
CHARGES OF JUDICIAL ACTIVISM IN EUROPE

By John Norton Moore*

Judicial activism was a core issue in the Senate hearings on President Bush's Supreme Court appointments. It has also become an issue in the debate about the future of the European Union (EU). Indeed, judicial activism at the European Court of Justice (ECJ) may be one factor in popular dissatisfaction with the European constitution. Several months ago, the new President of the European Council of Ministers, Austrian Chancellor Wolfgang Schuessel, called for a rethink over the role of the ECJ, which he said had "systematically extended European competences into areas where there was decidedly no European law." He cited decisions of the court concerning the role of women in the German army and access of nonnationals to Austrian universities.

Concerns of judicial over-reaching have also been raised over other decisions of the ECJ. Last September, it set aside a co-operative framework prescribing criminal penalties for environmental offences, as agreed among member states. The court did so on the grounds that only the EU legislature had the ability to take such action. It reached this conclusion despite an absence of general competence of the legislature to set criminal penalties and in the teeth of a provision in the EU Treaty which expressly confers authority for member states to co-operate in criminal matters. In London, *The Times*, reporting on this considerable transfer of power from member state capitals to Brussels, which had been bitterly fought by eleven EU governments, said: "An unprecedented ruling... by the Supreme Court in Europe gives Brussels the power to introduce harmonised criminal law across the EU, creating for the first time a body of European criminal law that all member states must adopt."

My attention to this growing European debate was triggered by an opinion expressed on 18 January, 2006, by the Advocate-General of the ECJ, concerning whether member states of the EU must submit their law of the sea disputes exclusively to the ECJ, or whether the dispute settlement procedures in other international agreements, including the United Nations Convention on the Law of the Sea 1982 (UNCLOS), are also available. While an opinion by the Advocate-General is not a final decision of the court, such opinions are so frequently accepted (in about 80% of the cases) and Advocate-Generals are so closely associated with the court that the opinion provides a fair target for appraisal of the judicial activism charge.

UNCLOS declares that "states parties... shall be presumed to have competence over all matters governed by this convention in respect of which transfers... [to an international organisation such as the EU] have not been specifically declared." Despite this, the Advocate-General determined that, even without any such declaration on the specific subject matter concerned, the ECJ had exclusive jurisdiction concerning law of the sea matters. Accordingly, he found that member states could not use

the dispute settlement provisions they had mutually accepted under UNCLOS for settling disputes among themselves. Moreover, there was no declaration whatsoever transferring competence from the member states to the EU regarding dispute settlement—the specific issue before the court.

If the Advocate-General's opinion becomes an opinion of the court, it may well place the EU in violation of UNCLOS. But the opinion's implications for the functioning of the ECJ may be of even greater concern. The Advocate-General failed even to note the difference between the court having jurisdiction and the precise question before the court of whether it had exclusive jurisdiction overriding other dispute settlement procedures accepted by the member states elsewhere.

The basis on which he set aside the treaty obligations of member states to one another in UNCLOS was by invoking the language of Article 292 of the European Community (EC) Treaty that gives the ECJ jurisdiction over "disputes concerning the interpretation or application [of the treaty]," despite the absence in the underlying dispute of any issue concerning interpretation or application of that treaty. The Advocate-General therefore effectively set aside dispute settlement procedures agreed by EU members states specifically for interpreting UNCLOS to apply a provision allowing the ECJ to interpret its own constitutive treaty, which was not part of the underlying dispute.

The Advocate General proclaimed a "jurisdictional monopoly" for the ECJ, even if that court's jurisdiction did not extend "to the entire dispute." As to the problem then created for member states now deprived of a forum capable of resolving the entire matter, he said: "[Even] if confronted with genuine difficulties, member states are not allowed to act outside the EC context simply because they consider that such a course of action would be more appropriate."

With regard to the governing specifics of the EC declaration on signature of the 1982 UNCLOS Convention, the opinion noted simply that the EC had relied on a broader constitutive provision in its governing treaty as a legal basis for making its non-relevant declaration. Thus, constitutive power was confused with the specifics of action taken under that power, which specific action clearly did not exercise that power in any relevant way other than to confirm member state competence in the matter at issue.

An empowered and independent judiciary is an essential element to the rule of law. But there are fundamental, systemic principles underlying the judicial function. These include deference to the constitutive instrument establishing a court and interpretation and application of relevant laws in context and by their clear language and fundamental purpose. For a court to exceed these limits not only undermines the rule of law in the immediate case but, even more seriously, also risks permanent damage by undermining respect for an independent and empowered judiciary.

* John Norton Moore is a Professor of Law at the University of Virginia. A modified version of this article first appeared in *Legal Week* on July 27, 2006.