Public Issues

Nr 1,080
September 21st, 2012
www.lyd.org ISSN 0717-1528

Judicial Activism and Accountability

It seems convenient to promote a culture of self-restraint and judicial minimalism, where judges enforce the laws to a specific case, refraining from using the judicial way to reconduct government programs or foster social reforms. The example of other countries may serve as reference.

The *Castilla*[i] decision, unanimously pronounced by the third division of the Supreme Court, shall be no doubt one of the most commented sentences of 2012; a fact that has been demonstrated by the wide media coverage and the profuse debate among experts from different disciplines. Although great deal of the debate has focused on the sentence's impact in terms of the country's energy matrix, the system's costs and the industry's uncertainty when investing on large-scale projects such as this – where compliance with the law and regulatory standards seem to be insufficient[ii]-, from the juridical perspective, the debate has been concentrated on whether the Court has gone beyond the scope of its power[iii]. The month before, a similar coverage and controversy had been caused by the sentence of the so-called *Pitronello* case[iv], where, as we may recall, the Public Ministry sought to accuse Pitronello under the Antiterrorist Law for placing a bomb in a bank branch office. In the sentence, pronounced by the 4th Oral Criminal Trial Court, with two votes against one, it was discarded that the ascribed facts were a terrorist crime, thus sentencing him for illegal tenure of explosive artifact, license plate adulteration and damages. In the past, other "difficult cases" –politically or culturally controversial- where the "judicial activism" issue was present, were the so-called *Isapres*[v] and *Píldora II* cases[vi], within the Constitutional Court.

All these typically constitutional "difficult cases", and the excesses incurred by the judges in relation to their powers, serve to illustrate

what in compared law –particularly in the North American law- is known as "judicial activism", that is, when judges are no longer monuments of impartiality and legal forms –in the terms of the ideal model described by Shapiro[vii]-, and are subject to the same passions, miseries and incentives of the rest of the individuals, they resolve a controversy based on their own political, religious, cultural or public policy beliefs or preferences rather than based on legal norms or its auxiliary interpretation features. In this sense, criminal "guarantism" may be considered a form of judicial activism.[viii]

The above is highly relevant, because we are not only dealing with categories we find convenient to have available when it comes to analyze the judges' behavior in "difficult cases", but, what is more relevant for judicial public policy effects, with an additional argument concerning the importance of the current control mechanisms aimed at judges, which still contain a series of faults in Chile.

As we have maintained in our publications[ix], it is a key factor to advance in control matters through the judges' performance evaluation, both to increase their accountability levels -and having the possibility of setting objective performance assessment systems which are able to reward/encourage good judges and punish/discourage bad ones- and to strengthen the judicial autonomy (especially the internal one). Furthermore, although there is an increasing consensus as to the way of evaluating quantitative aspects of the judicial task, we should now delve deeper into the qualitative aspects, those associated to the process of judicial decision and the sentence itself, a trend that starts to progress in the world and where we find good practices that are worth imitating.

Judicial Activism versus Judicial Restraint

The Black's Law Dictionary defines judicial activism as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions".x The term was introduced by the eminent historian Arthur Schlesinger Jr. in one of the Fortune Magazine issues in 1947.xi

In this perspective, a plausible hypothesis for explaining the result of a sentence in difficult cases should rather be found in the pursuance of certain extralegal goals based on the judges' mere ideological, cultural or even moral preferences; for example, in a case like Castilla, protecting an environment free from contamination at all

cost, the belief that the country has to increase the presence of non-conventional renewable energies in the energy matrix, opposing to capitalism, etc.xii In other words, a judge or group of them no longer interpret the existing social arrangement –materialized in the legislation or applicable administrative regulation- to resolve a controversy, and they become social reformers, change agents with regard to existing rules that are not consistent with their own preferences in the matter under discussion. At any rate, as Posner maintains, the judge is often not conscious of making a decision under the influence of these preferences.xiii

Judicial activism is opposed to the philosophy of self-restraint or judicial restraintxiv - which in the United States emerges from conservative sectors in view of the judicial activism of the "liberal" Warren Court. The Black's Law Dictionary defines it as the "philosophy of judicial decision-making whereby judges avoid indulging their personal beliefs about the public good and instead try merely to interpret the law as legislated and according to precedent".xv Under this philosophy, the judges perform their task by maximizing the use of available legal rules for solving a specific juridical controversy, and minimizing the interference of their decision on the political process and the definition of public policies and regulations, which are in the hands of the people's representatives, elected by and responsible to the people. Anyhow, for critics, the judicial self-restraint is nothing more than a pretext from those who disagree with the results or interpretations of certain decisions.xvi
In Chile, we find self-restraint doctrines in, for example, the constitutional reasoned deference.xvii Thus, the 3rd division of the Supreme Court could have adopted a self-restraint position, since there were substantial elements for it (e.g. expert deference), or not even having gone into the substance (sustaining that it is about a controversy for a plenary action). Anyway, in order to be consistent, this judicial minimalism must be extended to the most diverse subjects. Castilla can be considered as much judicial activism as the Constitutional Court's cases of Píldora II or Isapres, where sectors usually defending this form of judicial minimalism have applauded them.

Judicial Control: Performance Evaluation

Is it possible to detect judicial activism or, in other words, to control the judges who evidently deviate from the law or the deeply rooted judicial precedent, replacing it by their own political or public policy preferences? This leads us, through a different way, to deal with the

old judicial accountability problem. In this perspective, there are at least three basic aspects concerning judicial accountability that should be considered.[xviii]

In the first place, in a democratic society, the judges, as well as all other public authorities, must be periodically accountable to the citizens for their work – since in the evidently serious, exceptional cases, they may face impeachment; there are different mechanisms that go from the most problematic popular judicial election (United States) or appointment periods (such as for the Constitutional Court and specialized courts in Chile), to the most common performance evaluation mechanisms based on objective indicators.

In the second place, the performance evaluation[xix] allows, from the social and users' perspective, verifying the operator's assumptions, perceptions and beliefs; it allows judges and courts to respond to the concerns of individuals and users' groups; it is a prerequisite for demands based on evidence in view of new judicial initiatives and increasing budgetary resources; and it provides the means for the courts to demonstrate to the public opinion how resources are used, thus fulfilling their accountability duty. From the perspective of the judges and judicial officers, it allows objectively and equitably recognizing individual contributions of each professional and the group; it is a tool that serves to channel reward systems and economic and non-economic acknowledgements; it is an instrument for improving and upgrading training programs; it allows generating a support procedure for the progression systems in judicial life development.

And third, the performance evaluation should not only consider a multiplicity of tools (benchmarking, self-evaluation, peer evaluation, experts' evaluation, user satisfaction surveys, etc.), but also quantitative indicators (work load; issues' complexity; proceeding terms' fulfillment; accumulations; use of new technologies; dedication according to the type of matter they take cognizance of, training; juridical publications; lectures and participation in seminaries; teaching; etc.), and qualitative indicators.

As a matter of fact, as recent international evidence demonstrates it in OECD countries, it is easy to achieve consensus in relation to quantitative indicators, but reaching agreements in qualitative aspects is complex.[xx] The main argument against qualitative evaluation is simple: any interference in the core of judicial decision implies to damage the judicial independence of the judge who is

deciding the specific case. Therefore, the use of judgment annulment indicators by high courts is normally dismissed and it is maintained that the sole way of controlling the decision is through the existing procedural remedies.

However, the international experience itself has generated good practices in this matter. In France[xxi], for example, the Court of Appeals of Paris created an experts' committee for assessing the quality of sentences in 2003. In 2004, 200 cases were evaluated and in 2006, 1,500. Two evaluation criteria were set forth: (a) of the judicial decision process and (b) of the judicial decision itself. In the first case, the following questions were analyzed: Was there a report in the hearing? What type of hearing was it? What kind of decision was it? Hearing, sentence, and disclosure dates? On the other hand, the judicial decision evaluation criteria included: Are facts clearly established? Are the claims of the parties mentioned? Is the sentence substantiated? Are the decision's legal conditions mentioned? Does the sentence take care of the costs? Are the days on which interests and fines start to fall due specified? Are the sentence's execution mechanisms specified?

Additionally, in 2003, in the Netherlands[xxii], a court evaluation integral system was brought into operation based on quality standard control, considering a yearly evaluation of the court's operation; and the use of benchmarking among courts to assess the compliance of quality standards was implemented. Likewise, every four years, a user's perception evaluation is carried out; an internal satisfaction evaluation regarding the role, organization and managing team; and an additional evaluation from an external independent committee by means of a public report and one to the Ministry of Justice. This is in turn complemented by peer evaluations (judges to judges concerning the treatment given to the parties of the process, behavior, and quality of the sentences); and complaint procedures with regard to judges and officers. An evaluation of 2007 demonstrated this approach's positive results.

Chile is currently in the worst of worlds in this matter: a control system aimed at judges' work which does not distinguish between performance evaluation and disciplinary sanctions; and the way of applying the qualification scheme –by the hierarchical superior in not very transparent procedures- harms the internal independence. All in all, we can be optimists: some performance evaluation elements were included in the discussion of Law Nr 20,224 (2007) which modifies Law Nr 19,531 on remunerations of the Judicial Power,

which introduced us in the debate about the judicial performance bonus (institutional and collective performance); and in the last decade, initiatives tending to reform the qualification system have been given more emphasis, both in the academic community and within the Judiciary itself (i.e., Judicial Forum).

Conclusion

Recent sentences like *Castilla* or *Pitronello* have been controversial, because trial judges are deemed to have gone beyond the scope of their powers. A possible hypothesis, if we review the literature on judicial behavior matters is related to the concept of "judicial activism". Although we are dealing with a category that has not been greatly developed in our doctrine, it does not mean that it should not be under study. Ignoring this literature can be a great mistake. Likewise, it would be advisable to encourage a culture of judicial self-restraint, of judicial minimalism, where judges enforce the law to the specific case, refraining from using the judicial way to reconduct government programs or foster social reforms.

This kind of decisions remind us that in a democratic society, the judges –and their sentences- should be subject to scrutiny and control; not only academic –or from other authorities-, but periodically. In this perspective, the judges' performance evaluation gains ground in the world, consisting in measuring both quantitative and qualitative aspects. Furthermore, as we as seen, there is an increasing trend towards evaluating judicial quality standards, and a series of good practices are being implemented that can be followed by our country.

In brief…

- Recent sentences like *Castilla* or *Pitronello* have been controversial, because trial judges are deemed to have gone beyond the scope of their powers. A possible hypothesis, if we review the literature on judicial behavior matters is related to the concept of "judicial activism". Although it is a category that has not been greatly developed in our doctrine, it does not mean that it should not be under study. Ignoring this literature can be a great mistake.
- It would be advisable to encourage a culture of judicial self-restraint, of judicial minimalism, where judges enforce the law to the specific case, refraining from using the judicial way to reconduct government programs or foster social reforms.
- This kind of decisions remind us that in a democratic society, judges should be subject to scrutiny and control; not only academic or from other authorities, but periodically. There is an increasing trend towards evaluating judicial quality standards, and a series of good practices are being implemented that can be followed by our country.

[i] Case Nr 1960-2012, of August 28th, 2012.

[ii] To the former we could add the ineligibility of the remedy of protection to discuss the matter; the absence of cost-benefit evaluation for a decision like this – that is, consequentialist or proportionality considerations added to those inherent to the consideration of fundamental rights-; or the uncertainty as to how the high courts of justice will act in cases like this when environmental courts have passed judgment.

[iii] For example, we have critically studied the sentence, thus concluding that (i) the Supreme Court recognizes that the Environment Framework Law does not compel the owner of a project to be related with another one to jointly present it, thus the Court becoming a regulator who establishes its own standard while demanding the project's joint presentation; (ii) it ascribes itself the quality of technical expert – making a direct evaluation and determining the way of dealing with or evaluating the projects, thus becoming a public policy manager – when its role should be to resolve controversies among the parties; and (iii) the emission standards are not the only parameter envisaged by the industrial qualification contemplated in the urban regulation; so, even if the factors stipulated in the emission standards have been considered as objectivity standards for changing contaminant to annoying, since it is not the only element considered, it is necessary to apply the precautionary principle which could avoid a potential environmental damage. See Public Sentence Nr 28, "*Cerro Castilla: Cuando la justicia se transforma en regulador*", Libertad y Desarrollo, September 2012, Available online in: http://www.lyd.org/wp-content/files_mf/fallosp%C3%9Ablicos28septiembre2012.pdf

[iv] Case Nr 150-2012, of August 15th, 2012.

[v] Case "*Isapre I*" refers to the one deciding the first inapplicability action (article 93 Nr 6 of the Constitution) with regard to article 138 ter of the *Ley de Isapres*, STC Case Nr 976-07, of June 26th, 2008. Later on, it highlights the declaration of unconstitutionality sentence (article 93 Nr 7 of the Constitution) from parts of the mentioned provision, through STC Case Nr 1710-2010, of August 6th, 2012.

[vi] STC, Case Nr 740-2008, dated April 18th, 2008.

[vii] Shapiro, Martin, *Courts: A Comparative and Political Analysis*, The University of Chicago Press, 1981, p-1.

[viii] In fact, the use of formalisms –either procedural, of purely discretional analysis of the aspects of applicable criminal types, etc.- which seek to ascribe to criminal and sociologic doctrines, which are critical of the use of criminal law, and particularly of imprisonment in dealing with criminal phenomena – among other reasons because offenders are actually victims of the society, the model, etc.-; rather than to governing law. One of the most quoted texts on this subject is Roberto Gargarella: *De la injusticia penal a la justicia social*, Siglo del Hombre Editores, 2008.

[ix] See, for example, by José Francisco García, "*Reforma al Poder Judicial: Una agenda para la discusión*", Libertad y Desarrollo, Political Report Series Nr 100, April 2007. Available online in:

http://www.lyd.org/wp-content/files_mf/sip100reformaalpoderjudicialunaagendaparaladiscusionjfgarciaabril2007.pdf; "*Diseño Institucional de la Judicatura y Gobierno Judicial: lecciones para Chile desde el Derecho Comparado*" in García et al (eds.), Reforma al Poder Judicial, Libertad y Desarrollo-UAI-UC, 2007, p.75-120; and "*Corte Suprema y Gobierno Judicial: Un programa de reformas*", *Actualidad Jurídica* Magazine (UDD), Vol. 20, 2009.

[x] Black's Law Dictionary, West Group, Second Pocket Edition, 2001, p.380.

[xi] Kmiec, Keenan D., *The Origins and Current Meanings of "Judicial Activism*", California Law Review, October 2004, p. 1442-1476.

[xii] For Posner: "Ideology is not the only recourse of judges when they have to make decisions in the questions arising in the open area. Religious and moral values are among these sources and they are a consequence of how we grew up, the acquired education, our personal and professional background, and the personal traits that may, in turn, bring along the type of experiences that an individual tries to have. Personality traits include race, sex, ethnicity and other innate characteristics which identify the person, but also temperament, which not only conforms our values but also the predispositions such as shyness and audacity, which influence the way a person responds to the situations". Posner, Richard, "*How Judges Think*", Marcial Pons, 2011, p.112 (Spanish version)

[xiii] Posner, op.cit., p.96

[xiv] For a more detailed analysis regarding the debate on judicial activism and self-restraint, see Posner, op.cit, p. 316 and following. See also Shapiro and Alec Stone Sweet, *On Law, Politics & Judicialization*, Oxford University Press, 2002, p. 22-24.

[xv] Black's Law Dictionary, West Group, Second Pocket Edition, 2001, p.382.

[xvi] See Murphy, Walter F., C. Herman Pritchett and Lee Epstein, *Courts, Judges & Politics: An Introduction to the Judicial Process*, 2002 (5th ed.), Mc Graw-Hill, p. 141, and 311-312.

[xvii] See tipically Zapata, Patricio, *Justicia Constitucional*, Editorial Jurídica, 2008, p. 225-290.

[xviii] See footnote ix.

[xix] See José Francisco García, "*Accountability judicial y evaluación por desempeño*", presented at the International Seminar IDB-Judicial Power on performance control systems for judges and officers of the judicial power, on August 27th, 2012. Available online in: http://www.lyd.com/wp-content/uploads/2012/08/Evaluacion-por-Desempeno-PJUD-27.08-final.pdf

[xx] See Klaus Decker, Christian Móhlen and David F. Varela, "Improving the Performance of Justice Institutions: Recent Experiences from Selected OECD Countries relevant for Latin America", World Bank, 2011. Available online in:
http://siteresources.worldbank.org/INTECA/Resources/librojusticiaING-cian.pdf

[xxi] Idem.

[xxii] Idem.