

Judicial Activism – Justice or Treason?

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My topic is judicial ethics. Not the standard fare of judicial ethics handbooks, which remind us that judicial officers should not publicly support political causes, just as they should not frequenting hotel bars, or simply fall asleep on the bench. These matters are no doubt of some importance, but my topic relates to more fundamental judicial matters, in particular, the judicial duty, to ‘do justice according to law’.¹

While the ringing phrase ‘justice according to law’ gets little more than passing attention in ethics handbooks, it is the linch-pin of any system of judicial ethics. All the things that judges should *not* do in their lives have to be seen against assumptions about what they *should* do in court.

Well, no doubt whatever your job you should not turn up drunk, or fall asleep at work. But more specifically *judicial* sins, such as showing bias, partiality or favouritism, derive most of their force from normative paradigms of the judicial task. It is because of our ideas about role of courts in society, for instance, settling disputes or enforcing legal obligations that we require judges to be impartial, unbiased, listen to both parties, and, yes, perhaps justices do have a particularly strong duty not to fall asleep on the job.

So let’s look at ‘doing justice according to law’. Is it any more than a grand phrase that can be put to one side as a motherhood statement from which nothing specific follows.

Well, we can certainly construe the term ‘justice’ here in many different ways. ‘Justice’ may mean anything from (1) the accurate application of authoritative rules of positive law (called formal justice), through (2) treating the parties fairly according to some process model, (that is procedural justice), to (3) dealing with people according to their deserts, or their needs, or their moral rights (or however we care to define substantive justice).

Interestingly, the phrase ‘according to law’ can be construed in almost exactly the same variety of ways as can the word ‘justice’. ‘According to law’ might mean: ‘according to the authoritative rules’, or it might mean following procedural rules, or it might mean ‘acting in accordance with the substantive fundamental moral principles embedded in the very idea of law’.

And because the terms ‘justice’ and ‘according to law’ can be interpreted to mean exactly the same thing and in a variety of different ways, it is easy to dismiss the

¹ Thus Chief Justice Gerard Brennan’s introduction to Justice J B Thomas, *Judicial Ethics in Australia*: ‘Judging serves the community in two ways: by doing justice according to law in each case and by maintaining the rule of law in the community at large’ (p.v) The judicial oath for the High Court of Australia, starts with a pledge of allegiance to the Crown and continues: ‘will do right to all manner of people according to law without fear or favour, affection or ill-will’. High Court of Australia Act 1979 (Cwth)

phrase 'doing justice according to law' as a grand sounding pleonasm with whatever content we care to give it. Hardly a promising basis for a system of judicial ethics.

Such mindless pluralism may however be resisted. Most of us will take 'according to law' as a way of limiting how judges may go about doing justice (whatever that is), at least to the point of saying that judges must make decisions that are in accordance with recognised legal principles and rules and do so in accordance with procedures that are similarly defined. That is, 'according to law' points to the justice of judges as being formal and procedural justice, not substantive justice. A judge should not ignore 'the law' in the positivist sense of the rules and principles generally accepted as legally binding in the system in question, on the grounds that they were simply attempting to be 'just' in some undefined moral sense.

To say more we need a theory to articulate and justify this scheme of things.

Here we enter the controversial ground of philosophical jurisprudence. How ought judges to determine cases that come before them. What is the nature of judicial power?² This in turn is meshed in the wider discipline of legal and political philosophy which deals with what sort of legal system we want to have and how this relates to our preferred political system. This is a field in which I as a political philosopher have dared to tread from time to time over the last 20 years.

In this time there have been major shifts in the dominant paradigms of judicial reasoning. Amongst the judiciary (at least their public statements) we have moved from the standard espousal of a pretty strict commitment to following the rules and precedents, to a much more open-ended interpretive method in which the inevitability of judicial law-making is celebrated rather than minimised. The so-called 'fairytale' of the declaratory theory and the 'noble lie' that judges do not make law, undermined by the teachings of legal realism (Julius Stone) and later on various post-modernisms, has been replaced by a plethora positions, from American pragmatism (let's see what works for business), through economic analysis (remarkably subdued in Australia), to inspirational moralism, with judges allotted the task of protecting vulnerable minorities from the twin evils of majoritarian democracy and minority wealth.

Some of these changes are personified in the eclipse of the work of the Oxford philosopher Herbert Hart by that of his American successor Ronald Dworkin. Hart's position in *The Concept of Law* (1962) is that law is a system of ordinary conduct guiding and facilitating rules identified and applied in accordance with a higher order but nevertheless actual social rule, called the rule of recognition, that enables us to identify the authorised first order rules that citizens are meant to follow and judges are meant to apply. For Hart, the routine application of these first order rules works pretty well most of the time but they are sometimes unclear (language is open texture), sometimes incomplete and sometimes absent, leaving room for a smallish element of judicial discretion that gives scope for some common sense flexibility.

Hart confronted and headed off the legal realists, but was less able to deal with Ronald Dworkin who argued that this 'model of rules' is simply not how things work

² See Alexander's case – what distinguishes judicial from non-judicial power is adjudication of existing rights and obligations, as distinct from the creation of rights and duties'. Now many exceptions.

in the law. Law as we know, he argued, it is full of principles, with basically moral content, principles, such as equality before the law, or that no one should benefit from their wrongdoing, principles that override rules in the service of rights and therefore justice. And these principles cannot be understood and applied Dworkin argues without the exercise the moral judgment.

With this sort of analysis Dworkin has convinced several cohorts of students and hence generations of present and future judges, that it is the adjudicative duty of judges to make the law ‘the best that it can be’, and by ‘the best that it can be’, he means, ultimately, the way that most nearly accords with the moral views of the individual judge. True he applies this in the main the constitutional cases, and true he presents this as a way of interpreting existing legal materials not creating law from scratch. Nevertheless, at bottom his theory is that ‘the law’(and not just constitutional law) contains fundamental moral principles whose application involves the exercise of what I will call first order moral judgments of the judge, that is moral judgments about substantive right and wrong, moral justice and injustice.³

This model of law as an extrapolation of individual judicial morals does meet with some resistance, principally on the grounds that Dworkin overestimates the judicial capacity to know what is morally right or wrong, and that the diversity of reasonable moral views that individual judges may hold is incompatible with producing an actual legal system that manifests the qualities of being both principled and coherent. There are just too many judicial cooks with a hand in this particular legislative broth.

One locus of this resistance, I am glad to report, emanates from this part of the world. The rather motley collection of Jeff Goldsworthy a real Australian and professor of law at Monash, Jim Allan, a Canadian who has taught at Otago for many years, myself an exiled Scot, and above all the wonderful Jeremy Waldron a New Zealander currently at Columbia University, NY, have been dubbed by a not unfriendly critic ‘the Antipodean Positivists’. The critic is David Dyzenhaus, a South African working in Canada, who has condemned legal positivism for perpetuating the apartheid regime in his home country, in much the same way as Gustav Radbruch and Lon Fuller argued that the Nazis could have been more effectively resisted had the judges of the Weimar Republic espoused the jurisprudence of natural law rather than legal positivism.

Putting aside the historical basis of such emotive claims, the crucial thing to note about antipodean positivism is that it is not an old style analytical theory that seeks to define law as, for instance, the commands of the sovereign, but a normative or ethical theory that expresses a preference for a certain type of legal system, where, according

³ Since this approach permits putting to one side precedents that don’t accord with the moral outlook of the judge, and giving prominence to those that do, Dworkin’s position is compatible with ‘doing justice according to law’ only in the very limited sense (1) that judicial decisions must be principled, that is based on reasons, in his case primarily reasons that are grounded in individual rights and not consequentialist reasons that look to future well-being, and (2) aim to make the law coherent, that is a consistent manifestation of the judges first order moral viewpoint. On the grounds that his method is ‘principled’ Dworkin rejects the label ‘judicial activism’ which he confines to purely ad hoc decision-making

to my own version at any rate, there is a set of fairly specific general rules that can be identified and applied without recourse to contentious moral or other speculative matters, a system that it is possible for citizens to understand and follow (no doubt with legal advice in complex areas) and judges to apply without recourse to controversial first order moral judgments.

I call this theory 'ethical positivism', partly because the positivism in question is justified by political morality, but also because it requires ethical practitioners, particularly ethical judges and lawyers, to make it work. Waldron tends to use the term 'normative positivism' (despite the fact that this label is used for the rather different view that law is a system of norms not facts), and it also, for reasons that will become clearer, sometimes called 'democratic positivism'.

In this lecture I examine how ethical or democratic positivism can be used to develop and justify a useful working definition of 'judicial activism' that enables us to bring into focus significant types of unethical judicial conduct and give substance to the idea of doing justice according to law.

Now 'judicial activism' is not a term that judges like. Used pejoratively it suggests that the ethical judge is a passive, mechanical creature. Not very flattering. Used eulogistically it seems to imply that bold and creative judges are akin to political activists, a not very reputable bunch and rather unwelcome image. And if all 'judicial activism' refers to is the law-making aspect of judging then it is no big deal these days. Everybody agrees, we are told that judges make law. And if that's not what 'judicial activism' means then we have a hopelessly imprecise and ambiguous and unhelpfully emotive term that reeks of journalism rather than dispassionate analysis. 'Judicial activism' it is suggested is a term to be discarded⁴

I'm not so sure. 'Judicial activism' is a term of political criticism and all terms of political criticism are fluid and contested. If we were to give up our political vocabulary on the grounds of indeterminacy, there would be precious little political discourse left. In these situations we need to refine and articulate the points that are being made in the discourse, so that something more precise can be articulated and evaluated. And to do that, we need a theory.

My suggestion is that we approach judicial activism not narrowly as having to do simply with the proper scope of judicial law-making but through the broader notion of its contrary, judicial law-abidingness. On this approach a judicial activist is essentially (1) a judge who does not apply all and only relevant clear positive law and (2) does so because of his or her views as to what the content of the law should be. (I put this second point in because we have to distinguish the judicial activist from the judicial ignoramus – although the latter can also be dangerous within their own patch).

In so far as judicial activism is a failure to apply existing law it may be called 'negative judicial activism', and in so far as it replaces existing clear and relevant law with new rules, something which appellate courts have the capacity to do, it may be called 'positive judicial activism'. To this we must add adjudication which, when

⁴ See Sackville J, 'Activism' in Coper, Blackshield and Williams, *Oxford Companion to the High Court*, .6-7.

positive law is *not* clear or available, go beyond what is necessary to achieve clarity and consistency in law in a minimalist way (which we might call ‘opportunistic activism’). By a ‘minimalist way’ I have in mind that which is necessary to deal with the case in hand, or in the case of appellate courts, to clarify an relatively confined area of law.

On this wider context, the prime reason why judges should not be making law is that they should be applying it. Judicial law-abidingness rather than judicial inactivity is the virtue that contrasts with the sin of judicial activism.

As a matter of judicial ethics I do not in fact argue that such judicial activism is always wrong, but I will argue that, outside the confines of a fairly conservative common law methodology, it is can be so wrong as to be treasonable, because it is a breach of trust and an abuse of judicial power that undermines the foundations of constitutional democracy.

And I would add, the fact that most activist judges are only trying to be just, may be relevant to a plea in mitigation, but not as an acceptable defence. And yes, certain legal philosophers, many constitutional and international lawyers and certainly Ronald Dworkin are thoroughly implicated in this treachery. As are all those, judges, legislators, commentators and the like, who promote and condone the progressive expansion of vague moral standards into the corpus of the law: such as unconscionability, good faith and open-ended standards such as reasonableness. For the theory behind the critique of judicial activism provides a basis for the criticism of enlarged judicial discretion in general.

Some of you may agree with my conclusions but nevertheless deplore the language: surely treason is too strong a word for what is only after all a matter of jurisprudential opinion.

This underestimates the potential damage both to law and democracy that anything but sporadic judicial activism can do.

But perhaps I should make it clear that, in using the term treason am I not imputing any evil intent to judges or others whose conduct undermines the democratic rule of positive law.. Often judicial activism is quite the reverse: a misguided attempt to do what is right. To parody TS Elliot’s Murder in the Cathedral:

The greatest temptation, the greatest treason
Is to do the wrong deed for the right reason.

However, in case the language of treason still seems too strong, I would emphasise that I am also not suggesting that judicial activism should be deemed a form of judicial misconduct justifying discipline and removal. My reticence here is not because judicial activism is not an abuse of office. It often is.. But rather on account of the fragility of constitutional government. Judges need to be absolutely sure that they cannot be dismissed for making decisions unpopular with government or the press.

The problem here goes back to the unfortunate fact that we both need governments and have reason to fear the concentration of power that they involve. The tragic paradox of politics is the fact that we need to create a potential instrument of oppression. Now, while democracy is an attempt to deal with this paradox by making government a revocable trust, a temporary grant of power to be exercised only under a system of law, no system can formally solve the problem of who guards the guardians, in this case the persons whose job it is to say when that law has been broken.

That government be a government of rules, that there be separation of powers between law-makers and law-appliers, and that governments be vulnerable to the votes of the populace and that judges be *not* vulnerable in this way, are amongst the greatest political achievements of human civilisations, but they cannot do away with the need to entrust someone with making final answers, in such matters as the lawfulness of political conduct. In this situation allowing parliaments, or the governments that control them, to remove judges for judicial activism is likely to be a greater danger to constitutional democracy than permitting such activism to continue.

However, in my view, this enhances rather than diminishes the sinfulness of judicial activism. For, given that judges have immunity from external control, judicial activism can rely on the fact that there is no acceptable way of institutionalising an effective counter to such abuse of judicial powder. Because they are protected by the constitutional norms of judicial independence, judges are immune from formal consequences of their misconduct. Judicial activism is not a risky path for judges. The cost is paid by the community through the damage that is done to our system of government. So, I stick to my label: judicial activism is, or may be, treason.

To explain and defend this position, I will run briefly over why we might want to adopt democratic positivism as a theory of how the law ought to be. Why on earth would we wish to adopt a theory that appears to advise not only citizens but judges to put aside their own ideas of substantive justice and replace them with apparently amoral rules that we follow simply because they are the law. This looks like the abnegation of responsibility all round.

Well, basically there are two sorts of reasons. The first, the weaker of the two, is that adopting legal positivism makes for having a formally good legal system, with all the social and economic benefits that flow from it. And the second, a much stronger reason, is that legal positivism is necessary for the realisation of a democratic system of government, that is a system of government in which the people as a whole have real power to control how they are governed. Putting the two considerations - order and democracy - together, I would argue that democracy is unattainable in a large and complex society without a formally good legal system, as I shall define it.

With respect to the formally 'good' legal system, we are talking here not about the moral or other content of ordinary laws or even procedural rules, but about the way in which simply having a orderly and public system of rules produces social benefits such as social coordination, facilitation of cooperation and systematic control of harmful conduct. A formally good legal system should consist of a framework of intelligible and applicable rules by means of which we can coordinate our behaviour, enter into workable agreements and know what we cannot do or must do in order to

avoid official disapproval and sanctions. These objectives can be achieved it is argued, only if we have an agreed set of specific rules capable of being followed and applied by people whether or not they agree with their content.

We will, of course, also want the content of the rules not only to be compatible with the aims of coordination, facilitation and regulation, but actually serve to produce results that we think optimal with respect to our social and political values. However, whatever these substantive values may be, we will require formally good law: rules that are general, clear, specific, applicable, stable and so on. This is the familiar theme that clear, predictable law promotes order and stability in society. Rules enable us to know where we stand and to plan accordingly.

It is also fundamental to a particular sort of justice, the justice I earlier called formal justice, the justice of treating like cases alike. This sort of justice cannot be achieved unless there is an operative system of general rules impartially applied. Without that we cannot claim to be even attempting as a society to treat like cases alike.

Now, of course, a *really* good legal system. will have laws that are not only general, specific and clear, but have content we like: the right generalisations, the right classifications, the rights remedies etc. If we could only agree what such substantively good laws would be then our political problems would be at an end. But in what Jeremy Waldron calls 'the circumstances of politics' we disagree fundamentally about the proper content of law. Democracy is a system set up to handle and resolve these disagreements in so far as is possible.

This takes us to the second argument for ethical positivism, that a system of good positive law is essential for the realisation of democratic government in a large and complex society. There are many reasons for adopting this view. For instance, collectives or their representatives cannot routinely make decisions about particulars, but only about types of persons and situations.

Further, choice of rules is not only a manageable focus for political discussion and choice, but is one which functions so as to mitigate the role of naked self-interest in politics by making explicit the choices that have to be made between how different categories of person and behaviour are to be subject to or beneficiaries of state power. Only if democracy is centred on the choice of rules, can it begin to approach the ideal of providing real political power to the people as a whole. And if the rules thus created are not followed or are subverted by processes that enlarge judicial discretion at the expense of rule-governed decision-making then democracy is thereby diminished.

In many ways both reasons are hardly controversial. Nearly everyone able to think about the matter would agree that we need a publicly knowable system of followable rules that can be identified in a publicly verifiable way. And few would demure from the general thesis that the people through their elected representatives should make the rules that it is the courts duty to apply, and that democratic decision-making is more democratic if it is focussed on making general rules than on ad hoc exercises of majority power.

Even the most activist of judges usually endorse some such background set of political assumptions. This is however often followed by a string of caveats and qualifications that threaten to undermine the apparent commitment to the democratic rule of law. Majorities get it wrong. Minorities suffer in consequence. Rules need to be kept up to date. Parliaments are slow to legislate. Technology moves too fast for government. Politicians are short-sighted. And so on.

It is pointed out, for instance, that often there simply are no rules of a reasonably specific sort available to apply. In this situation there is no logical space for negative activism (not applying the rules) or indeed positive activism (changing the rules) for there are none to be changed, and opportunistic activism becomes inevitable and pervasive. In this situation legalism cannot be strict because it is bound to be incomplete.⁵

So what to do if there are no clear and relevant rules for judges to apply?

Well, the first thing to note is that this means that the system is defective and must be improved. And the primary duties here fall on governments and legislatures. Democratic positivism is not in fact a theory of law directed primarily at lawyers and courts, but at the democratic system as a whole, especially the legislature and the legislative drafters that serve them. It is the responsibility of the democratic system as a whole to produce clear and comprehensive rules.

But systems fail, often chronically. And, meantime the democratic judges are in a difficult situation. The situation is not so problematic in the criminal law where charges not based on clear rules may be dismissed, but less easy in private litigation when it may seem wrong always to leave a detriment where it lies, and may be inadequate with respect to the function of pressing dispute-resolution. Nevertheless, no punishment and no remedy when there is no clear law is a good starting point, and we need to be cautious of filling the evident gaps in any system of law by the liberal exercise of judicial discretion, or, at the higher level, in the making of new law.

But marginal creativity for the purpose of creating clarity and certainty is something that is even required by legal positivism. The argument for having a formally good system of law, itself legitimates a measure of rule creation for instance where this is necessary to resolve pressing disputes, although the argument from democracy suggests that any significant legal developments should be left with democratically elected bodies. Hence the constraint of minimalism.

⁵ Sir Owen Dixon, at his swearing in: 'Close adherence to legal reasoning is the only way to maintain the confidence of all parties in federal conflicts. It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism' (1952) 85 CLR xi, xiv.

Later he accepted 'the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions or to decide that a category is not closed against unforeseen circumstances which might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented with the result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or social necessity or of social convenience'. 'Concerning Judicial Method' (1956) 29 ALJ 468 at 472.

There are more radical objections than the occasional absence of rules. Of particular philosophical interest is the argument that we can never have rules whose meanings limit decision-makers. Rules, we are told, are but strings of symbols, symbols are artificial cultural constructs whose meanings depend on how they are understood by their audience. All language must therefore be interpreted. And all interpretation is subjective in that it is vitally dependant on the mental operations of the particular individual seeking to understand the rule. It follows that there is no such thing as plain or ordinary meaning.

Such rule-scepticism depends on sociological and philosophical arguments to the effect that all meanings depend on understandings of symbols that are embedded in cultural presuppositions and personal histories. For it is evident that there is no 'objective' meaning that is independent of shared linguistic conventions and the shared social experience in which these conventions apply.

But the fact that language is a social phenomenon with certain social under-pinnings does not in itself show that culture, conventions and social experiences cannot result in shared understanding of texts. 'Plain meaning' is certainly a culturally dependent phenomenon, indeed a communicative achievement, but it manifestly can succeed social role in social circumstances where there are shared understanding and the genuine desire to communicate.

That we often fail to achieve plain meaning, indeed that we often don't want to, or indeed that we often want to undermine or subvert it (which is exactly what lawyers are often paid to do), are evident facts of messy, lazy and adversarial social situations. But this is not to say that it cannot be and is not done.

(Indeed to deny the possibility that a culture can be developed in which it makes sense to talk of plain meaning is in the end self-defeating, for it is a view that, ex hypothesi, cannot be communicated, because in effect nothing can be communicated).

Nevertheless the problems of achieving successful communication are real ones and do present a challenge to any form of legal positivism. How can we go about achieving it?

A lot here depends on exactly what is being commended by way of interpretive method. To give my concept of judicial activism more clarity I must say something about its contrary: judicial law-abidingness. And how this bears on judicial reasoning.

I'm afraid we need some analysis and definition here. Hard work at this time of night, but this is the terminology within which the distribution of governmental power is determined in our society. So, if you care about politics, pay attention.

The position I take on judicial reasoning is a form of textualism, but a form of textualism that places texts in their contexts. I call it, enjoying the play on words, contextual textualism, or contextualism for short. Text in context, or Contextualism, does not see the text as simply a way of getting at the subjective intention of the legislature. Democracy cannot be defended in terms of an appeal to some usually non-

existent general will. Rather we have a system where the people through their elected representatives have the duty of creating an official text, approved by a democratic vote, that is then constitutive of what they intend, it is something for which they can be held responsible at least when understood in accordance with its plain meaning (or lack of it). Contextualism is not intentionalism.

Neither is contextualism to be equated with 'literalism' if this means reading the words and sentences out of context, merely with the aid of a good dictionary in ignorance of the social and political contexts. Indeed most people we call literalists accept that the words of a piece of legislation can only be understood in the type of situation from which the legislation arose and to which it is intended to apply, the ends it is designed to serve, the controversies that lead up to it, the alternative positions that might have been adopted, and the conventions of language shared by those involved and also the conventions for the interpretation of such authorised texts in that jurisdiction.

But contextualism is not purposive interpretation in any strong sense of 'purposive'. Contextualising does not mean, use the text to find the ultimate or background overarching purpose of the legislation then do whatever is necessary to achieve that purpose in this case or in similar cases. Rather it means, if you have an appreciation of the social realities from which the legislation emerged then you have the context that may enable you understand the meaning of the text.

Contextualism is a form of originalism, but only in the sense that it generates reasons for emphasising the original texts, particularly of statutes and constitutions. It legitimates going back to the meaning of a text prior to the accretions of later and sometimes erroneous precedential decisions. To that extent it endorses the so called literalism of the Engineer's case that abandoned some tenuously based constitutional implications, about intergovernmental immunities and reserved state powers, and returned to 'the meaning of the Constitution' read 'naturally in the light of the circumstances in which it was made.'

In that sense contextualism is not essentially conservative. It provides a basis for overturning a line of precedent that has got out of touch with the original text. Another example might be the way in which *Cole v Whitfield* (1988) went back to the evident contextual meaning of s 92 'trade, commerce and intercourse amongst states shall be absolutely free' namely to promote free trade and avoid protectionisms between states rather than constitutionalise laissez-faire political economy. *Cole*, I believe, may be read as a contextualist return to the text that corrected the previous judicial activism evident in activist decisions such as the bank nationalisation case 1948.

There is of course a tension between a textualism of precedents and a textualism of original text, but the democratic standing of the Australian constitution does give a basis for the Engineer's Case and *Cole v Whitfield* if we see these as returning to 'ordinary and natural meaning' of the democratically endorsed text.

And indeed the same may be said about the recent cases of *Hughes* and *Wakim* in relation to cross vesting. If the Constitution clearly does not allow for C'wth DPP or

prosecute under states' corporations legislation there is a contextualist reason for deciding on that basis.

(Certainly the contextualism of ethical positivism does not mean following the interpretive method of the time – it is not conservative in that sense – . As we have seen, it allows for putting to one side precedents based on non-positivistic or activist interpretations of authoritative texts.)

It follows that while contextualism may be the contrary of 'judicial activism' it should not therefore be confused with judicial inactivity. Indeed failure to apply existing law - negative judicial activism - is a culpable form of *inactivity*. And I might note here that in so far as the judiciary of the Weimar Republic could have done anything to stop the rise of the Nazis it would have been applying the ordinary positive law against the Nazi thugs in the streets.

So, judicial law-abidingness often requires clear and decisive action in applying the text of the law. Indeed, judicial activism is often culpable inactivity. One aspect of the sad thing about the history of native title in this country is the failure of courts to *correctly* apply existing law, by holding that the land was unoccupied or unsettled when this was not in fact the case, although courts can hardly take the primary blame for that, given the assumptions of the time.

Does this mean I reject the standard opposition between judicial activism and judicial restraint? Yes and no. Judicial law-abidingness certainly does not involve holding back from the application of positive law simply because to apply the law would thereby constrain government, or have major social and economic consequences. (As Julius Stone pointed out) judicial 'restraint' in this context, is an abdication of judicial responsibility.

On the other hand, judicial law-abidingness does *not* require a court to give priority to its own interpretations of rules in situations where other reasonable interpretations are placed on these same rules by governments and administrators. The term 'judicial activism' is a US import and it was developed primarily in the area of constitutional law to state the thesis that courts should show respect for the interpretations of the constitutions developed by elected governments where these are not clearly contrary to the text of the constitution. In general this is correct. (This may not help however when what we have is a legal contest between states and commonwealth.)

That does not of course mean that governments or legislatures and more than judges may simply make the constitution mean what they choose and simply assert for instance that its legislation is within legislative power. That was tried in the Communist party case, and properly rejected by the High Court.

Interestingly, the legislation in question there (the Dissolution Act) was declared invalid in part at least because it gave judicial power to the executive to decide who was a 'communist', that is who belongs to a body of persons whose existence is prejudicial to the security and defence of the commonwealth, a violation of the separation of powers that is clearly incompatible with democratic positivism. To that extent the Communist Party decision is a democratic positivist one.

Now, if judicial law-abidingness rules out courts putting their own favoured interpretation on such provisions and claiming their necessary superiority, then the use of vague and abstract constitutional provisions to support a preferred political goal is a form of judicial activism. It goes beyond what the text requires. In this context, deference to the elected branch is appropriate.

So, there is a type of judicial activism, an opportunistic variety perhaps, that takes the form of utilising the necessarily broad provisions of a constitution to achieve purposes that have no firm basis in a contextual understanding of the Constitution. Many people consider that much of the implied rights jurisprudence of the Mason court falls under this head of opportunistic judicial activism. It goes beyond what the text requires in the pursuit of a political objective.

Certainly, free speech of some sort is clearly a presupposition of the representative government established in the Constitution, but what constitutes the *sort* of free speech that makes representative government a reality is a controversial matter that the founding fathers clearly left to the parliament to decide under the constraints provided by the text of the constitution and the representative system itself.

Australian Capital Television 1992 invalidated, in the name of freedom of political communication, a no doubt imperfect law whose purpose was to restrict the impact of unequally distributed wealth on the outcome of elections by preventing political advertising during election periods. In so doing, the High Court opted for an American over a British model of dealing with election advertising, a preference that is not justified by a contextual understanding of our constitution. Given the lack of rigour in the method of reasoning adopted, and the opportunistic way in which a new right was discovered in the Constitution, it does look as if at least this piece of implied rights jurisprudence was the result of a conscious attempt to alter the Constitution by unconstitutional means. A very positive form of judicial activism. A palpable act of judicial treason.

The logical extension of this approach to implied rights was clearly articulated in the minority judgment of Dean and Toohey in *Leeth v C'wth* 1992. There the concept of judicial power was used to frame an implied right to equality before the law which, as they present it would permit judges to render any legislation invalid on the basis that the distinctions it embodies are either not in the judge's view reasonable or because, in the judge's view, they are disproportionate to any legitimate end.

This is precisely what a loose form of implied rights reasoning would endorse, thus subjecting the substance of all democratic decisions to the moral and political opinions of the higher judiciary. This was a dissenting opinion that has not been taken up favourably in later cases. In general the High Court, meantime, has drawn back from that particular anti-democratic abyss.

Since some implied rights jurisprudence can be seen as a move towards an entrenched bill of rights, I will make just a brief mention of court-centred entrenched bills of rights. For the avoidance of misunderstanding let me say that I am totally committed to achieving a polity within which human beings are respects as being of equal worth and importance and that this does involve in part having legal rights that do something to embody the values that underlie the discourse of human rights. Nevertheless there

are many worries about pursuing the moral rights that are human rights through the mechanism of entrenched bills of rights.

Here I only mention one of them, and that is such a system almost requires judges to be judicial activists, that is to take broadly drawn statements of rights and turn them into concrete provisions that are not required by the text but represent their moral readings, no doubt supported by a selective appeal to the moral readings of other judiciaries, in a way that leaves citizens no legitimate way for us to resist them beyond constitutional amendment, a process that is itself powerless in the face of loose methods of constitutional interpretation.

I must not get carried away on this one this evening. Suffice it to say that the citizens of the ACT would be committing their own treason against the rule of democratic law if they adopt an entrenched bill of rights that left it, for instance, to our Supreme Court to determine a whole range of controversial issues in which we all have a legitimate political interest and as much right to a say as any judge.

Well, that's my case in a nutshell. It is a case that has to be defended against numerous objections. One of the enjoyable things about this topic is the number of really bad argument about. I refer of course not to those arguments I have provided you with already, but the counter arguments that many of you will be eager to come up with. I have a list of some really bad arguments, and a few not quite so bad ones, on which I could comment. I shall deal with only as many as my time allows, and am ready to stop at any time the chair calls upon me to do so.

Let's start with a really bad one.

(1) This model of rules, that's now how it works, believe me. That's not how it is done. You Campbell are an outsider. You don't know how the law operates and it doesn't follow your model of rules. As Dworkin (the theorist!) said to Hart (the barrister!): the model of rules is factually wrong.

The argument is fallacious. Democratic positivism may not describe accurately all that goes on, but it is not intended to it. This is a confusion of is and ought. Democratic positivism sets forth an ideal to which we should strive. My complaint is that it is an ideal that is being put aside for no good reason and to the peril of our system of government.

(2), Lets spend a little more time on a not so bad argument that defends the historical role of the common law. At best, what I propose, it may be objected, is applicable only to statutory interpretation and maybe constitutional law, but not to the common law.

Well, yes, democratic positivism is highly suspicious of the common law. Not with respect to its role as a method of statutory interpretation, of seeking to render statutes clearer and more consistent in the course of interpretation within the confines of the text, contextually understood as applied to particular cases. And not with respect to requiring statutes to be clear and unambiguous if they are seeking to change existing law, including existing common law, particularly where long established rights are involved.

But there is reason to be suspicious of the common law in a democracy if it is taken to be a significant source of new law with an open ended method in relation to sources of law –culling from all over the world precedents that are to the liking of adventurous judges. As there is reason to be suspicious if the common law is reoriented to become a bedrock of moral principles that trump actual rules and whose implications must be forever unclear.

And it does frustrate me that some common lawyers talk about the role of the common law as if the democratic revolution of the 19th century had not occurred. In a democratic polity there is good reason for phasing out many aspects of the common law, certainly as a source of new law. Jeremy Bentham saw that.

Nevertheless perhaps there is no great harm in the common law as long as its development is gradual and it is in clear subordination to legislation. It may indeed be a means to achieve greater clarity and consistency. And there may be benefit in the gradual development on rules in the light of the cases that come before the courts: unforeseen circumstances, changing social realities etc..

I could argue against this on the grounds that it gets us into lots of problems due to lack of policy expertise: eg the current insurance blow outs maybe. Judicial law-making can get us into a mess because justices don't have the competence to carry it out. The issues that divide the parties in legal cases are only part of a wider and more complex picture about which the court is uninformed and may be incompetent to deal with.

Common law development may be no great problem if it is incremental and consensual. But even then incremental changes reach crucial thresholds than are tantamount to major changes in law and the consent is difficult to establish.

Ideally therefore, in a flourishing democracy, common law should fade away into constrained statutory interpretation.

And certainly democratic positivism fiercely resists attempts to entrenched common law to the point where it is put beyond the reach of statutory revision (Bonham's case 1610, and flirted with in *Union Steamships v The Queen* 1988).

(3) Here we come to the most immediately persuasive argument for judicial activism, that democracy does not adequately protect vulnerable minorities. Is there not a case for retaining a measure of judicial activism whereby judiciaries can intervene to protect those whose votes are too small in number to prevent injustice to them?

Sometimes this argument is based on a very simple view of democracy that assumes all voters are solely motivated by narrow self-interest with no interest in the public good or justice.

Even on a more optimistic view, we all agree that majorities can get it wrong, and that in this as in every area of life people do have limited altruism.

Indeed this is a main reason for insisting on the rule of positive law, and why it is that a principal duty of the courts is to ensure that general laws are fairly applied, especially in the case of vulnerable groups.

Just as it is a reason for statutory provisions to outlaw discrimination on ground of race, gender, age and so on.

But to go beyond this and give courts a roving brief to change the law when they think a social group is being badly treated by the majority, comes up against the key political difficulty that we do not have agreement when and where such injustice exists or on what should be done about it if it does.

Well it is not a such a big concession in my position to say that judicial belief in a grave injustice may justify at least ignoring mistaken precedents and correcting a past mistake in common law. I certainly read Mabo partly in that way. And find it perfectly compatible with ethical positivism⁶.

But it may be bad if this concession is made into a general principle that perceived injustice legitimates a major shift even in democratically correctable common law.

Once we go beyond formal justice, then justice, substantive justice, takes us into the consequences of changing the rules: and straight into policy. Correcting a social injustice is a complex, non-incremental matter that cannot be distinguished from policy making considerations, therefore we cannot sustain the position that judicial law-making is acceptable to correct substantive injustice but not with respect to public policy..

Further, as a general principle, it suffers from the defect of requiring to be interpreted in the light of the moral values of the person interpreting the principle. In other words, it is too subjective. There is great disagreement about substantive justice. We cant have a system we judge by whether or not we like the particular results. A power given for one purpose can readily be used for another less palatable one.

⁶ So what about Mabo? A litmus test for my position. Justice or treason?

- No problem: all subject to the override of parliament, and since accepted by Parliament in some form. If it is problematic it is not the most problematic for of judicial activism.
- But it is surely activist: overturning years of precedent. Well, no: rather years of silence. And the odd precedent.
- And yet it is a major fact that the precedential decisions were clearly erroneous in the factual assumptions made at the time in relation to the application of the terra nullius doctrine. What happened was conquest not the occupation of empty territory.
- And, remember that, just because it has political consequences does not make it activist. Indeed it would have been a form of negative activism not to make an obviously correct decision in law because it has major consequences.
- Surely it is unsettling and therefore contrary to the orderliness argument. Although it was not really all that adventurous. The skeleton remains.
- Undemocratic? Better if it had been by legislation, as Land Rights after Milirrpum v Nabalco 1971 (Gove Land Rights case).

Also, there are no available criteria to pick and choose between the perceived injustices we allow the judiciary to correct and those we do not:

- We can't distinguish judicial 'whims' from personal moral opinion, unless we mean fleeting or idiosyncratic opinions. Certainly activist judges have to take a majority of other judges on a court along with them. But all moral judgment is in the end personal, individual, and controversial and not objectively distinguishable from so-called 'mere whims'.
- If 'enduring values' (see CJ Brennan) can be distinguished from other values then they are not necessarily superior values. . Many of our enduring values are far from admirable. As a test for which values we think should license activism: the fact they are old won't do. The fact they are still with us looks more hopeful. But why exclude recent developments from the values to which we give weight? eg anti-discrimination is really quite new in relation to race and gender.

No doubt there is a problem here with the respect to the unjust treatment of minorities. In fact requiring democracy to be operationalised via rule-governance is one way of seeking to render political power more equal and so protecting minorities. But, it is not a problem that can be overcome by increasing the discretionary rule-making power of judges.

Now for some really bad ones:

(4) 'Formalism', it is said, is a cover for hidden ideologies (Barwick?). Judicial activism is fine as long as it is done 'openly'. These are dangerous half truths. We will get neither justice nor better policy by having public debate aimed at changing the judicial mind. Any method can be used in bad faith or self-delusionally. What is the advantage of being open if there is no effective accountability?

Another bad one

(5) The opportunities for judicial law-making are too limited to make much difference. Evidently false. In fact the only real limitation is popular opinion.

And another, not quite so bad objection

(6) Legislation is needed but not forthcoming, therefore judges must fill the breach. There may be good democratic reasons why legislation is slow to come. There are democratic arguments for allowing intense minorities to block change. Perhaps some controversial issues do have to be left. Presumptuous.

And another

(7) Democratically mandated judicial activism. It is acceptable if it is not rejected by the electorate. (Acts Interpretation Act -not clearly activist. Purpose clauses can mean different things, eg just look at it in context).

If mandated it is a treacherous mistake. You can bring about the end of democracy democratically.

A philosopher's mistake:

(8) Judges decisions must be morally justifiable, that means that they must follow their consciences. Or, Judges have to apply the law and this means them deciding what is lawful therefore it is their views that must determine the outcome.

Legal Realism is right that judges have the last word, and would be right if they argued they ought to have. But this does not mean they are not subject to moral criticism if they become activist, merely that there are other reasons for giving them security of tenure.

But Realists are wrong if they think that means that all judicial decisions are the law, otherwise there would be no sense in judges worrying over what the law is, for the law would be what they said it is.

Even worse:

(11) It is said that activism is acceptable in constitutional law, because constitutions are organic growths, and legislatures can't change constitutions.

Constitutions are meant to be enduring frameworks. Neither can the judges change constitutions. No question that judicial activism has clear application to ignoring the text in its context, including its context as a constitutional text. And there are clear democratic procedures for constitutional change.

Overall then: Judicial activism is not a satisfactory response to perceived substantive injustice. Other, more democratic, mechanisms need to be explored.

CONCLUSION

Perhaps I have made out a case for an analysis of judicial activism analysed in terms of departures from law-abidingness. Where the law in question is good positivist law, the justice they should stick to is formal and procedural justice, and we should make it possible for them to do so by providing them with good positive law.

This gives us a basis for being highly critical of the move to broad discretionary type law as well as straight out judicial law-breaking and law-making.

Sometimes I think that there are really two sins: undermining certainty and clarity on the one hand– and ignoring democratic decisions on the other. For sure, absence of clarity and certainty in law is a defect of law in non-democratic societies. And making new law may add to clarity and certainty, at least in the future. But my case is that in a democracy there is an additional reason for good formal law in that effective democratic decisions simply cannot take place unless they can make rules that are actually applied.

Once advantage of this analysis is that it applies not only at the giddy heights of appellate courts but in every courtroom where laws are enforced (or not as the case may be).

Maybe it is particularly dangerous in appellate courts because they make law not just in the instant case but by establishing new rules and principles that other then follow.

And especially bad in constitutional matters, that are difficult to change after the even through constitutional amendment.

Hence the need for tough public scrutiny and critique, not on the motives of judges, but of their judicial conduct. Where necessary we need to criticise and shame unethical judicial conduct. For that is the way that ethics are promoted.

One way we can do this is by suggesting that judges who cannot bring themselves to enforce existing law ought to resign. At least in the straightforward cases of negative activism - failure to apply clear and relevant authoritative rules- judges always do have a choice. If applying a clear law goes against their moral convictions, then they can and should resign rather than put to law to one side or replace it with another.

So I close with these words:

‘in the administration of any law there comes a point beyond which discretion cannot travel. At this point, if a judge is unable in good conscience to implement the law, he or she may resign. There may be no other course properly available. Judges whose authority comes from the will of the people, and who exercise authority upon trust that they will administer justice according to law, have no right to subvert the law because they disagree with a particular rule. No judge has a choice between implementing the law and disobeying it.’ (pp127-28).

If you think this rather over the top, the extravagance of an ill-informed philosopher, then I have set you up. For they are in fact not my words but those of the honourable Murray Gleeson (p.127 of his Boyer Lectures (2000) ‘The Rule of Law and the Constitution’). If he will forgive me, I am happy to include the CJ as an antipodean positivist.

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