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**Judicial Activism – The Boundaries of the Judicial Role\***

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**Introduction**

Discussion of the ill-defined concept of judicial activism must begin with a question about the proper limits of the judicial role in a society under the rule of law. The answer to that question may vary from one society to another. It may depend upon the functions which are conferred upon the judiciary. What those functions are will in turn depend upon particular constitutional structures, the historical role of the judiciary and what the society expects of its judiciary in the present day.

Where judges, in purporting to discharge their functions, exceed what the constitution provides, or what history has defined, or what contemporary society expects of them, then they are apt to be called 'activists' or 'imperial' and said to have gone beyond their proper limits and to have become a law unto themselves.

What is legitimate in one society may be illegitimate in another. For example, the public interest jurisdiction exercised by Indian courts would probably be seen by Australians, if undertaken by Australian judges, as an unwarranted intrusion into executive functions. The question arises whether there is some common ground between different societies, constitutions, histories and expectations by which the boundaries of the judicial function may be defined.

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\* This paper substantially reflects the content of French RS, 'Judicial Activists – Mythical Monsters?' (2008) 12 *Southern Cross University Law Review* 59-74.

## The elements of judging

Let us begin by considering the core elements of the judicial function and the surprisingly wide-range of creative things that they require judges to do. In so doing we may assume a society which provides:

- (i) a body to make laws: the legislature;
- (ii) a body to carry out laws: the executive;
- (iii) a body to resolve disputes according to law: the judiciary.

To this assumption may be added the further conservative assumption that the functions of making the laws, administering them and adjudicating upon them are institutionally separated. That is a conservative assumption because it assumes the narrowest function for the judiciary. What on that narrow function is required of the judges?

The High Court of Australia in 1983 described the central function of courts exercising federal jurisdiction under the Australian Constitution as:

... the quelling of ... controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion.<sup>1</sup>

That statement supports a simple model of judicial decision-making:

- (i) The judge identifies a rule of law applicable to a class of fact situation.
- (ii) The judge determines the facts of the case.
- (iii) The judge applies the rule of law to the facts of the case to yield a conclusion in terms of the rights and liabilities of parties before the Court.

The proper function of the judge can be considered in the light of that simple model.

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<sup>1</sup> *Fencott v Muller* (1983) 152 CLR 570 at 608 (Mason, Murphy, Brennan and Deane JJ).

## **The application of broad legal standards**

The rules of law which are to be applied by a judge may be constitutional or statutory or the judge-made rules of common law. Although questions of judicial choice and susceptibility to charges of 'activism' arise most acutely in relation to identification of applicable rules of law there are also issues of normative choice involved in the application of some rules.

Many common law rules use language such as 'reasonable' or 'unconscionable' or 'foreseeable' or 'remote' or 'good faith'. Such terms leave so much to judicial evaluation in their application that it is difficult to say that they have a single useful meaning. The same phenomenon is found in statutes in which broad terms are used which are capable of application to a wide range of fact situations. It is left to the courts to work out the appropriate application case by case. That task must involve the development of sub-rules of application. So a new common law grows, derived from case-by-case application of a broadly expressed legal rule. A good example is the term 'misleading or deceptive conduct' which entered our legal lexicon in 1974 through s 52 of the *Trade Practices Act 1974* (Cth) and was replicated in its 1987 equivalents in the *Fair Trading Acts* of the States. A substantial body of judge-made law has developed around the section through the process of case-by-case decision-making. It has been applied to consumer transactions, advertising, promotional statements, pre-contractual negotiations, statements in prospectuses, professional opinions and advices, logos, trade marks, trade names and get-up. The judge-made law has been subjected to parliamentary intervention on one occasion when s 65A was enacted to exclude media from the scope of the prohibition.

The prohibition on misleading or deceptive conduct states a legal rule which has been developed for the most part by logical reasoning. There are, however, wide statutory words which define what Julius Stone called 'legal standards' rather than legal rules. These require normative decisions in their application. As Stone said:

When courts are required to apply such standards as fairness, reasonableness and non-arbitrariness, conscionableness, clean hands, *just* cause or excuse, *sufficient* cause, *due* care, adequacy or hardship, then judgment cannot turn on logical

formulations and deductions, but must include a decision as to what justice requires in the context of the instant case. This is recognised, indeed, as to many equitable standards, and also as to such notorious common law standards as 'reasonableness'. They are predicated on fact-value complexes, not on mere facts.<sup>2</sup>

Some quantitative indication of the use of these kinds of terms in statutes in Australia appears from the number of Acts of the Commonwealth Parliament in which they appear. The term 'good faith', appears in 169 separate Acts. The word 'reasonable' appears in 143, 'interests of justice' in 50, 'unconscionable' in 12 (which is quite sufficient), 'just cause' in seven and 'just excuse' in one. This does not take account of their use in more than one provision of the same Act. Their interpretation and application case by case involves not only the development of a principled approach based on logic but one necessarily informed by value judgments. Additionally, terms such as 'in relation to' and 'in connection with', particularly found in taxing statutes, require judicial consideration of their general range and evaluative judgments about their application in particular cases.

The entrusting by the legislature to the judiciary of responsibility for developing the law within broadly stated guidelines is commonplace and has become more so over recent decades. It reflects the complexity of our society and the infinite variety of individual circumstances.

### **Statutory interpretation**

Overshadowing the judicial duty already discussed, to apply broadly expressed legal rules or standards, is the large question of statutory interpretation. Statutory language, unlike algebra, usually presents choices about its meaning. Precision of expression is illusory. The more detailed the linguistic formulae which are used, the more scope there is for argument about their boundaries. A good example is the *Migration Act 1958* (Cth). Its predecessor the *Immigration Restriction Act 1901* (Cth) comprised 19 sections when enacted. By 1950 that Act had expanded to 64 sections. The *Migration Act 1958*, as first enacted, contained 67 sections. Since its enactment the Act has been the subject of over 100 amending Acts and

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<sup>2</sup> Stone J, *Legal System and Lawyers' Reasonings* (Sydney, Maitland Publications Pty Ltd, 1964) at 263-264.

had expanded to 760 sections, supported by hundreds of regulations set out in two volumes. Underlying some of the amendments, particularly the detailed prescriptions of conditions attaching to the grant or cancellation of visas, seems to have been a desire to reduce ministerial discretion and replace it with conditional obligations. But the more conditions, the more room there is for debate about their proper construction.

Issues of statutory interpretation arise acutely in a litigious setting. At the administrative level, or between private parties, a statute may work well for all practical purposes. But when a statute comes to court it is usually accompanied by an argument about what it means. There are well-recognised rules for the interpretation of statutes which begin with the meaning of their words according to ordinary grammar and usage. But anyone who has read a dictionary knows that most words have more than one definition. The applicable meaning of statutory words must be identified by reference to their context and legislative purpose. Sometimes statutory objectives appear in the Act itself, but are expressed at such a level of generality as to be of limited assistance in solving specific interpretational problems. Sometimes the court may have to have regard to other materials such as the Second Reading Speech, the Explanatory Memorandum and Law Reform Commission Reports to ascertain purpose.

Some say that the normal and proper judicial function is to construe an Act in accordance with the intention of the legislature. But the concept of legislative intention is a construct. It has been called a fiction on the basis that neither individual members of parliament nor even the government necessarily mean the same thing by voting on a Bill or in some cases, as Justice Dawson once remarked, 'anything at all'.<sup>3</sup> If the term 'legislative intention' is meant to designate a collective mental state of the body of individuals who make up the parliament, then it is a fiction which has no useful purpose.<sup>4</sup> In my view it is used to proclaim an attributed intention based upon legislative purpose formulated by the usual

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<sup>3</sup> *Mills v Meeking* (1990) 169 CLR 214 at 234 (Dawson J).

<sup>4</sup> See *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 345-346 (McHugh J).

processes of statutory interpretation.<sup>5</sup> That attribution is made by the court interpreting the statute. It works in effect as a declaration of legitimacy, that the interpretation adopted is proper in a representative democracy characterised by parliamentary supremacy and the rule of law. It says that the court has used criteria of construction which are generally accepted. Those criteria permit and require reference to matters which were before the parliament when the law was enacted. Prime among them were the words of the statutes and their ordinary meanings. The rules of construction are known and understood by parliamentary drafters and are properly to be regarded as understood by parliament. They are partly judge-made and partly statutory. They do not always yield a single unique answer.

Much room is left for judges in the interpretation process to determine what the law is. But if that occasions complaint then the complaint is misconceived. The meanings of legislative words are not like rocks lying around on the ground waiting to be picked up. They are necessarily products of interpretation. That interpretation is legitimate when it is principled and invokes criteria which, whether developed by courts or decreed by statute or both, are broadly understood by the legislature, the executive and the judiciary. And to that extent they represent another example of a necessary, legitimate and generally accepted authority to the judges to determine what the law is by determining what it means.

### **The many meanings of 'activism'**

Against this inescapably choice-rich decision-making conferred upon the judges as a necessary part of their judicial function, the question arises: what is there left for so-called activist judges to do that defines them as activists? It is hard to know because there are so many definitions of judicial activism.

The first reported use of the term 'judicial activism' was by Arthur M Schlesinger in an article on the Supreme Court of the United States in the January 1947 edition of *Fortune* magazine. This was Roosevelt's Supreme Court. The words 'judicial activists' appeared on the second page of the article referring to Justices Black, Douglas, Murphy and Rutledge.

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<sup>5</sup> *Mills v Meeking* (1990) 169 CLR 214 at 226 (Mason CJ and Toohey J).

They were contrasted with 'Champions of Self Restraint' – Frankfurter, Jackson and Burton. Justice Reed appeared next to a photograph of Chief Justice Vinson above the title 'Balance of Power'.

No definition of 'judicial activist' was offered in the article. However, Schlesinger sought to characterise the conflict he perceived between the two groups in a way that gave content to his coined term. The activist group, as he saw them, believed the Supreme Court could play an affirmative role in promoting the social welfare. The 'Champions' advocated a policy of judicial self restraint. Where one group saw the court as an instrument to achieve desired social results, the second saw it as an instrument to permit the other branches of government to achieve the results the people want for better or for worse. In so characterising the conflict, Schlesinger acknowledged the legal realism underpinning the Black/Douglas view which derived from ideas particularly dominant at Yale Law School. The Yale thesis, as he outlined it, was that judging is a matter of reverse engineering from result to reasons. On that theory:

A wise judge knows that political choice is inevitable; he makes no false pretense of objectivity and consciously exercises the judicial power with an eye to social results.<sup>6</sup>

While the Supreme Court of the day had generally tended not to invalidate laws of Congress it was, Schlesinger said:

... still inescapably vested with political power through its obligation to pronounce on the meaning of laws.<sup>7</sup>

Much of his discussion of activism versus restraint was in the context of the exercise by the Supreme Court of its constitutional power, asserted in *Marbury v Madison* in 1803, to strike down legislation. However, relevant to the earlier discussion in this paper of the wider judicial function in relation to statutory interpretation, he observed:

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<sup>6</sup> Schlesinger AM, 'The Supreme Court: 1947' (January 1947), *Fortune*, Vol XXXV, No 1 at 201.

<sup>7</sup> Ibid.

The most carefully drawn statute has its silences and ambiguities; it cannot provide for every concrete case. As the wisest American judge, Learned Hand, once put it, the words a judge must construe are “empty vessels into which he can pour nearly anything he will.”<sup>8</sup>

Since Schlesinger's adoption of the term 'judicial activism', its definitions have sprouted like weeds. One defines it as a judge serving a function other than what is necessary for the decision of a particular dispute between the parties.<sup>9</sup> Another says that it denotes a willingness to write opinions brimming with dicta.<sup>10</sup>

Keenan Kmiec, a former law clerk to Justice Samuel Alito, offers 'five core meanings' of 'judicial activism':

- (i) Invalidation of the arguably constitutional actions of other branches.
- (ii) Failure to adhere to precedent.
- (iii) Judicial 'legislation'.
- (iv) Departures from accepted interpretive methodology.
- (v) Result oriented judging.<sup>11</sup>

Interestingly, he notes that during the 1990s the terms 'judicial activism' and 'judicial activist' appeared in 3,815 journal and law review articles and up to the end of 2004 appeared in another 1,817 articles, an average of more than 450 per year. He observes:

Ironically, as the term has become more commonplace, its meaning has become increasingly unclear. This is so because 'judicial activism' is defined in a number of disparate, even contradictory, ways; scholars and judges recognise this problem, yet persist in speaking about the concept without defining it. Thus, the problem

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<sup>8</sup> Ibid.

<sup>9</sup> Heydon D, 'Judicial Activism and the Death of the Rule of Law' (2003) 47 *Quadrant* 9 at 10.

<sup>10</sup> Grano JD, 'Delimiting the Concept of Judicial Activism: Flag Desecration and Abortion' (1989) 6 *Cooley Law Review* 439 at 441.

<sup>11</sup> Kmiec K, 'The Origin and Current Meanings of "Judicial Activism"' (2004) 92 *California Law Review* 1441.

continues unabated: people talk past one another, using the same language to convey very different concepts.<sup>12</sup>

Australian constitutional law academic, Professor Craven, has offered three definitions which are really one, relating respectively to the common law, the statute law and to the Constitution.<sup>13</sup> Judicial activism in his view involves the conscious development of the common law according to the perceptions of the court as to the direction the law should take in terms of legal, social or other policy. It exists in relation to statute law where a court consciously adopts an interpretation of statutory language which goes well beyond the ordinary import of the words because the court believes that an extended interpretation is necessary to give effect to the true legislative intention or because it wishes to frustrate an unpalatable legislative intention. In connection with constitutional interpretation he appears to equate activism with 'progressivism'. This he describes as an approach to constitutional interpretation which requires continual updating of the Constitution in line with the perceived community and social expectations rather than according to its tenor or conformity with the intentions of those who wrote it.<sup>14</sup>

Judicial review of executive action tends to attract debate about judicial activism in Australia. The Australian Constitution, and various public law statutes, empower and require Australian courts to pass upon the constitutionality of legislation and the validity and lawfulness of executive acts. Section 75(v) of the Constitution confers authority on the High Court to review unlawful executive action in applications for prohibition, mandamus or injunction against officers of the Commonwealth. The like jurisdiction is replicated in statutory form for the federal and State courts by ss 39 and 39B of the *Judiciary Act 1903* (Cth). *The Administrative Decisions (Judicial Review) Act 1977* (Cth) and various State equivalents seek to simplify and make judicial review more accessible than through the processes of the constitutional writs. From some perspectives the very exercise of such

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<sup>12</sup> Ibid at 1443.

<sup>13</sup> Craven G, 'Reflections on Judicial Activism: More in Sorrow than in Anger', speech to Samuel Griffith Society (1997).

<sup>14</sup> Ibid.

jurisdiction is judicial activism. A distinguished Australian political scientist, Professor Brian Galligan wrote, in 1991:<sup>15</sup>

Judicial review is by its very nature an activist function since it involves the judiciary in performing a number of key functions that directly affect the institutional shape and powers of the branches and levels of government.

Professor Galligan defined 'judicial activism' as 'control or influence by the judiciary over political or administrative institutions'.<sup>16</sup> Such a definition of course encompasses the uncontroversial discharge of the judicial review function conferred upon courts by the Constitution or by parliament.

Some have sought to distinguish between 'proper' and 'improper' judicial activism. In the context of constitutional review, proper judicial activism polices the boundaries of power between government entities and improper activism is rooted in the belief that law is only policy and that the judge should concentrate on building the good society according to the judge's own vision.<sup>17</sup> This just shifts the definitional problem to the boundary between proper and improper.

## Conclusion

Much discussion of 'judicial activism' is really a discussion about separation of legislative, executive and judicial power and the reciprocal restraints that accompany that separation. In the Australian context, it will recognise that separation is not defined by bright lines and that the restraint involved is in part conventional. Such discussion is undoubtedly necessary and useful and should be ongoing. It is always meaningful to ask whether a judge has exceeded his or her proper function by laying down legislative rules beyond that

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<sup>15</sup> Galligan B, 'Judicial Activism in Australia' in Holland KM (ed), *Judicial Activism in Comparative Perspective* (Macmillan, 1991) at 71.

<sup>16</sup> Ibid at 70.

<sup>17</sup> Jones G, 'Proper Judicial Activism' (2002) 14 *Regent University Law Review* 141 at 144 citing Cox A, 'The Role of the Supreme Court: Judicial Activism or Self Restraint' (1987) 47 *Maryland Law Review* 118 at 121-122.

permitted interstitial law-making which is necessary to dispose of the matter before the Court. The question may properly be asked in the context of judicial review of executive action, whether a judge or a court has entered upon the rather ill-defined territory of 'merits review' and sat in the seat of the executive to substitute its own view of the correct or preferable decision rather than stay within the boundaries of review of process and lawfulness. The question may also be asked whether the judge or a court has applied to the task of constitutional or statutory interpretation the principles generally regarded as accepted or legitimate and, if not, why they have been departed from. Each of these questions raises a different kind of legitimate concern. Their sharpness is lost and the seriousness of the debate about the judicial function which they raise is compromised if they are swept up under the almost meaningless rubric of 'judicial activism'. We then get into taxonomical debates.

There is much concern expressed by protagonists in the activism debate about judges taking over the functions of the legislature and the executive. It is useful to return to a key passage in Montesquieu's *The Spirit of Laws*, about separation of powers where he said:

Again, there is no liberty, if the power of judgment be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.

Miserable indeed would be the case, where the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of judging the crimes or differences of individuals.<sup>18</sup>

The debate about judicial activism contemplates judges assuming legislative or executive functions. But the judges are the least powerful of the three branches of government. Montesquieu's concern as expressed in the passage quoted was not limited to judges exercising executive or legislative functions. It extended to the combination of those functions. What then of intrusion by the legislature and the executive into the judicial function? That is a topic for another day.

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<sup>18</sup> Montesquieu C, *The Spirit of Laws* (Legal Classics Library, Gryphon Editions Ltd, 1984).