Law

Judicial Levers for Social Change:

Activism in the High Court of Australia

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Abstract

The opening three chapters of the *Australian Constitution*, titled "The Parliament", "The Executive Government" and the "The Judicature", set out the distribution of power within Australian democracy. These bodies are respectively designated responsibility for the "legislat[ion]", "administrat[ion]" and "interpret[ation]"[1] of Australian laws. This essay examines the power vested in interpretation and consequences of an activist[2] judiciary.

1 The Constitutional Role of the High Court

The High Court has two broad roles in Australian democracy. The first, is its appellate jurisdiction whereby appeals against the decisions of lower courts are "final[ly] and conclu[sively]"[3] adjudicated. The second, is "identifying and declaring the limits of legislative and executive power"[4]. More precisely, it is deciding the legitimacy of policy and behaviour in relation to laws passed by the legislature. These decisions, then, become precedent in later decisions both for lower courts and for the High Court itself.

2 Defining Judicial Activism

All functions performed by the court rely on *interpretation* of laws. On some issues, interpretation is quite direct, and circumstances resemble exactly those stipulated by the relevant legislation or well-understood precedent. These cases, however, rarely reach the High Court, having been resolved in lower courts. Cases which arrive at the High Court generally either have an ambiguous set of facts or relate to ambiguous legal documents and

precedents, impeding the accurate and consistent interpretation of laws. Any such interpretation, given the difficulties faced by lower courts in reaching what the appellant deems to be a reasonable consensus, is necessarily subjective.

This subjectivity gives rise to a scale of legal interpretations[5]. On one end, lies a strict adherence to the letter of the law and the intent of the legislator; on the other, lies a judiciary which rules entirely as it sees fit[6], administrating what *it* sees as justice, regardless of precedent. This is, in effect, the scale of *judicial activism*, where the more activist a judiciary, the less bound by precedent and more reflective of judges' personal views decisions are[7]. An acknowledgement of this scale makes popular culture's blanket criticism of all *judicial activism* as justices "dream[ing] up" "bogus exception[s]" just to "have [their own] way"[8]rather untenable. All decisions, that are not *identical* to previous cases[9], require justices to render judgement on what is "correct" in any given situation. Of this scale, Michael Kirby wrote[10]:

> Nostalgic dreams of judges without choices, devoid of creativity, abjuring all 'activism', may be found in fairy stories. But for judges, lawyers and citizens who are obliged to live in the real world, it is necessary to face up to the requirements of judicial choice. Choice about the meaning of a constitutional text. Choice about the interpretation of ambiguous legislation. Choice about the application, extension, confinement or elaboration of old principles of the common law to new facts, circumstances and times.

Indeed the existence of common law vests the power of creating laws, partially, in the hands of the judiciary.

3 Case Studies

Disagreement arises over how this power must be used. To illustrate this, examine the following two case studies

3.1 Dietrich v The Queen (1992)

Consider the case *Dietrich v The Queen (1992)*[11], presided over by the Mason Court which "favoured a degree of judicial activism"[12]. In it, the court ruled that:

> ...where an accused charged with a serious offence is (through no fault of their own) unable to obtain legal representation, any application for an adjournment or stay should be granted (unless there are exceptional circumstances) and the trial delayed until legal representation is available...

Here, the High Court, a judicial body, has mandated that until defence is provided to any accused individual, should they not be able to attain it for whatever reason (in this case, lack of funds)[11], cases should adjourn. Controversy stems from the fact that this decision results in *policy* changes which reside in avenues traditionally controlled by the legislature.

A Senate inquiry about the consequences of this decision found that it caused significant increases in Legal Aid budgets across Australia and diverted pre-existing funds away from family and civil cases into criminal cases. This would suggest that the High Court had meaningfully affected the distribution of funds within states and forced change in funding priorities. These are roles conventionally delegated to state legislatures, whose hands were now tied to pass facilitating legislation, most notably the *South Australian Criminal Law (Legal Representation) Act 2002* and Victoria's amendment of the *Crimes Act 1958*.[13]

Critics of activism argue that this allows the High Court "unchecked power" in enacting whatever policies it fancies, usurping that of an "elected parliament"[14]. The danger of such a model lies in the imperfection which plagues all decisions individuals make. Conventional legislative processes control this imperfection through democracy, lowering the chance of catastrophic error by distributing the power among the largest possible group of people. No such system could be instituted in the High Court. So, while a court in 2020 Australia may be relatively sensitive, flexible and just, these conditions are impermanent and, in their absence, an activist judiciary is far more dangerous than a constructionist one.

Furthermore, Gregory Craven, an constitutional law expert, suggests that these powers risk "politicising" appointees to the High Court, allowing governments enact legislative changes through judicial means, where they are met with significantly less resistance and no electoral accountability.[15] This, he argues, would result in a system which "focus[es] almost exclusively upon factors which may be thought to disqualify judicial candidates, and [is] aimed mainly at ... securing the curial balance most favourable to the political interests of the [appointer]"[16].

Michael Kirby, on the other hand, a noted supporter of judicial activism argues that the High Court, being the highest appellate court in Australia – the last resort for those seeking justice, must prioritise that "justice" over any "formalist" readings of the law, righting past wrongs if need be. Calling the past law "a form of cruel and usual punishment"[17], he denounced critics of the decision contending that the High Court "shapes [Australia's] approach to legal doctrine"[18], not the reverse. Decades later, the consensus among legal scholars is that *Dietrich* "undeniably strengthen[ed] the Australian common law ... [and] the legal system"[19], and at that, Kirby would argue the debate is settled – the High Court has discharged its duties in determining what brings about the most justice.

For constructionists like Dyson Heydon, however, it "us[es] judicial power for a purpose other than that for which it was granted, namely doing justice according to law", instead, "furthering ... some political, moral or social program"[20] – degrading the power which,

constitutionally, rests firmly in the hands of the public and their elected representatives.

3.2 Mabo v Queensland (No 2) (1992)

Mabo v Queensland (No 2) (1992)[21] remains one of the most controversial and well known decisions handed down by the Mason Court.

> It reversed the decision of the Judicial Committee of the Privy Council in the 19th century which had affirmed that all native Aboriginal interests in land in the Australian continent had been extinguished by the acquisition of sovereignty over Australia by the British Crown and the accession to the Crown of the radical title in land throughout Australia by reason of that sovereignty.[22] [23]

The justices gave two broad reasons for overturning the previous decision of the Judicial Committee, rejecting *terra nullius* – the notion that the land was "desert uninhabited" before European arrival[24]. The first was that significant bodies of anthropological research demonstrated that Indigenous Australians had substantial "connections with the land"[25], invalidating the methods of acquisition. The second was that the International Court of Justice, in its *Advisory Opinion of Western Sahara (1975)*, had rejected *terra nullius* as the basis for Spanish sovereignty in the region[26].[27] On these grounds, the High Court granted "a form of native title which, in cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their law and customs to their traditional lands"[28].

The decision was met with immediate political backlash. Michael Wooldridge, the then opposition spokesman for Aboriginal and Torres Strait Islander affairs, declared that "a Coalition government would not allow the High Court to 'set the pace' on land rights in the absence of legislation", warning that "if the High Court wants to take this role it will find it self in conflict with a future Coalition government"[29]. Both Tim Fischer and Rob Borbidge "repeatedly attacked the High Court for its activism in "making [native title] law", rather than interpreting it."[30] Many similar critiques emerged in the following months. Though these critiques often relied on a binary view of "judicial activism", which, as previously discussed, neglects the reality that all decisions are necessarily activist, their underlying criticisms remain valid.

This sentiment is best distilled in Justice Dawson's sole dissenting opinion:

> Accordingly, if traditional land rights (or at least rights akin to them) are to be afforded to the inhabitants of the Murray Islands, the responsibility, both legal and moral, lies with the legislature and not with the courts.
>
> The policy which lay behind the legal regime was determined politically and, however insensitive the politics may now seem to have been, a change in view does not of itself mean a

> change in the law. It requires the implementation of a new policy to do that and that is a matter for the government rather than the courts. In the meantime it would be wrong to attempt to revise history or to fail to recognize its legal impact, however unpalatable it may now seem. To do so would be to impugn the foundations of the very legal system under which this case must be decided.[31]

In a sense, *Mabo* is markedly more constitutionally anomalous than *Dietrich*. In relation to the latter, many argued that the need for a fair trial was something the court could mandate. No such justification exists here. Of this, Kirby writes:

> No doubt the Mabo decision is creative. No doubt it sits upon the fine line which separates a truly legislative act from the exercise of true judicial function. ... A system based upon the common law, of its nature requires a creative judiciary. If the judges of the common law did not so act the law would fail to adapt and change to modern society.
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> The recent increase in apparent creativity on the part of the courts in Australia may be the more noticeable only because of their earlier abstinence long maintained. That abstinence may have created a log jam of injustice which only now the High Court and other Australian courts are striving to clear.[32]

Such a justification would be consistent with that which was given for *Dietrich*. Kirby also notes that "calls for legislative reform" on the matter of Native Title had "fallen on deaf ears"[33], implying that when this is the case, it calls upon the High Court to enact such change through judicial routes.

4 The Impossible Balance

It is obvious that there exists no simple solution to the problem at hand. The High Court holds a special role in setting the bounds of common law, determining cases which are ambiguous and, in doing so, clarifying outcomes for future cases. The activist's argument is extremely intuitive: when an individual or group seeks justice, the court which holds the greatest autonomy (i.e. is least bound by precedent) should be able to deliver that, regardless of what previous cases may say. That autonomy, however, comes at the cost of misuse – as Heydon, Reid[34] and Craven argue – the more empowered an upstanding court is to deliver the *most* just outcomes, the more empowered a corrupt (or even politicised) court is to abuse power with impunity. These debates will doubtless continue in the legal profession and in its scholarship; for as long as humans remain the means of delivering justice, their decisions will be defined by imperfection and subjective interpretation, and they will forever be fighting to sustain and honour this impossible balance.

For references, footnotes and endnotes, click here.