THE "ROGUE" EUROPEAN COURT IN THE CAMPAIGN FOR BREXIT

MAYA LESTER QC

BRICK COURT CHAMBERS

First published on the Judicial Power Project website on 15 December 2016 as part of a series on "Debating Judicial Power: Papers from the ALBA Summer Conference".

1. As a practitioner, my first thought is that reading about judicial activism is a lot more interesting than working on actual cases. Dusting off my old US law school jurisprudence books which I hadn't opened for 20 years, and thinking how nice it would be to be an academic just for a bit, it struck me how the same debates about judicial activism and the proper limits of judicial authority have been raging for centuries and all across the world.

2. As the notes I earnestly made in margins reminded me, the Federalist Papers called the judiciary the least dangerous branch, but was judge-made judicial review thought up in *Marbury v Madison* undue judicial activism? Should judges save themselves from the "countermajoritarian difficulty" by exercising the self restraint of Alexander Bickel's "passive virtues"? Since Lord Reid reminded us that we no longer believe in fairy tales and that of course judges make law, does that make *Donoghue & Stevenson* judicial activism, or is it the development of the common law? Was Robert Bork right that Aharon Barak "established a world record for judicial hubris" when he decided to turn Israel's Basic Laws into a constitution? It's Dworkin versus Finnis all over again.

3. I found reading back into this debate that it is to some extent frustrating and sterile, because so much just depends what one means by "activist" (whether that is good or bad, for a start), how one sees the role of a judge and how one defines democracy. One man's rewriting of the statute books is another's upholding of the rule of law. One judge's violation of the separation of powers is another's upholding of the same doctrine by acting as a check on abuses of power by the executive.

4. And, as Lord Justice Laws said, the term activism is ambiguous. No two writers agree about what they mean. Some mean outstepping the judicial role by insufficient deference to decisions that should be made by the executive or legislature, or by over-straining interpretations. Some mean judges taking decisions they lack the expertise to make. For instance, pursuing a results driven agenda, or plugging legal gaps that should be filled by other branches.

5. All this vagueness and relativism was, after a couple of hours yesterday, enough to make me want to throw down the books and get on with some actual cases for actual clients as my actual deadlines were flying by.

6. However, something about the judicial activism debate matters today much more than it has done before. Usually the consequence of criticizing judges is no more than an awkward dinner in St John's Hall when the judge whose judgment you laid into in your paper turns out to be next to you at dinner. Law school musings about whether judges should or would refuse to enforce a morally repugnant enough Act of Parliament usually stay in the abstract.

7. But not so today. Debate about judicial activism played a key role in Brexit. The Leave campaign again and again told us that the European Court in Luxembourg is "dangerously activist", and a "rogue court". Foreign judges trampling over our national sovereignty by telling us what shape of banana we should be eating. And, for those that bothered to distinguish between the two systems, that the Strasbourg court was stopping us deporting dangerous criminals and making us give prisoners the right to vote, and lashings of porn. And the result should not be some kind of judicial reform, but to leave the systems altogether.

8. So what I thought I would do, my contribution as an EU & public law practitioner, was to try to find out exactly what the Leave campaign meant when it accused these two courts of "activism", the kind of activism that would justify not just criticism at lawyers' conferences, but an argument for the nation leaving the entire EU system.

9. This turned out to be more difficult than one might think. I am indebted to my pupil (now tenant) David Heaton for spending time trying to find actual examples of cases that the Brexit campaigners said showed undue activism in Luxembourg. This was a surprisingly difficult exercise. There are plenty of rhetorical jibes at the "rogue" or "activist" Court of Justice from Boris Johnson, Dominic Raab and others, about the Court of Justice of the European Union (CJEU) "undermining the basic principles of our democracy". As Paul Craig would say, phrases with a CNN soundbite quality (Fox News, more like it). But it is almost impossible to find examples of the actual cases they object to and why.

10. In the end we found 3 cases between us, cited in press articles by Marina Wheeler QC and by Suella Fernandes (former barrister, now Tory MP). Both criticise the CJEU for being "activist" and of "judicial overreach" in the sense of deciding what the law should say rather than interpreting it, and usurping the role of English courts.

11. The first case they both cite is Case C-411/10 *NS v Secretary of State*, which they say shows the CJEU riding roughshod over the UK opt-out from the EU Charter of Fundamental Rights. What the CJEU said in that case is that transferring asylum seekers to other member states under the Dublin II Convention fell within the scope of EU law, and that EU law might preclude a transfer where one member state knows that there are systemic human rights

abuses in the treatment of asylum seekers in the receiving State. All the CJEU said about the so-called UK opt-out in Protocol 30 to the Charter was that it didn't change the result of the case, because all it says is that the Charter reaffirms existing rights, and "does not extend the ability of the CJEU, or any UK court, to find that UK acts are inconsistent with fundamental rights".

12. With respect to the writers, I can't see how this can be said to be judicially activist, or to be trampling over UK sovereignty – it's a straightforward interpretation of Dublin II, and a correct account of what Protocol 30 says. It would have been activism to have re-written Protocol 30 to have said it exempted the UK from the Charter. The roughshod riding was done by Tony Blair pretending that the UK had a Charter opt-out when it plainly did not. And of course there's nothing wrong with complaining about the Charter if you want to. But what seems to me to be unjustified is blaming the CJEU judges for refusing to apply a binding treaty which we ratified.

13. Suella Fernandes gives two other examples of CJEU overreach. First, she says the CJEU also disregarded the UK's opt-out of the Working Time Directive: She is referring to Case C-266/14 *Tyco*. In that case the CJEU said that time spent travelling from home to work was "working time" within the meaning of that Directive. With respect to Ms Fernandes, the UK has no opt-out; John Major secured one in 1993, but Mr Blair opted back in in 1998. Again, I have no problem with criticizing that directive if you want to, but one body whose fault it is not is the CJEU.

14. The final example we could find is that EU judges should not have the final word on whether it was lawful for Britain to restrict EU migrants' access to benefits, referring to C-308/14 *Commission v UK*. But this is just bizarre. The Court in that case rejected the Commission's argument that the UK's policy was unlawful, said the EU regulation *does not* harmonise social security, which is a matter for member states, and even though it thought the UK's system was discriminatory, said it was proportionate to the UK's financial justification. The Brexiteers might not like the fact that EU law has any say in social security at all, but they should be *thanking* the CJEU judges for respecting national sovereignty and subsidiarity, not accusing them of such activism that we should escape their dangerous clutches.

15. Now don't get me wrong. I am no unquestioning CJEU groupie. I spend most of my practice swearing about unelected bureaucrats and cut and paste Delphic, inconsistent, judgments as much as the next EU lawyer. And I do think there are areas where the Court has been more eager to give EU legislation expansive interpretation than others. Incidentally the UK has been delighted by this when it suits it – supportive of the Court's early jurisprudence expanding the internal market, less so of the recent citizenship cases, so it picks and choses its support of activism.

16. When one is assessing whether a Court is "activist", when it is used as a criticism, it suggests to me doing something un-judicial, or being motivated by something other than doing justice according to law in a particular case. But in order to level that charge, surely you have to look at what the particular judges

you are talking about are supposed to be doing. What the debate about activism often ignores is that activism must be considered in context. Which court are we talking about, doing what, and at what point in history. Surely doing justice according to law for a South African judge faced with applying racist apartheid laws must be judged differently from what is appropriate for the commercial court judge in London.

17. So back to Brexit. Judges are at the CJEU in order to interpret a treaty that we ratified, and that our Parliament decided should trump national law, and EU legislation it has been given jurisdiction to interpret, when asked to do so by national courts. It seems to me to be unfair to criticize it for "activism" when it is doing the job we have asked it to do. But does it not go from unfair to inappropriate and misleading, to assert charges of activism at judges in order to advance an agenda of leaving the entire system for political reasons.

18. Of course there are judgments one can disagree with, not least CJEU judgments. But I should say that in the area of EU law I know best, which is the Luxembourg court acting not on preliminary references but as a judicial review court, reviewing decisions of the Commission & Council of Ministers, it seems to me to do a pretty exemplary job of being aware of, and staying within, its proper judicial role.

19. The role of each branch of EU government has arisen in almost all of the hundreds of cases I've been involved in which the Court has reviewed the due process and evidential basis for asset-freezing listing on sanctions measures (examples I know about). The Court, in *Kadi* and subsequent cases, has been acutely aware of the limits of its jurisdiction to review foreign policy decisions and to defer to decisions lying within the discretion of the executive. But it has risen to the challenge of ensuring robust review where EU fundamental rights, mainly procedural due process, are not protected. They have invalidated decisions made without proper reasons or an opportunity to meet the case against one. They have 'read down' EU legislation purporting to give the EU powers it does not have in the Treaties. But they have not second guessed policy decisions.

20. I am absolutely not a wholesale supporter of this case law either. But I have not been in a single case, in Luxembourg (or, I should say, in London) where I have thought judges were trying to do anything other than decide the particular case before them in a way which best applies the relevant legal rules and principles; doing justice according to law. I myself have never experienced a judge I thought was motivated by a desire for judicial power or the desire for activism. If anything sometimes our role feels like trying to persuade inherently cautious and careful judges to create remedies for wrongs.

21. Criticisms of the court in Strasbourg as well as in Luxembourg were thrown into the Brexit debate for good measure. Indeed in April, Theresa May, in her pre Prime Ministerial state, said we should leave the European Convention system because of judicial activism in Strasbourg. But again, she (and other critics) rarely analyse what the job is that this particular court is supposed to be doing and where they have gone wrong. Judges are in Strasbourg in order to

interpret the European Convention on Human Rights and determine whether national action breaches those rights. Theresa May mentions there "activist" cases in particular.

22. First, she says Strasbourg almost stopped the deportation of Abu Qatada to Jordon. Of course that is true, but can the Court fairly be said to have been activist in that case? The Court *rejected* the argument that deporting Abu Qatada would result in inhuman or degrading treatment, because the Government had agreed undertakings from Jordan that that would not happen, and that it was not for the Court to second guess that. Called on to decide whether the UK would be condemning him to a fair trial in Jordan, Jordan refused to confirm that torture evidence would not be used against him; was that "activist" in finding a breach of Article 6?! After the judgment, Jordan did give adequate undertakings to the British Government – surely that is a good example of appropriate inter-branch dialogue, not judicial overreach.

23. The second "activist" case Mrs May and others point to is prisoner voting. But again, what was the Court supposed to do in *Hirst* so as not to be "activist"? The Court's job is to give effect to a right to vote. It was faced with a blanket ban on <u>all</u> prisoners voting. The Court recognised that the right to vote is not absolute – conditions could be imposed by member states a long as they are proportionate to a legitimate aim, but a blanket ban was too blunt an instrument. The fact that the UK has declined to come up with a proportionate restriction on the right to vote does not make the Strasbourg activist in calling a blanket ban disproportionate.

24. The final charge of activism is leveled at the famous case of *Golder*. Mr Golder was a prisoner in the Isle of Wight, who denied an accusation by a prison officer that Mr Golder had attacked the officer. He wanted to bring a libel claim, but was refused permission to consult a lawyer. He complained to Strasbourg that this impeded his right to a fair trial because he could not even access a court, still less have a fair trial. What should Strasbourg have said? That the ECHR doesn't expressly say that the right to a fair trial includes the right of access to get to court as well as the right to fairness at the trial once you get there? The Court said if it did not interpret Article 6 as including the right of *access* to court as well as fairness at trial, a state could do away with courts altogether without breaching the ECHR. Surely this is not impermissible activism, but sensible interpretation to avoid emasculating the provision.

25. Now again, there are plenty of reasonable criticisms one can make of the Strasbourg court for taking an unreasonable time to strike out cases for being manifestly ill-founded without giving any reasons. You can disagree about the breadth of the margin of appreciation they have applied. But what seems to me to be unfair is to brand them with 'activism' and a reason to leave the system altogether, when one considers their particular constitutional role.

26. What I took from all this is that the judicial activism debate is as healthy as it is nebulous. Of course the Government will naturally resist judges standing over their shoulders, particularly foreign judges. And it is no doubt good for judges around the world to be challenged about, and aware of, their proper role. But

what seems to me to be more worrying is when the crime of judicial activism is charged at courts who, when examined in their proper context, are doing what they have been asked to do, and when judicial activism is used as a populist slogan to pursue a political agenda rather than the rule of law.