion

Judicial activism is a phenomenon that occurs in all three of the courts examined here. Each one has had phases in which it was more activist, or where it switched its attention to new fields in which it became active. Through such activism each court was able to shape the nation (or supranational entity) within which it operated. All three courts have faced the heavy criticism that they have overstepped their competences and disregarded the true meaning of their Constitutions.

On the other hand, all three systems seem to have recognized the need to establish an institution to watch over the Constitution and to prevent the people from enslaving themselves. Without the stepping forward of the USSC in the civil rights question, there would not have been a development as fast and radical as it happened. Without the ECJ stepping forward in integrating the Member States and forming a real union among them, the EC would not be what it is today. Without the BVerfG, the German consciousness of fundamental values and rights would not be what it is.

But judicial activism should not be unlimited. There are clear limits. First, the text of the Constitution is a limit in the sense that interpretation should still have a basis in the text, although this can be quite hard in the case of constitutions as their text is very abstract. Second, the powers of the democratic legislative branch have to be respected as it is necessary to uphold the principle of the separation of powers. This is, however, the most difficult part. It needs a careful examination of how far the power of the legislature goes. The Constitution and with this judicial review are definitely a limit to those powers. It is almost impossible to define a clear line that should not be overstepped. But what is possible is to define the extremes. Complete judicial restraint is not what is demanded from the courts. A decision like *Bush v. Gore* must not happen either. It was a highly critical judgment concerning the matter whether the USSC, the Florida state court or maybe even another entity was able to decide about the recount of the votes. The case led to a situation where the officially elected president had fewer votes than his competitor. In cases like this it is more advisable for the courts to step back. The courts must be aware of the institutional limits on their competences. Luckily, in all three systems considered here they have been critically watched and not held to be sacrosanct, put up on a hill and worshipped like constitutional idols. The judges have faced and will continue to face criticism for their judgments.

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98 See Modéer, European Legal Cultures, in: Comparative Legal Cultures, A Reader in Comparative Legal History, 2004, pp. 70, 72 et seq.

So is judicial activism good or bad in the end? As with everything, the right dosage is needed. A court that lets the legislator do what he wants is no constitutional court. Therefore, there will always be some kind of friction. Judicial activism is characterized by the judges who stand up for their ideals of the Constitution and what they understand to be the views that stand behind the Constitution, inherent in the culture of their nation. As stated above, without activist courts, there would not have been many of the important changes that still shape our society today. As an example again, without the USSC, the development of civil rights would not have taken place as it did.

I owe an answer to the question posed at the beginning: Are the courts running wild? I do not think so. If there is a line depicting the median between too activist and too passive, each court did stray once or even several times far off to either side of this line. Over the course of time, however, all three courts have stayed mainly on that line and demonstrated a mature competence in deciding highly complicated matters paying due regard to their respective Constitution.