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Chapter Seven

Judicial Activism: The Beginning of the End of the Beginning
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There is something of a tendency today to regard Australian judicial activism as an extinct species from the mid-nineties, like Sir Anthony Mason or Jeff Kennett. Certainly, the present Gleeson Court has come to stand for a tasteful judicial conservatism to much the same extent that Edna Everage stands for gladioli. In these times of bucolic constitutional jurisprudence, therefore, one might think that a paper on judicial activism is as relevant as a step-by-step guide to thatching. Yet as the title of this piece suggests, such a view is not well founded. Like King Arthur, Australian judicial activism is not dead, but uneasily sleeping. It will arise when the times are propitious, and this may be a good deal earlier than many imagine.

With this prognosis in mind, the paper approaches the issue of judicial activism in a slightly different manner than is usual. Its first section will undertake the standard survey, defining the phenomenon, considering its forms and deficiencies, identifying the reasons behind it and so forth. The second section, however, will cover rather less familiar ground in trying to predict the future course of judicial activism in Australia, partly through locating it within a particular body of constitutional theory, as well as by trying to draw out its wider implications in the field of constitutional politics.

Judicial activism – the beast

"Judicial activism" traditionally is a poorly delineated phenomenon. Too often, it stands for little more than my reaction to a curial decision that I seriously dislike. Sir Humphrey Appleby might have observed that it is a classically irregular form of speech: "I am judicially creative, you are judicially close to the line, he is a judicially active constitutional bandit". The true definition of judicial activism, however, is relatively straightforward, describing the process under which a judge takes a decision which involves the conscious moulding of the law by reference to the judge's own perception of the relevant policy imperatives.

It needs to be understood at the outset that courts can be active in very different circumstances, and with widely varying degrees of legitimacy. To take the simplest example, a court clearly can be judicially active in re-shaping the common law. At the next level, a court may pursue an activist path in so "interpreting" a statute that its meaning is fundamentally different from that intended by Parliament. Finally, a Court may seek to shape the Constitution itself, either by ascribing a particular meaning to a portion of text, or by discerning the existence of some "implied" constitutional doctrine. Constitutions are in fact particularly vulnerable to this type of activism, because of the width of expression they necessarily employ.

Clearly, these three different forms of judicial activism have three, different degrees of legitimacy. In the case of the common law, such law is made by the courts, and there can be no great objection in principle to their re-making it, particularly as any such action can be promptly over-ruled by Parliament. This is why the criticism of the High Court's decision in *Mabo* substantially was misplaced. Of course, it still may be possible to criticize such decisions on the grounds not of principle, but competence: that the Court lacks the expertise and practical insight necessary to direct large shifts of policy, a much more arguable critical perspective in relation to *Mabo*. It is for precisely such reasons that the traditional methodology of the common law is highly conservative, based on precedent, authority and policy reticence.

Judicial activism in a statutory context is considerably more sinister. The courts have no capacity to make or amend statutes: these are made by Parliaments elected directly by the people. Their judicial sabotage thus raises not merely issues of institutional incompetence, but profound democratic and legal illegitimacy.

Even worse is constitutional activism. Almost uniquely among the older Constitutions of the world, the Australian Constitution was drafted by delegates elected by the relevant populations; directly endorsed by the people at two federal referenda; and remains changeable only by the people at a referendum conducted under s.128. Australia thus has a democratically derived and democratically alterable Constitution, and it is difficult to imagine a context in which judicial activism could be more illegitimate.

Nor is such constitutional activism much more plausible when plotted on an axis of competence. When the High Court engages in constitutional activism – often called progressivism – it essentially is involved in the taking of macro-policy decisions of the first order. For example, when the Mason Court in cases like *Australian Capital Television* created an implied freedom of political communication, it was involved in setting the mutual limits of privacy and speech in a political context, by reference to norms of political, media and corporate behaviour. Yet the Court is a body of legal distinction only, and has no obvious insight into any of these matters.

None of this, of course, suggests that there is not room for the Court to make choices in the interpretation of the Constitution: constitutional language can be highly ambiguous. What the Court cannot legitimately do, however, is consciously to mould the Constitution against the grain of its intention, text and historical scheme. For the remainder of this paper, it will be this vexed issue of constitutional judicial activism – progressivism – that will be considered.

That the High Court has been a serial and recidivist constitutional activist no informed person seriously could doubt. Australia's constitutional jurisprudence is littered with major judicial interpolations on the grounds of policy, and if the Mason Court of the '90s is remembered as a progressivist's Elysium, this essentially is because the activities of that Court were rather more

self-conscious and self-congratulatory than has been the norm with Australian constitutional activism, rather than because our judicial copy-book hitherto had been unblotted.

Undeniably, the Mason Court's creation of an implied freedom of political communication represented a high-point in Australian judicial creativity in a constitutional context. This was, after all, a right with no plausible constitutional text to support it, and one utterly opposed to verifiable historical intent. Similar exercises in constitutional implausibility by members of the Mason Court are to be found in the extension of a watered-down version of separation of powers to the States in *Kable*, and the desperate efforts of Sir William Deane to create a free-wheeling right of equality in *Leeth*.

It would be quite wrong, however, to pretend that these admittedly bumptious instances comprise the most significant examples of Australian constitutional activism. Far and away more important, both conceptually and in terms of effect, was the 1920 decision of the Court in *Engineers* to interpret the Constitution according to a rule of ruthless literalism, so deflating its underlying federal principle, and beginning an on-going process for the centralisation of Commonwealth power via judicial sponsorship. Moreover, *Engineers* underlines the status of constitutional activism as a phenomenon of long lineage and, sadly, strong conservative affiliations. In many ways, *Engineers* literalism has received the ultimate accolade achievable by any piece of judicial activism: it has been so accepted for so long, that it no longer looks like activism, even to many of those most prone to decry such a course.

As to the reasons underlying Australian constitutional activism, quite different explanations are proffered by its apologists and critics. To those inclined to defend it, constitutional activism is firmly based in principle. Fundamentally, it reflects the notion – almost universally accepted in Australia – of a balanced Constitution, under which powers and institutions mutually check one another.

On this analysis, judicial activism is not inconsistent with democracy, but an intrinsic part thereof, refining it from crude majoritarianism into an internally regulating system in which the fickle will of Parliament and people is tempered by judicial discretion. Such a view of judicial activism has received a significant fillip in days when the ravages of an arrogant Executive and an uncaring Parliament have become the staple of university lecture rooms and broadsheet newspapers. It also has been reinforced by the current fad for post-modern literary theory in a constitutional context. If one sincerely believes that constitutional language has little or no determinate meaning, what is wrong with the Courts giving it a life of its own?

Critics of constitutional activism ordinarily view it in terms not of principle, but power. Their position is that constitutionally active judges are not engaged in saving democracy from itself, but in quite cynically imposing a policy vision of their own – heavily based on a particular vision of rights – that would prove quite impossible to implement through a democratic referendum. Even more crudely, they suspect such judges of intense constitutional hubris, wallowing in their purloined status as philosopher kings of the Constitution. Finally, they look on the excesses of post-modernist legal theory with scorn, arguing that the Constitution has meaning and to spare for all those who care to look for it.

Whatever view one takes of constitutional activism, the general opinion is that it has been much cowed in recent times, after the bullish years of the Mason Court. Two central pieces of evidence are offered in support of this conviction, and each is persuasive enough, so far as it goes. The first is that the High Court now displays only a limited enthusiasm for the implied rights jurisprudence developed during the Mason years. The implied freedom of political communication was suffered to live in *Lange*, but it has not been substantially extended. Predicted new rights based, like it, on the concept of representative democracy have not been forthcoming.

Second, the numerical dominance of "conservatives" on the Gleeson Court is much bruited about. Of the seven present Justices, Chief Justice Gleeson, and Justices McHugh, Gummow, Hayne, Callinan and Heydon routinely are described as being constitutionally conservative. Only Justice

Kirby continues to fly the flag of quirky constitutional radicalism. So complete is this conservative dominance perceived as being that, at a recent conference at the Australian National University, no institutional friend of constitutional conservatism, speaker after speaker bemoaned the triumph of "legalism".

Increasingly, on both the constitutional right and left, the Mason years thus are being seen as a highly unusual, not easily repeated period of constitutional innovation. The assumption is that, in the unlikely event that such a bench ever were to emerge again, this would be an eventuality far in the future, and to be achieved only as a result of a prolonged and not particularly likely series of judicial appointments. The remainder of this paper is devoted to arguing that this perception of constitutional activism as a monster confined to the past and the remotely foreseeable future, like a Geelong premiership, is quite wrong.

Judicial activism – the future

The first point here is to understand, as few Australian critics of judicial activism do, that it is not an isolated, aberrant constitutional virus. In fact, constitutional activism represents only one strand of an inter-connected body of views that together form one of two quite distinct philosophies that presently are battling for the constitutional high-ground in Australia. These may for convenience be termed "the old constitutionalism" and "the new constitutionalism". Most serious contemporary controversies over the Australian Constitution are battles between these philosophies, and the nature and potential of constitutional activism only can be understood in their context.

The old constitutionalism, unsurprisingly, represents the "traditional" approach to Australia's constitutional order. It displays a basic belief in democratically elected Parliaments as the ultimate arbiters of day-to-day policy. It has a corresponding belief in the people themselves, at referendum, as arbiters of constitutional policy. It is sceptical of the notion of entrenched rights, believing that it is up to Parliament to mutually accommodate rights on an ongoing basis. It evinces a broad adherence to a functional version of the separation of powers, holding that Parliaments make laws, Executives implement them, and courts merely interpret legislation. As a matter of style, the old constitutionalism is deeply suspicious of abstract constitutional values and concepts: its *métier* is rules and language. Obviously, constitutional activism runs foul of every tenet of the old constitutionalism.

The new constitutionalism thoroughly dislikes Parliament as a nest of political hacks and fixers. It loathes the Executive as a body almost programmed for the violation of human rights. Indeed, it regards the Constitution generally with deep suspicion, regarding it as dated, partial and inadequate. Its principal obsession is with human rights: they are (or should be) the Constitution, and a Constitution is to be judged principally according to its status as a shrine for such rights. The people themselves are viewed ambivalently, with favour as the potential recipients of rights, suspiciously as willing despoilers of the rights of minorities. Crucially, the judiciary is much loved, as a vehicle by which the savage instincts of populace and Parliament alike may be restrained through the wielding of a Constitution whose meaning is almost infinitely malleable. Consistently with this conception, new constitutionalists are deeply attracted to abstract constitutional values and concepts, which give content and significance to the Constitution's uninspiring words.

The crucial point to understand about the new constitutionalism in the present context is that constitutional activism is one of its very core components. Not only does constitutional activism fit neatly with all the key suppositions of the new constitutionalism – that Parliaments are untrustworthy, Executives nasty and the people unreliable – but also, without a judiciary prepared to interpret the Constitution in a radical manner, new constitutionalists realise perfectly well that they will never be able to achieve the nirvana of constitutional rights they so desire: referendum, after all, is not an option.

Thus understood, constitutional activism is not a vulnerable, isolated phenomenon, but an intrinsic part of a constitutional platform subscribed to by a great many lawyers and others, and which indeed represents orthodoxy in most Australian law schools. It is not simply going to disappear, so long as its hosts survive, and those hosts show no signs of succumbing.

What this means is that conservative constitutionalists must appreciate that they are in the midst of an ideological struggle for the Constitution's soul, or at least its larynx. An immediate consequence of this is that they need to accept the importance of being able to articulate a consistent constitutional theory; for without such an acceptance, it will be very difficult for them to wage ideological warfare in a constitutional context.

One problem here is that Australian lawyers, and especially conservative lawyers, traditionally despise theory, preferring the case-by-case logic of the common law. Indeed, until the early '90s there virtually was no constitutional theory in Australia, and anyone interested in the topic was regarded as profoundly eccentric. Conservative constitutionalists were particularly slow to enter the field, and really only did so when the Mason Court's flirtation with naked progressivism became so intense that the construction of some negating theoretical discourse became unavoidable. Even now, Australian conservative constitutional theory is a sparse field, but if one accepts the proposition that constitutional activism is a deeply unresolved issue in Australia, it is one that will have to be assiduously tended.

One difficulty here is that conservatives have tended to take an extremely unsophisticated view of constitutional interpretation. If asked what they do when engaged in the process, they tend to respond that they are reading the words. If further asked what is involved in reading the words, or whether words can have more than one meaning, or whether Constitutions contain more than just words, they generally are irritated, covered with confusion or both. Yet what is required in any theoretical contest are sophisticated theoretical apologists, and these tend not to arise in large numbers on the conservative side of Australian constitutional debate.

A particular issue here is that of judicial appointment, particularly to the High Court. Conservative governments are naturally predisposed to appoint to the Court eminent advocates from the commercial bar. While such appointees have many merits, a typical one is not going to be sophistication in terms of constitutional theory, if indeed they ever have encountered such a concept. Judges of this type are no match in terms of rhetoric or sophistication for colleagues such as Justice Michael Kirby, who possesses a deep (if highly uncongenial) grasp on constitutional theory. If the High Court does in the future again become a battleground of contending constitutional theories – as it will – an Australian Scalia is unlikely to emerge from commercial chambers. A wider net will need to be cast to secure a potent conservative constitutionalism on the Court.

This leads naturally into one of the few realistic discussions of what governments – and particularly conservative governments – should be doing when they make High Court appointments. It often is asked, usually by students and journalists, whether High Court appointments are or should be "political". If what is meant by this is whether the High Court should be stacked with legal party hacks, the answer obviously is "no". On the other hand, given that every government (like every judge) should have a vision of what the Constitution is and how it is to be interpreted, it is the bounden duty of a government to appoint to the Court those lawyers who it believes will give effect to that vision.

It follows from this that, to take the proximate illustration, a conservative government not only should appoint old constitutionalists to the Court, but that it would be foolish (and downright derelict in its duty) to do anything else. On this basis, the criticism of the recent appointment of Justice Heydon on the grounds that he had flagged his constitutional politics not only was misconceived, but silly: accepting always his obvious legal competence, there could be no better grounds for having appointed him. Similar criticism of the appointment of Justice Gareth Evans, had it ever occurred, would have been equally wide of the mark. The appointment itself would

have been unimpeachable: the real objection would have been to the method of interpretation to which he (presumably) would have been committed.

There is another point here, closely related to the capacity of judges intelligently to articulate their positions in terms of plausible constitutional theory. If a judge is going to construe the Constitution according to a particular interpretative theory, then his or her least intellectual obligation is to explicitly articulate that theory. Only by such means can the Court intelligently be held publicly accountable for its decisions and positions.

Yet one of the most regrettable historical features of the High Court's constitutional jurisprudence has been the willingness of many of its Justices to couch their reasons in terms that give no real guide to the motive reasoning that underlies them. The classic genre here is *Engineers* literalism, under which Justices of the Court were able to justify innumerable instances of policy-driven, centralising literalism as nothing more than a neutral, dictionary-propelled construction of the Constitution. Less far reaching in the long-term, but equally galling, was the willingness of some members of the Mason Court to justify their interpolation of rights into the Constitution not by reference to the actual policy preference that determined their position, but through deeply spurious textual construction, constitutional history and legal theory.

The point here is one of basic constitutional ethics. A Justice of Australia's highest constitutional Court should be prepared openly to declare the constitutional theory he or she employs, the justifications for that theory, and its application in the instant case. Anything less constitutes grave intellectual dishonesty, in much the same class as the actions of the academic lawyer who, after long research, determines that he does not like the conclusions to which the evidence has driven him, and will patch together a superficially plausible raft of reasons to support the opposite position. It is greatly to the credit of Justice Kirby that, however much one may disagree with his progressivist method, he espouses and applies it openly. Traditionally, constitutional activism in Australia is as ashamed to speak its name as bed-wetting.

Turning from questions of high ethics to the brutal practicalities of constitutional activism, it is worth noting that the characterisation of the Gleeson Court as a profoundly conservative bench can be grossly overdone. This issue can be considered both in terms of personnel, and as a matter of intellectual opportunity. On the question of personnel, the Gleeson Court does not neatly divide into the "six conservatives, one radical" judicial playground so commonly discerned by commentators. The reality is that the Court is not as monolithic as it might at first glance seem, with the position of some Justices being decidedly fractured: conservative on some issues, more radical on others.

We have already seen that a superficial analysis identifies six out of seven of the Justices as being "judicial conservatives". In fact, only three of these six – Chief Justice Gleeson and Justices Callinan and Heydon – may be regarded as intrinsically conservative. The other three – Justices McHugh, Hayne and Gummow – all are capable of more rambunctious flights of judicial fancy, particularly in the context of their beloved Chapter III, dealing as it does with the sacred subject of judicial power. The true balance on the Court thus is not a conservative landslide of six to one, but a scrambly slope comprising three conservatives, three variables, and one radical.

Moreover, this balance could change quite quickly. In the lifetime of two Latham governments – hardly an impossibility – there will be at least four High Court retirements: those of Chief Justice Gleeson, and Justices McHugh, Kirby and Callinan. This represents the departure of two conservatives, a variable and a radical. Replacement of these four retirees by constitutional activists would, in less than a decade, produce a Court composed of four radicals, two variables and a single conservative. As a point of reference, a decade backwards rather than forwards, the Mason Court was in full swing.

To take the matter further, curial climate can be changed as much by leadership and strength of character as by numbers. The replacement of a conservative Chief Justice by a radically dynamic

successor could affect the entire direction of the Court, particularly so long as a significant number of its members belong temperamentally to neither hard-line conservative nor hard-line radical camps.

In terms of intellectual opportunity, the question is whether there remain potential hotspots of constitutional activism that are attractive to the Court. The obvious answer is that the Court already is displaying an unhealthy interest in the expansive potential of Chapter III of the Constitution, which deals with judicial power. Chapter III combines the potentially deadly characteristics of being endlessly fascinating to the Court, because it concerns the Court itself, and being soaked in implied rights potential. This rights potential arises because, if Chapter III is regarded as safeguarding the judicial process, then all that is required for the creation of some novel right is its characterization as an indispensable part of that process. Significantly, the "variables" on the Gleeson Court all share some degree of enthusiasm for Chapter III cabalism.

Over time, the potential of Chapter III as a source of rights is enormous. Prominent examples might include the creation of a right to due process, extending not only into the courts but also into law enforcement procedures, and the ultimate vindication of Sir William Deane's mooted right of equality. Both would have far greater practical repercussions than the present implied freedom of political communication.

Already, there are straws in the wind blown by the Court's enthusiasm for the concept of judicial power. Perhaps the most noted was *Wakim*, where the Court was prepared to pull down a vital co-operative regulatory scheme essentially because it found it repugnant to its own philosophy of judicial power. Another was the Court's recent decision (in the context of the Commonwealth *Migration Act*) concerning the legislative ousting of judicial review. The actual decision is unimpeachable, but some of its undertones sound a disturbing note of judicial supremacism. There is every chance that Chapter III will, in the ripeness of time, become the second front of constitutional activism.

Nor is this the only possible course of advance. Justice Kirby has been working industriously for some time on his own project, which might be termed "constitutional internationalism". According to this theory, expressed in such decisions as *Newcrest Mining*, the common law, statutes and the Constitution itself all are to be interpreted so far as possible consistently with Australia's international obligations, and especially with its international obligations in relation to human rights. At first blush, this seems harmless enough, until it is recalled that the necessarily more general nature of the Constitution's language will make it exceptionally easy for an appropriately-minded judge to discern an ambiguity or lacuna into which the contents of some international instrument might slip. In this way, the Constitution gradually could be internationalized from within, and a much desired rights agenda achieved without the troubling of the electorate at referendum.

Justice Kirby's theory is open to attack on a number of grounds, but in the absence of any sustained rebuttal he is patiently developing it, much in the manner of the early Sir Owen Dixon dropping constitutional bricks for later use. The theory is immensely popular in the law schools, and with many barristers, and is persuasively expressed. It offers a flawed but superficially plausible basis for a judicial activism far more principled and logically constructed than the dubious "implications" of the Mason Court. Nothing is more predictable than that it will have many future outings.

While properly decrying these various progressivist advances, conservative governments have to accept at least some of the blame for their popularity, in at least one respect. As mentioned above, most Australians accept the idea of a Constitution of balanced powers, and they will be most susceptible to the attractions of constitutional activism if they consider such balances to be in peril: if federalism, bicameralism and parliamentarianism cannot safeguard our liberties, perhaps judicial activism will.

When conservative governments trample on the principle of balanced government through such proposals as that to seriously compromise the Senate, both as a House of review and of federal diversity, is it any wonder that people look to the courts to provide an alternative check? It is the same sentiment that underlies much of the misguided support for a directly elected President, the man on horseback to keep the politicians in their place.

The ultimate question is how far constitutional activism could go in Australia. Is it merely an irritating pest that nibbles around the edges of the Constitution, or could it become a locust? The uncomfortable reality is that Australian constitutional activism has the potential to transform the Australian Constitution. The starting point here must be to remember that the Constitution already is light-years distant from its framers' intentions, largely through the centralising activities of the High Court. They scarcely would recognize, in the haggard spectre of Australian federalism, the coordinate government of States and Commonwealth that they envisaged.

Beyond this, we have had for decades a doctrine of the separation of Commonwealth judicial power that is at best historically contestable, and for a decade an implied freedom of political speech that is historically risible. Future dramatic judicial development of the Constitution would not be novel, but an extrapolation from an established pattern.

For all that it is routinely said, for example, that the High Court never could develop an unwritten Bill of Rights out of the Constitution, this almost certainly is an under-estimation of the Court's potential. Given the willingness to extrapolate such sweeping themes as "representative democracy" and "equality" out of the document; a corresponding determination to wring every ounce out of the concepts of judicial power and judicial process; and a predilection for constitutional internationalism, there is no reason why the Court could not, over time, marshal a body of doctrine equivalent to most constitutional Bills of Rights.

There is a certain irony here. The conclusion reached above involves accepting that the Court is capable of making substantial thematic change to the Constitution, through vaguely plausible interpolations and the exploitation of constitutional silence. Yet it will find it harder to make even comparatively small changes where these would conflict with specific language of the Constitution. Thus, the obsolete and unimportant but specific power of disallowance contained in s.59 cannot easily be deleted from the Constitution by the High Court, whereas the creation of a hugely significant constitutional right to an interpreter in criminal cases would, for the right Court, be a relatively simple matter. Whether the Court could interpretatively transform Australia into an effective republic is an interesting question, but one difficult to answer.

Finally, within these predictions of constitutional activism, it needs to be recalled that the process will not be without cost for the Court itself. A constitutionally active Court is a politically active Court, and politicians can scent rivals over long distances. If the High Court again embarks on a course of studied constitutional activism, it inevitably will come under sustained political assault. That assault will be both deeply unpleasant for the Court, and deeply troubling in terms of the preservation of its prestige and independence.

Conclusion

The essential theme of this paper is a straightforward one. Instead of simply hunting for judicial activism and decrying it when we find it, we need to understand its origins, its attractions and its likely course. Only then can serious thought be given to debating and combating it, in the certain knowledge that its day will come again, and soon.
