

Judicial activism and restraint in the creation of the International Judicial Function

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PROPOSITIONS

1. Academic legal research always carries an element of subjectivity since any analysis and resulting conclusion can only be understood within the limitations the legal researcher has set upon the work.
2. For most of its existence, the international legal system has been considered without its judicial component, as adjudication was not traditionally the preferred method of dispute resolution.
3. Judicial activism and restraint are two concepts that have emerged in scholarly debate as a result of academics being either displeased or impressed by the decision-making of certain courts and tribunals (be they national or international).
4. The nature of the international legal system is traditionally one that is characterised by a lack of a hierarchy of legal norms or systems, which is the result of the importance placed on State consent, in addition to the fragmentation of the system itself, as a result of the large number of self-contained systems found within it.
5. Within this legal order, the international judiciary as an institution has been left to create itself, with little or even no guidance from its creators or its domestic counterparts, and without unified codes of procedure or rules and regulations that national courts inherit.
6. It is this nature of the international legal system and its lack of procedural certainty that essentially leads international courts and tribunals to engage in activism or restraint in order to effectively be able to carry out their functions in the pursuit of administering justice and ensuring effectiveness.
7. Through the use of activism and restraint in order to administer justice, international courts and tribunals have also given form to the judicial function as one quite separate (yet not entirely unrelated) from that of the national judge.
8. While activism and restraint are addressed in the literature as opposing concepts, a more complementary relationship between the two might be better suited in order to describe how they interact within the decisions of the international judiciary in particular.
9. While international courts and tribunals are characterised by the self-regulating nature of the institutions within which they act, they are also judicial institutions staffed by capable members of the judiciary who have been tasked with resolving disputes within their specific context.
10. An examination of the use of judicial activism and restraint by the international courts shall reveal their role in the creation of the international judicial function, having led to international judicial institutions that now exist in their own right.
11. While writing your PhD thesis certainly makes you feel that you are becoming an expert in your field, completing it reflects the old adage that states ‘the more I learn, the more I realise how much I don’t know’.