Judicial Activists or Champions of Self-Restraint: What Counts for Leadership in the Judiciary?

The General Sir John Monash Leadership Oration

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It is an honour, if a somewhat surprising honour, to have been invited to give the General Sir John Monash 2016 Leadership Oration. As I explained to Jillian Segal in response to the invitation, unlike previous speakers, Ian Roberts-Smith VC and the Governor-General, Sir Peter Cosgrove, I lay no claim to valour and I am not sure that managing a staff of three qualifies me as an inspirational leader.

It was suggested that I might address the concept of leadership more generally. Then with that acumen for which Jillian Segal is renowned she got back to me suggesting that, perhaps, the topic "leadership in the law" was too boring even for a judge to deliver. She proposed that I consider the topic "does society require the leadership of courageous/activist judges?", which she said would give scope to address how courageous or activist judges should be at a time when society may not be finding the guidance it is looking for from politicians and other institutions.

As a stellar law graduate, Jillian Segal had the distinction of serving as one Sir Anthony Mason's Associates when he was Chief

Justice of the High Court. All these years later, I detected in her proposed title a provocation reminiscent of those days. In retirement, Sir Anthony observed that "the community is uneasy with the notion that the courts are somehow concerned with law, but not with justice."[1]

In recent years, much of the work of the High Court in public law has arisen from decisions made under the *Migration Act* 1958 (Cth). The policy of the former and present governments in this area has been the subject of heated public debate. Commonly, opposing sides in that debate call in aid considerations of justice and morality. Decisions of the Court interpreting the validity and scope of the powers conferred under the Migration Act respecting the processing of claims for refugee status have been the subject of criticism in one case as "activist" and in another for "excessive legalism". In the latter case, a correspondent to the *Sydney Morning Herald* was moved to write that it was tragic that justice dispensed by the High Court "has focussed on the law and completely forgotten about 'fairness' and 'moral rightness'"[2]. Another correspondent writing of the same decision said that reading it had reminded him of the American author's description of the difference between the law and

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1 Mason, "A Reply", in Sanders ed *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 113 at 115.

2 "Letters", *Sydney Morning Herald* (Sydney), 5 February 2016.

justice – "justice is something you get in the next life; in this life you have the law."[3]

In issue in that case was the validity of a law passed by the Commonwealth Parliament. Necessarily in our federal polity it falls to the High Court to determine the validity of laws enacted by the State and Commonwealth Parliaments. I intend no disrespect to the correspondents who were moved to take an active part in the public debate, but a moment's reflection would suggest that it would be concerning if the Court did not apply legal principle in determining the limits of the legislative power of our democratically elected Parliament.

I have settled for a somewhat less sensational topic.

The expression "judicial activist", is of relatively recent origin, albeit that the concept is an old one. It appears to have been coined by an American historian, Arthur Schlesinger Jnr, in an article published in a popular magazine in 1947. He was writing about the composition of the Supreme Court of the United States and he classified the Justices as either "judicial activists" or "champions of self-restraint". In the former camp were those who in his view regarded the Court as an instrument to achieve desired social results; while those in the latter camp saw the Court as an

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[3] "Letters", *Sydney Morning Herald* (Sydney), 5 February 2016.

instrument to permit the other branches of Government to achieve the results the people want for better or worse[4].

Whether Schlesinger's analysis was a fair one is not a matter about which I feel qualified to comment. In the Australian context, it seems to me to be well wide of the mark. The High Court, in common with other final courts of appeal in the common law world, has an undoubted law-making role. The role is inherent in the development of the common law. On occasions that development takes into account the Justices' perception of contemporary societal values. Of course today much of the Court's work involves the interpretation of statutes. Not uncommonly, the words the legislature enacts bear more than one meaning. Plainly enough there are choices to be made in the attribution of the correct legal meaning to the statutory text. Those choices are made by applying well understood principles of construction, that are the tools of the court and parliamentary drafters. It would be a crude assessment to attach the pejorative label "judicial activist" to a decision merely because it departed from the law as previously stated or because it assigned to statutory text a meaning other than one ordinary grammatical meaning of the text.

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[4] Schlesinger Jr, "The Supreme Court: 1947", (1947) *Fortune*, quoted in Kmiec, "The Origin and Current Meanings of 'Judicial Activism'", (2004) 92 *California Law Review* 1442 at 1446-1447.

"Champions of self-restraint" is not an expression that has been taken up by the academy here. The label applied to Australian judges considered to be in Schlesinger's second category tends to be "Dixonian legalist". Sir Owen Dixon, acknowledged as one of, if not the, finest jurists in the common law world in his time, was sworn in as Chief Justice of the High Court in April 1952. On that occasion, he famously said he should be sorry if it were thought that the Court was other than "excessively legalistic"[5]. His method was one of "strict and complete legalism"[6], a method he expounded in an address given at Yale University in 1955[7]. Reading that address is apt to give an incomplete appreciation of the application of the method. Strict and complete legalism did not stand in the way of the creative distillation of new principle in an appropriate case[8], nor did it require unyielding deference to authority. The Yale address should be read with Dixon CJ's fine dissenting reasons in *Parker v The Queen*[9].

Not long before Parker's case, the House of Lords in *Director of Public Prosecutions v Smith* held with respect to proof of criminal

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5 [1952] 85 CLR xi at xiv.

6 [161] AC 290.

7 Dixon, *Concerning Judicial Method* (1956) 29 ALJ 468 at 472; *Yerkey v Jones* (1939) 63 CLR 649 at 684-685.

8 *Yerkey v Jones* (1939) 63 CLR 649 at 684-685.

9 (1963) 111 CLR 610; [1963] HCA 14.

liability that a man is presumed to intend the reasonable consequences of his action[10]. This somewhat startling decision was inconsistent with the High Court's earlier decision in *Stapleton v The Queen*[11]. At the time *Parker* was decided the settled practice of the High Court was to follow decisions of the House of Lords in preference to its own. However, Dixon CJ could not bring himself to accept the statements of principle in *Smith,* which he said were misconceived and wrong. With the concurrence of the other members of the Court, Dixon CJ declared that Australian courts should continue to apply the law stated in *Stapleton* and that *Smith* should not be taken as authority in this country[12]. In 1963, this was a radical stance to take.

So, too, was it radical to consider, as Dixon CJ did, that Parker should have had the partial defence of provocation available to him on his trial for the murder of his wife's lover. The law, as it was understood at the time, required a killing to be done under sudden provocation and before there was time for the blood to cool before murder might be reduced to manslaughter. The provocation was not sudden in Parker's case but it was powerful. In the days preceding the killing, the deceased had insulted and taunted Parker, flaunting his hold over Parker's wife. Finally the deceased and the wife had

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[10] *Director of Public Prosecutions v Smith* [1961] AC 290.

[11] (1952) 86 CLR 358; [1952] HCA 56.

[12] *Parker v The Queen* (1963) 111 CLR 610 at 632.

taken off together over the entreaties of her and Parker's children. Parker drove after them and, having found them, in a distraught state he repeatedly stabbed the deceased. Dixon CJ thought it a shortcoming in the criminal law that murder might be reduced to manslaughter where a man kills his wife's lover caught in the act of adultery but not allow the same concession to human frailty in a case such as this[13].

Dixon CJ rejected the rigidity of the received doctrine which reflected the social conditions of earlier centuries. He held that the jury should have been instructed to consider whether the killing was done under provocation[14]. Dixon CJ's invocation of the standards by which the provocation was to be judged[15] is eloquent of views about the relations between men and women of half a century ago. It may sound jarring to our ears, which only serves to underscore the need for judges to adapt the common law to keep it in "serviceable condition"[16].

It does a disservice to Dixon CJ to paint him as an unbending formalist. It is undeniable that the jurisprudence of the Court underwent a change in the years following his retirement and

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[13] *Parker v The Queen* (1963) 111 CLR 610 at 627-628.

[14] *Parker v The Queen* (1963) 111 CLR 610 at 628.

[15] *Parker v The Queen* (1963) 111 CLR 610 at 628.

[16] *Dietrich v The Queen* (1992) 177 CLR 292 at 324.

particularly under the Chief Justiceship of Sir Anthony Mason. As others have observed, there were external influences which contributed to that change[17]. First, the latter part of the last century saw the abandonment of the declaratory theory of the common law; here and in the United Kingdom judges openly acknowledged the evident fact of their law-making function. Secondly, Sir Anthony Mason's tenure on the Court corresponded with the emergence of Australia as a truly independent nation with the passage of the *Australia Acts* in 1986. The last links with the Privy Council were severed and the High Court was truly engaged in declaring the common law of Australia. A development recognised by the amendment of s 80 of the *Judiciary Act* 1903 (Cth).

McHugh J writing extra-curially pointed out that the rejection of "strict legalism" as an interpretative tool (to the extent that strict legalism was ever applied) was not some heretical departure by the Court[18]. He illustrated that proposition by reference to the Engineers' Case[19]. Familiar to every law student, the Engineers' Case which was decided in 1920, threw out the doctrine of implied

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[17] See Kirby, "Sir Anthony Mason Lecture 1996: AF Mason – From Trigwell to Teoh", (1996) 20 *Melbourne University Law Review* 1087 at 1096-1097; McHugh, "The Constitutional Jurisprudence of the High Court: 1989-2004", (2008) 30(1) *Sydney Law Review* 5 at 10-12.

[18] McHugh, "Constitutional Jurisprudence of the High Court: 1989-2004", (2008) 30 *Sydney Law Review* 5 at 10.

[19] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

intergovernmental immunities on which constitutional interpretation had proceeded since federation[20]. McHugh J adopted Sir Victor Windeyer's explanation of the significance of that change. Sir Victor Windeyer viewed the work of the High Court through the eyes of a legal historian. In the *Payroll Tax Case*[21] he said it was wrong to regard the Court's rejection of a doctrine that had held sway for the first 20 years of our federation as the correction of error or the uprooting of heresy. He put it this way:

> "[In] 1920 the Constitution was read in a new light, a light reflected from events that had, over 20 years, led to a growing realisation that Australians were now one people and Australia one country and that national laws might meet national needs. ... Reading the instrument in this light does not ... mean that the original judges of the High Court were wrong in their understanding of what at the time of Federation was believed to be the effect of the Constitution and in reading it accordingly."[22]

Over the course of my professional life, in the field of tort law it has been possible to discern trends in the decisions of the High Court towards extending liability in tort and at other times towards confining it. The former trend has on occasions been criticised as "judicial activism"[23]. The development of controlling mechanisms to

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[20] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

[21] *Victoria v Commonwealth* (1971) 122 CLR 353 at 396-397.

[22] *Victoria v Commonwealth* (1971) 122 CLR 353 at 396.

[23] Heydon, "Judicial Activism and the Death of the Rule of Law" (2003) 23 *Australian Bar* Review 110 at 123.

place some limit on liability flowing from Lord Atkin's articulation of the neighbour principle in *Donoghue v Stevenson*[24] has not proved susceptible of easy answers. It was one thing to award damages to a person physically injured as the result of the defendant's negligence and another to allow recovery for psychiatric injury or for purely economic loss. Courts struggled with the idea of compensating a plaintiff for what, perhaps unhappily, was described as "nervous shock".

There was the concern about fictitious claims and about how to put a money value on non-physical injury. The hesitancy reflected the courts' limited understanding of the nature of psychiatric injury and, as Windeyer J put it, the tendency of the law to be "marching with medicine but in the rear and limping a little"[25]. In 1939, a majority of members of the Court considered that it was not reasonably foreseeable that a mother watching the recovery of her seven year-old son's dead body from a water filled trench which the council had negligently failed to fence might suffer psychiatric injury[26]. As the law developed, recovery for psychiatric injury came

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[24] [1932] AC 562 at 580.

[25] *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 395 per Windeyer J.

[26] *Chester v Waverley Corporation* (1939) 62 CLR 1 at 10.

to depend upon concepts of sudden shock or, more generously, the perception of the immediate aftermath of an event[27].

The law as it stood at the beginning of this century would not permit recovery to Mr and Mrs Annetts to compensate them for the psychiatric injury each suffered as the result of learning of the death of their 16 year old son. As the result of the negligence of his employer, their son died of dehydration, exhaustion and hypothermia. He had gone to work as a jackaroo on a cattle station in Western Australia. Before he left home, Mr and Mrs Annetts had sought and received assurances that he would be under constant supervision and well looked after. Contrary to those assurances, the boy was sent to work alone as a caretaker on a remote part of the property. From there he went missing. When Mr Annetts was informed of that fact in a telephone call from the police, he collapsed. There followed a prolonged search for the boy in which Mr and Mrs Annetts took some part. His blood-stained hat was found in January 1987 and in April of that year his body was located. Mr and Mrs Annetts were informed of the discovery by telephone. Mr Annetts travelled to Western Australia where he identified his son from a photograph of the skeleton.

The Full Court of the Supreme Court of Western Australia, faithfully applying the law as it was understood, found that Mr and

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[27] (1984) 155 CLR 549 at 590-591.

Mrs Annetts' claims did not satisfy the requirements of sudden shock or direct perception sufficient to give rise to a duty of care owed by the employer to them[28]. That holding was reversed in the High Court. Gleeson CJ commented on the difficulty of applying inflexible criteria to an area of the law which has as its central concept reasonableness; a concept inherently resistant to the rigorous categorisation of its elements. His Honour concluded that:

> "The process by which the [Annetts] became aware of their son's disappearance, and then his death, was agonisingly protracted, rather than sudden. And the death by exhaustion and starvation of someone lost in the desert is not an 'event' or 'phenomenon' likely to have many witnesses. But a rigid distinction between psychiatric injury suffered by parents in those circumstances, and similar injuries suffered by parents who see their son being run down by a motor car, is indefensible."[29]

The rejection of the criteria of sudden shock or direct perception in the immediate aftermath of an incident necessarily widened the law of negligence. However, few would seek to diminish the force of Gleeson CJ's reasons by characterising them as "activist".

Nowhere is the inutility of Schlesinger's taxonomy better illustrated than by considering the decisions of Brennan J. His was

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[28] *Annetts v Australian Stations Pty Ltd* (2000) 23 WAR 35.

[29] *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 at 337 [36].

the leading judgment in *Mabo v Queensland [No 2]*[30], rejecting the great body of received doctrine that distinguished inhabited colonies that were *terra nullius* from those that were not, holding that the Meriam people's native title to land had survived the Crown's acquisition of sovereignty over Australia. His Honour approached the matter by saying that the High Court, declaring the common law of Australia, may adopt rules that accord with contemporary notions of justice and human rights provided those rules do not fracture the skeleton of principle that gives our law its shape and internal consistency[31]. He observed that the Court was no longer bound by the decisions of courts in the hierarchy of an empire, which at the time, had been concerned with the development of its colonies. Judged by any civilised standard, Brennan J said the traditional common law understanding expressed in those decisions was unjust.

Passages from Brennan J's judgment in *Mabo [No 2]*, controversial as they were the time judgment was delivered, are now engraved in stone in Reconciliation Place within view of the chambers he occupied as Chief Justice. The acceptance of the rightness of the decision symbolised by that sculpture does not deny that the decision was a radical departure from a settled understanding of the law of property.

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[30] (1992) 175 CLR 1.

[31] *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 29.

To appreciate Brennan J's judicial philosophy, one needs to set *Mabo [No 2]* against his powerful dissent in *Dietrich v The Queen*[32]. *Dietrich* was concerned with the content of a fair trial in a criminal case. It held that, exceptional cases apart, if through no fault of his own the accused is unrepresented, the court should stay proceedings on the indictment until arrangements are made for the accused to be legally represented. The decision had evident resource implications: as a practical matter legal aid commissions were obliged to prioritise grants of aid to persons accused of serious crime.

Brennan J acknowledged that legal representation reduces the possibility of injustice and enhances the fairness of the trial. His Honour thought it incongruous that Australia should be a party to the International Covenant on Civil and Political Rights, which declares that in the determination of any criminal charge a person shall have legal assistance assigned to him in any case where the interests of justice so require, unless Australian governments provide the resources to carry that entitlement into effect[33]. Nonetheless, Brennan J considered that the majority's conclusion was an unjustified intrusion upon the functions of the legislative and

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[32] *Dietrich v The Queen* (1992) 177 CLR 292.

[33] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entry into force 23 March 1976), art 14(3)(d).

executive branches of government[34]. His reasons contain a discussion of how the Court is to take account of contemporary values in developing the law[35]. He said that courts are not justified in developing the law to conform to transient notions that emerge in reaction to a particular event or are inspired by a campaign conducted by an interest group. Rather, he spoke of moulding the law to conform to the relatively permanent values of the Australian community, provided always that the skeleton remains intact[36]. Probably few judges would contest that statement of common law judicial method.

Of course one may ask how it is that judges divine the relatively permanent values of Australian society. Happily, this is a concern that is often more philosophic than practical. Gleeson CJ's assessment of the content of reasonableness in the Annetts' case is probably one with which few in today's society would cavil. The difficulty for judges arises in novel cases which turn upon contested values. In this category are the "Wrongful birth" cases. The High Court has held by a narrow majority that the parents of a child born as the result of negligent advice concerning a sterilisation procedure

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[34] *Dietrich v The Queen* (1992) 177 CLR 292 at 324.

[35] *Dietrich v The Queen* (1992) 177 CLR 292 at 319, referring to Francis Bacon, *The Advancement of Learning,* (1605), Bk 2, fol 10b.

[36] *Dietrich v The Queen* (1992) 177 CLR 292 at 319.

were entitled to damages for the cost of raising and maintaining the child[37].

All of the arguments against the award of damages in that case depended upon claims about society's values. For the judges in the minority, taking those values into account the law should not countenance valuing the life of a child to the parent. The majority disavowed the public policy arguments, and held that damages for the cost of raising and maintaining the child could be calculated without setting off the value of the child. McHugh and Gummow JJ illustrated that proposition by pointing out that the coalminer, forced to retire because of injury, does not have his damages reduced because he finds himself free to sit in the sun each day and read his favourite newspaper[38].

It may be accepted that judges have no special purchase on the content of contemporary societal values. Nonetheless, the development of the common law would have been most unsatisfactory if judges did not have an eye to those values in deciding the cases that come before them. They need to keep the other eye on consistency in judicial decision-making - treating like cases alike and different cases differently is itself an aspect of justice. Weighing the need to develop the law to accommodate

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[37] *Cattanach v Melchior* (2003) 215 CLR 1.

[38] *Cattanach v Melchior* (2003) 215 CLR 1 at 39 [90].

perceived changes in society against the need for certainty and consistency calls for judgment. These are judgments that can be criticised in individual cases as producing an outcome that is too adventurous or not adventurous enough. It is another thing to conclude that the judge in either case is pursuing some personal agenda.

One answer to the question of what counts for leadership in the judiciary is for the judge not to seek to be seen either as an activist or a champion of self-restraint. For that matter, for the judge not to seek to be seen very much at all. Putting the legal profession and diligent law students to one side, few members of the Australian public would know the names of the members of the High Court, much less have a view about how individual Justices might decide cases. It is improbable that the fate of a federal election might be thought to turn on which party will be in a position to appoint the next Justice to the High Court. Gleeson CJ made the point nicely around the time of the High Court's centenary. He had done a survey and found that in his time as Chief Justice, the Court had only once divided along lines such that Justices appointed by a Coalition government were of one view and Justices appointed by a Labor government were of a different view[39]. The division of opinion in that case was with respect to the liability of a local

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[39] Gleeson, *The Centenary of the High Court: Lessons From History*, Australian Institute of Judicial Administration, Banco Court, Supreme Court of Victoria, 3 October 2003.

government authority to a pedestrian who had slipped on an uneven footpath.

We are fortunate in this country in the respect that is paid to the Court by politicians on each side of the House. We maintain that respect by sticking to deciding cases on their merits and otherwise being circumspect about participation in public affairs.