
ARTICLES

Judicial Activism



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Is judicial activism a good thing? This question is currently being debated not only in Australia but also in many other countries whose legal systems are based on the common law. In this essay, Justice Michael Kirby analyses the public's attitude to activism in four countries: Australia, India, the United States and England. He suggests that in each of these jurisdictions public antipathy towards activism may be based on a misunderstanding of what it involves and a failure to appreciate the narrow confines within which it operates.

LIKE every lawyer of my generation in Australia, I grew up in an era of strict legalism. Australian judges disclaimed and denied activism. Indeed they deplored it. They portrayed themselves as finding and applying, not making, the law. One of the greatest of Australia's Chief Justices, Sir Owen Dixon, at his swearing in as Chief Justice said, in words known to every Australian lawyer of that time:

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.¹

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1. (1952) 85 CLR xi, xiv.

In a subsequent address to Yale University in 1955, Sir Owen accepted that judges did develop the law. But he was at pains to emphasise that it was a very limited creative function:

It is one thing for a court to seek to extend 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 of social necessity or of social convenience.²

This is the doctrine in which I grew up in the law. It was the purest version of judicial restraint. It was not unlike the pronouncement by the first Chief Justice of India, Hari Lal Kania, at the inaugural sitting of the Supreme Court of India on 28 January 1950:

It is not the function of the Court to supervise or correct the laws passed by the legislature. The Court tries its best to do justice between the parties but if a clear provision exists, it has to administer the law not make a new one.

One of the most vivid applications of this approach in Australia came in a comment made by one of the finest judges of the High Court of Australia (Sir Frank Kitto) in a decision of that Court in 1967.³ In response to a comment by another fine judge below (who later himself became a Justice of the High Court of Australia, Sir Kenneth Jacobs) Kitto J remarked:

I think it is a mistake to suppose that the case is concerned with ‘changing social needs’ or with ‘a proposed new field of liability in negligence’, or that it is to be decided by ‘designing’ a rule. And if I may be pardoned for saying so, to discuss the case in terms of ‘judicial policy’ and ‘social expediency’ is to introduce deleterious foreign matter into the water of the common law — in which, after all, we have no more than riparian rights.⁴

It is against the background of these exchanges that recent developments in the High Court of Australia and other Australian courts, both in constitutional and general legal doctrine, seem the more remarkable. This is not an occasion or the

2. O Dixon ‘Concerning Judicial Method’ (1956) 29 ALJ 468, 472.

3. *Rootes v Shelton* (1967) 116 CLR 383, 386-387.

4. The comment was addressed to a remark by Jacobs JA in *Rootes v Shelton* (1966) 86 WN (NSW) (Pt 1) 101-102. See also JJ Doyle ‘Judicial Law-Making — Is Honesty the Best Policy?’ (1995) 17 Adel L Rev 161, 203.

place in which to review the whole range of innovative legal principles which have been stated by the High Court of Australia in the past decade. But they include, importantly, rulings which have the effect of ensuring legal assistance in many criminal cases involving indigent accused in order to avoid unfair trial;⁵ the exclusion of uncorroborated and unconfirmed police testimony to counteract a judicially perceived problem of unreliable confessions;⁶ the overruling of the ancient doctrine that marriage was of itself a defence to the complaint of rape by a wife;⁷ and, most important of all, reversing nearly 150 years of decisional law in which it had been held that Australia was terra nullius when sovereignty was acquired by the Crown on British settlement. The Court concluded that Aboriginal and other indigenous peoples retained their 'native title' to land until it had been lawfully extinguished.⁸

In addition to the decisions on native title already referred to, many more general legal developments have occurred involving extremely significant decisions of a constitutional character handed down in recent years. Most controversial of these has been the discovery by the High Court of Australia of a new implied constitutional right, in certain circumstances, to protect free expression about political, governmental and related topics.⁹ This right, or some aspects of it, is shortly to be re-argued before the Court. It would therefore not be appropriate for me to re-open the debates here.¹⁰ But it is pertinent to note that one of the reasons which has been given for the support by the new Australian Federal Government for the reconsideration of those constitutional decisions is that:

The role which the Court assumed for itself in these cases involves a fundamental shift in political responsibility from the Parliament to the High Court. Politically contentious issues are best handled by the Parliament as part of the political process and not by the Court.¹¹

The Federal Attorney-General stated that the Government would 'seek to reverse the trend towards an interventionist High Court'.¹² It would seek to replace

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5. *R v Dietrich* (1992) 177 CLR 292.
 6. *R v McKinney* (1991) 171 CLR 468.
 7. *R v L* (1991) 174 CLR 379.
 8. *Mabo v Qld [No 2]* (1992) 175 CLR 1. See also *Wik Peoples v Qld* (1996) 187 CLR 1.
 9. *Australian Capital Television v Cth* (1992) 177 CLR 106; *Theophanous v Herald and Weekly Times* (1994) 182 CLR 104; *Stephens v WA Newspapers* (1994) 182 CLR 211.
 10. *Levy v Vic* (1997) 146 ALR 248; *Lange v ABC* (1997) 71 ALJR 818. [Decisions in these two cases have been handed down since Justice Kirby delivered this address. — Ed.]
 11. DM Williams QC *Courier Mail* 14 Nov 1996, 1. See since DM Williams 'Judicial Independence and the High Court' (Melbourne: Monash Uni, 1 May 1997 — address).
 12. *Ibid.*

constitutional decision-making by the Court by effective legislation by the Parliament. The Attorney-General was critical of the failure of successive Parliaments, Federal and State, to introduce reforms of defamation law. He suggested that it was preferable that such reforms should be made by the elected representatives of the people rather than by unelected judges.

The occasion which has given rise to the application for the re-argument of the constitutional principle before the Court — which comprises seven Justices — is the retirement of two of the Justices who were in the majority in support of the extension of the implied constitutional right to free speech. They were the former Chief Justice, Sir Anthony Mason, and the present Governor-General of Australia, Sir William Deane. They have been replaced on the Court by Gummow J and myself. I therefore find myself faced with an almost daily barrage of verbal injunctions either to hold the line on constitutional free speech or to retreat to the proper role of judicial restraint. Naturally, I read all of these opinions carefully. They will be dutifully forgotten as I enter the Court and concentrate my mind on the submissions of the parties that will be placed before me there. Nevertheless, it is worth citing briefly one commentary by a senior lecturer in a Sydney law school, Mr John Gava, who has cautioned:

The worst result of activism is that the judges may end up losing the public's faith in their most important attribute — the perception that they are impartial referees deciding according to the rule of law. Australia is wonderfully lucky in this regard. Of course our judges are human, with all the normal failings. But they do deserve their reputation for fairness and impartiality. Losing that would be a tragedy.

To argue against judicial activism is not to make the mistake of believing that the judge's role especially in appellate tribunals like the High Court is anything other than creative. Of course it is.... This does not, however, necessarily lead to activism. There is a world of difference between an attitude to choice which recognises and limits itself to incremental changes, tries to remain faithful to earlier decisions and appreciates that caution and restraint should be foremost in the judge's mind, and one which sees judging as an opportunity to act as a surrogate or replacement legislature and government. Or, as has been said, the impossibility of a completely sterile operating environment does not mean that surgeons should operate in sewers. Judicial activism should attract criticism, not hero worship.¹³

13. J Gava 'The Rise of the Hero Judge' *Aust Fin Rev* 14 Nov 1996, 21.

UNITED STATES

In the United States of America, the tension between judicial activism and judicial restraint has been present virtually since the foundation of the republic and the creation of the Supreme Court.

The history of the Supreme Court of the United States teaches that judicial activism is not confined to a particular ideological or social viewpoint. It may be liberal. But it may also be conservative. In the early years of this century the 'judicial activists' on the Supreme Court of the United States impeded legislation enacted by the Congress, or the legislatures of the States, dealing with social or economic affairs. Thus legislation governing child labour, workers' hours and workers' rights were consistently struck down as being violations of the commerce clause of the United States Constitution or the judicially created doctrine of 'liberty of contract' under the due process clause of the Fourteenth Amendment. A well known example of this kind of judicial activism is the decision of the Supreme Court in *Lochner v New York*.¹⁴ In that decision, the Court invalidated legislation of the State of New York regulating the hours during which bakers could work. The Court held that this was a violation of 'liberty of contract'. These doctrines extended well into the 1930s. At one point they even threatened the New Deal programme of President F D Roosevelt. The 'judicial activists' were denounced by the President. He threatened to enlarge the Court to overcome their unpopular decisions.¹⁵

In more recent times it has been 'judicial activists' of the liberal school who have attracted the ire of Presidents Nixon, Ford and Reagan. Many a political slogan was devised in the United States to attack what was seen as the 'adventurism' of the Supreme Court under Earl Warren CJ. It was during that time that the Court took many bold and courageous steps in the interpretation of the Constitution in matters such as school desegregation (described as the Court's 'noblest enterprise');¹⁶ reapportionment of unequal congressional electorates; prohibition of Christian school prayers; aid to parochial schools and restraints on police invasions of individual civil liberties. The critics of this form of 'judicial activism' complained that the Warren Court had promoted equality as the central doctrine of the United States Constitution at the expense of other values embedded in the Constitution and in society. The critics found most offensive the activist Justice's

14. (1905) 198 US 45.

15. WE Leuchtenburg *The Supreme Court Reborn* (New York: OUP, 1995) 82 et seq.

16. AM Bickel *The Least Dangerous Branch: The Supreme Court and the Idea of Progress* (Indianapolis: Bobbs-Merrill, 1970).

belief that 'progress called history would validate their course'.¹⁷

The appointment of new judges and a long period of leadership by Chief Justices wedded to greater judicial restraint (Burger CJ and Rehnquist CJ) changed somewhat the debate in the United States. The advocates of judicial restraint relied heavily upon the doctrine of the separation of the judicial from the legislative and executive powers under the Constitution. This is a feature not only of the United States Constitution but also of the Constitution of Australia¹⁸ and, to some extent at least, of the Constitution of India.¹⁹ Advocates of judicial restraint frequently suggest that the principle is grounded, conceptually, in the idea that each branch of government should stick to its own function. They point to the fact that courts are limited to decision-making in concrete cases and controversies according to standards already established by law. Courts are not entirely free agents. They should not decide a dispute if there is no concrete interest in the litigant to be relieved by judicial decision (standing). They should not decide a dispute if the conflict is contingent and may not become actual (timeliness). They should not decide a dispute if the conflict is purely theoretical or the controversy has passed (mootness). They should not ordinarily give merely legal opinions for it is the argument in a concrete dispute between parties which will refine decision-making apt to the functions of the judicial branch (advisory opinions).

Each of the foregoing vehicles for judicial restraint has come under consideration in Australia and elsewhere in recent years. Each of them opens up large areas for legitimate differences of opinion amongst lawyers. Advocates for a broader standing rule, for a more relaxed approach to ripeness and mootness and the provision of judicial advice in appropriate cases, point to the need for courts to be useful in the resolution of important controversies in society. They argue that the delays and costs of litigation will ordinarily afford more than enough restraint to prevent busybodies and pure theoreticians from knocking on the doors of the courts.²⁰ In India, by the expansion of the law of standing, the courts have endeavoured to enhance their utility to prevent infringements of fundamental rights. The practice of the Supreme Court of India of entertaining letters and telegrams addressed to it as writ

17. Ibid, 13-14. Note however that Burger CJ, who succeeded Warren CJ, was also, in his way, an activist judge. See C Tobias 'Warren Burger and the Administration of Justice' (1996) 41 Villanova L Rev 505, 506-507.

18. *R v Kirby, ex parte Boilermakers' Society of Aust* (1956) 94 CLR 254. See also *Wilson v Minister for Aboriginal Affairs* (1996) 138 ALR 220.

19. *Rai Sahib Ram Jawaya Kapur v State of Punjab* AIR 1955 SC 549, 556; *Chandra Mohan v State of UP* AIR 1966 SC 1987.

20. *North Galanjanja Corp v Qld* (1996) 158 CLR 595; *Lindon v Cth* (1996) 70 ALJR 145.

petitions, and in acting upon these, has naturally attracted criticism from some quarters.²¹ On the other hand, it has often been the way by which the Court has transformed a purely theoretical right, and a hypothetical application of the rule of law, to the actual enforcement of the law in a way which brings justice under the law to the mass of the people.

I can think of no other final court of the common law which has gone so far as the Supreme Court of India did in *Gupta v Union of India*.²² It there unanimously ruled that, where judicial redress is sought for legal injury to a person, or a determinate class of persons who, by reason of poverty, helplessness, social or economically disadvantaged position or disability are unable to approach the Court for relief, any member of the public, acting bona fide and not for oblique considerations, may maintain an action on their behalf. Such a person may seek judicial redress for the legal wrong or injury caused to such other person or determinate class of persons. Perhaps it was the special needs of India which called forth from its courts a radical refashioning of the instruments of the common law and a reconceptualisation of the role of a modern judiciary in a free society.

UNITED KINGDOM

The debate in the United States concerning the role of the judiciary has not, until lately, found many parallels in the United Kingdom. Doubtless this is because of the absence of a comprehensive written Constitution and the traditional judicial deference to Parliament and to the Executive government sitting within it. This deference is historically derived from the notion that the Sovereign in Parliament is ultimately the source of all governmental power in the realm. However, in recent years, observers of the English scene will know that the judiciary has been taking a much more active course. It has been striking down many ministerial decisions on judicial review.²³ So vigorous has this process become that it caused a major debate in the House of Lords in June 1996, initiated by Lord Irvine of Lairg.²⁴ The noble Lord rose 'to call attention to the relationship between the judiciary, the legislature

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21. SJ Sorabjee 'Public Interest Litigation for Protection and Promotion of Human Rights: The Indian Experience' *NZ Law Conference Proceedings* (1996) 40, 48.
 22. 1981 (Supp) SCC 87.
 23. Eg *R v Secretary of State for Transport, ex parte Factortame Ltd [No 2]* [1991] 1 AC 603; HWR Wade 'Sovereignty — Revolution or Evolution?' (1996) 112 LQR 568; Lord Steyn 'The Weakest and Least Dangerous Department of Government' [1997] Public Law 84.
 24. *Hansard* (HL) 5 Jun 1996, 1254. In May 1997 Lord Irvine was appointed Lord Chancellor, making his comments even more pertinent than when made.

and the executive and the judicial participation in public controversy'.²⁵ He said that there was:

Unprecedented antagonism between the judges and the government both over judicial review of ministerial decisions and the restrictions which the government proposed on judicial discretion in sentencing. Certainly there have been a string of decisions striking down ministerial actions as unlawful. That has even led to some conservative politicians calling judicial review itself into question. The public must be perplexed by what they perceive as a major clash over the distinct roles of parliament, ministers and the judges.²⁶

The debate which ensued makes interesting reading for lawyers from countries such as Australia, India and the United States brought up with a written Constitution, a federal system of government and constitutional procedures for judicial review. Lord Irvine cautioned:

In exercising their powers of judicial review, the judges should never give grounds for the public to believe that they intend to reverse government policies which they dislike. That is why I regard as unwise observations off the Bench by eminent judges that the courts have reacted to the increase in the powers claimed by government by being more active themselves, and adding for good measure that this has become all the more important at a time of one-party government. It suggests to ordinary people the judicial invasion of the legislature's turf.²⁷

Lord Irvine went on to condemn extra-judicial statements by 'distinguished judges' who had suggested that 'in exceptional cases the courts may be entitled to hold invalid statutes duly passed by Parliament'.²⁸ To a noble Lord, brought up in the tradition of Dicey and the absolute supremacy of Parliament, the judicial initiatives were heretical and an anathema. Yet to us who live in federations under a constitutional rule of law, it is a regular feature of judicial and political life. Other Lords in the British debate noted that it was the growing openness of the judiciary which had led to the comments for which they were being taken to task. They hoped that the debate would not force judges back into reticence.²⁹ Lord Wilberforce

25. Ibid. Note that the debate about activism extends to civil law countries. For a comment on the position in the Netherlands: see M de Werd & R de Winter 'Judicial Activism in the Netherlands: Who Cares?' in B Bakker et al (eds) *Judicial Control — Comparative Essays on Judicial Review* (1996) 8. For comment on the European Court of Justice: see A Arnall 'The European Court and Judicial Objectivity: A Reply to Professor Hartley' (1996) 112 LQR 411.

26. *Hansard* supra n 24.

27. Ibid, 1255.

28. Ibid.

29. Eg Lord Rodgers *ibid*, 1264. Cf MD Kirby 'Lord Cooke and Fundamental Rights' in

acknowledged that there had been a period of 'enthusiastic expansion of judicial review since 1968'. However, he suggested that there were 'now signs of a rather more cautious attitude in the higher courts'.³⁰ This passage, from one of the great judges of the century, suggests a perception of a need to quieten the fears of Parliament and to allow the expressed anxieties about judicial activism to blow over.

There is much agonising about the 'elective dictatorship' of the British system of government³¹ and the differences between the judiciary in a country such as the United Kingdom and that of, say, the United States. Lord Simon of Glaisdale once remarked:

The first quality that is required of a judge [was expressed] when the eminent American judge and jurist Felix Frankfurter was asked about the three most important judicial qualities. He said, 'First, detachment; secondly, detachment; and thirdly, detachment'. Although I would certainly put detachment first, there is also room for intuition particularly by judges of instant jurisdiction, and for logical rigour, particularly on the part of appellate judges. However, I entirely agree that detachment must come first.... We must remember that every time a judge is called to conduct ... an inquiry, he is embroiled in a controversial issue and his detachment may be compromised. Indeed, the reputation for detachment of the judiciary as a whole may be compromised.³²

I could go on with these citations from the United Kingdom debate. It was wound up by the then Lord Chancellor (Lord Mackay of Clashfern). He supported the view that judges have developed the law over the centuries. But he went on:

The extent to which that is permissible for them is not easy to formulate. I have seen various attempts in recent times to define the boundary between what is proper development and what is not.... I find it difficult to enunciate what that boundary is. That can sometimes be seen in the difference of views between my colleagues as to whether that boundary has been passed. If the boundary were clear, one would not expect such a difference of opinion.... Development of the law is part of the traditional role of the judges over the years under our system. It has been a healthy and a powerful influence on the law and on the development of the law and the protection of our people in the various centuries when it has been done, and it continues with complete health and robustness at the present time.³³

P Rishworth *The Struggle for Simplicity* (NZ: Legal Research Foundation, 1997) examining Lord Cooke's thesis that some rights lie so deep that even a parliament ostensibly with powers cannot override them. Cf *Golaknath v State of Punjab* AIR 1967 SC 1643; *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461.

30. *Hansard* supra n 24, 1268.

31. *Ibid*, 1276.

32. *Ibid*, 1282.

33. *Ibid*, 1309.

Enough has been said to show that the issue of judicial activism is very much a matter of controversy and debate in the country from which the common law has been derived. I suspect that the impact on that country of the external scrutiny of its law by the European Court of Justice and the European Court of Human Rights has been a healthy corrective to the insularity and self-satisfaction which have sometimes been features of English law in the past. Every legal system, including that of India and Australia, is improved by the scrutiny of what is done by friendly strangers and a comparison of our systems with what goes on elsewhere. Because we of the common law enjoy a basically similar judicial institution, with functions both to apply and interpret but also to develop the law, we necessarily share similar problems. It is therefore useful for us to examine those problems and to learn from each other's insights.

INDIA

Now come back to India. Having held judicial offices of various kinds for 23 years, I have learned enough wisdom to know that one must be cautious about entering into a debate on a touchy subject in another country. Its controversies can only be understood by prolonged study or encounter. Any naive doubts that I might have had about the subject of judicial activism in India were dispelled by visits to India in 1996. Upon one visit, I picked up the copy of *India Today*³⁴ containing a detailed analysis of the work of the Supreme Court of India in the *Jain Hawla* case and an extended interview with Verma J of the Supreme Court.³⁵ The flavour of the article can be found in the following exchanges:

Q: Do you see yourself as a crusader?

A: Kindly don't place me in that category.... I can't sit in Court in the morning and lead a dharma in the evening. I can't use the trappings of my office to carry out my private agenda. And, in any case, how many people would come and listen to my speeches if I were not occupying my post?

Q: So how do you see the future of judicial activism?

A: The judiciary will continue to respond to the changing needs of the times. That is how activism has evolved. Let me dispel the popular impression that judicial activism began less than two decades ago. The truth is, way back in 1893, Justice Mehmood of the Allahabad High Court delivered a dissenting judgment

34. *India Today* 15 Mar 1996, 108-122.

35. *Ibid*, 120-122. Chief Justice of India after March 1997.

which sowed the seed of activism in India. It was a case of an undertrial who could not afford to engage a lawyer. So the question was whether the court could decide his case by merely looking at his papers. Mehmood held that the pre-condition of the case being 'heard' (as opposed to merely being read) would be fulfilled only when somebody speaks. Just look at how that man treated the law as a living organism.³⁶

On a second visit to India, in October 1996, *The Times of India* reported comments of Shiv Sena Leader Bal Thackeray, at a meeting with the Prime Minister where he was reported as asking:

'Who is running the country — the government, the courts or the media?'.... Reiterating that no judgment could be based on a 'public outcry', he [said], 'Let judges behave as judges. They should not use objectionable language. If they do so it would not be possible to treat them with respect'.³⁷

The *Indian Express* carried an extended interview with Justice Kuldip Singh on his retirement from the Supreme Court of India. Asked what was the limit of judicial activism, he replied:

The limit is the law and [to] remain within our powers. The Constitution gives us the power of judicial review over executive acts. We cannot go beyond that.³⁸

And he might have added, 'We cannot renounce that role'.

Throughout the final courts of the Commonwealth, the Supreme Court of India and other Indian courts enjoy a respected reputation for creativity and ingenuity. But I have previously had cause to suggest that judges and lawyers in India and Australia should fashion new links with each other, relying no longer upon a common attention to the pronouncements of the English courts.³⁹ Although the detail of Indian jurisprudence is no more known in my country than that of Australia is known here, there is a general belief or understanding that the Supreme Court of India, and the High Courts under its leadership, have been particularly creative and imaginative in the development of the constitutional and common law of this country. Sometimes, in my own decisions, I have drawn upon the jurisprudence of the Indian courts to sustain a small advance in the exposition of the common law. So I did in a

36. Ibid, 122.

37. *Times of India* 22 Oct 1996, 1.

38. *Indian Express* 5 Jan 1997, 7.

39. MD Kirby *India and Australia: A Neglected Legal Relationship and a Plan of Action* (New Delhi, 24 Oct 1996). Many Indian appeals to the Privy Council continue to be cited: eg *R v Burah* (1878) 3 App Cas 889, 905 in *Capital Duplicators Pty Ltd v ACT* (1992) 177 CLR 248, 270, 282.

case involving the right of a person, affected by an administrative decision, to have reasons stated.⁴⁰ However, that decision was reversed in the High Court of Australia, upon which I now have the honour to serve.⁴¹ In other decisions, I have reached conclusions on a matter of fundamental principle which, as I have later discovered, were similar to those reached by the Indian courts.⁴² This has convinced me of the need to improve the flow of information between our two jurisdictions.

Many decisions of the Supreme Court of India show that Court's facility in the development and adaptation of the common law to the enormous contemporary problems and opportunities of India. Those who trouble to examine the law of India carefully soon come to an understanding of the way in which the Supreme Court has, by a series of landmark judgments described by some as 'judicial activism', established basic principles which deserve wider attention.

I refer, in this regard, to decisions on such matters as the right to go abroad;⁴³ the right to privacy;⁴⁴ the right to protection against solitary confinement;⁴⁵ the right not to be held in fetters;⁴⁶ the right of an indigent person to have legal aid;⁴⁷ the right to a speedy trial;⁴⁸ the right against handcuffing;⁴⁹ the right against custodial violence;⁵⁰ the right against public hanging;⁵¹ the right, in certain circumstances, to medical assistance;⁵² and the right in certain cases to the provision of physical shelter.⁵³

In India, as in my own and every other country, there are different views about judicial activism. Some judges, for example, find any variation from precedent an anathema and react with repulsion to the fact, methodology and language of the judicial activist. One distinguished Indian judge once wrote:

Perorations and sermons as also theses and philosophies (political or social), whether couched in flowery language or language that needs simplification, have

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40. *Osmond v Public Service Board* [1984] 3 NSWLR 447.
 41. *Public Service Board v Osmond* (1986) 159 CLR 656, 668.
 42. *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680. Cf *Rajagopal v State of Tamil Nadu* (1994) 6 SCC 632.
 43. *Satwant Singh Sawhney v D Ramarathnan APO New Delhi* AIR 1967 SC 1836.
 44. *Govind v State of MP* AIR 1975 SC 1378; [1975] Crim L Journ 1111. Reliance was placed upon *Griswold v Connecticut* (1965) 381 US 479.
 45. *Sunil Batra v New Delhi Administration* AIR 1978 SC 1675; [1978] Crim L Journ 1741.
 46. *Charles Sobraj v Supdt Central Jail* AIR 1978 SC 1514; [1978] Crim L Journ 1534.
 47. *MH Hoskot v State of Maharashtra* AIR 1978 SC 1548; [1978] Crim L Journ 1678.
 48. *Hussainara Khatoon v State of Bihar* AIR 1979 SC 1360; [1979] Crim L Journ 1036.
 49. *T Vatheeswaran v State of TN* AIR 1983 SC 361(2); [1983] Crim L Journ 481.
 50. *Sheela Barse v State of Maharashtra* AIR 1983 SC 378; [1983] Crim L Journ 642.
 51. *A-G (India) v Lachma Devi* AIR 1986 SC 467; [1986] Crim L Journ 364.
 52. *Paramand Katra v Union of India* AIR 1989 SC 2039; [1990] Crim L Journ 671.
 53. *Shantistar Builders v N K Totame* AIR 1990 SC 630.

ordinarily no proper place in judicial pronouncements.⁵⁴

As against clarion calls to modesty, restraint and under-statement, other Indian judges have deliberately invoked vivid language in order to make their legal points and to explain the reasons for their decisions in a way which will be understood by ordinary citizens. This was how, for example, Iyer J wrote. It was he who penned the assertion that there was 'no iron curtain' between the prisoners of India and the Constitution of India.⁵⁵ The effect of what he wrote was later taken up by other courts, including the Privy Council.⁵⁶ Perhaps it was that distinguished judge's experience, of himself spending a night in prison, that galvanised him into a measure of activism for the disadvantaged. Perhaps it was a philosophy learned at the knees of his parents. Perhaps it was a special power with language that took on its own momentum in the search for justice, adapting where necessary legal principles which appeared to stand in the way. Anxiety about social justice and the removal of discrimination on all irrational grounds has caused judges like Iyer J to become exemplars of a kind of 'judicial activism' that is often in tune with the deeply felt emotions of ordinary citizens. It is concerned about the rights of children. It is concerned about torture, cruel, inhuman and degrading treatment or punishment.⁵⁷ It is also concerned about the struggle against what Iyer J has described as the 'gargantuan corporate corruption' of Indian institutions. It is concerned about the struggle of citizens with the bureaucracy;⁵⁸ about debtors in the grip of penury;⁵⁹ and the rights of trade unionists and industrial workers.

I have no doubt that controversies exist in India about all of these causes. Judicial experience teaches me that, in all of them, there would be another point of view. For every litigant demanding judicial activism, there is ordinarily another urging judicial restraint. In India, the special features of society and its institutions, and the urgency of the problem presented to the courts, doubtless help to explain the demands for 'judicial activism'. The former Attorney-General of India, Soli Sorabjee, has pointed out that:

Indignant critics forget that it is the Executive's failure to perform its duty and the notorious tardiness of legislatures that impels judicial activism and provides its motivation and legitimacy. When gross violations of human rights are brought to its notice, the judiciary cannot procrastinate. It must respond.

54. *Manohar Nathurao Samarth v Maratroa* 1979 (4) SCC 93, Tulzapurkar J.

55. *Sunhil Batra v New Delhi Admin* supra n 45.

56. *Riley v A-G (Jamaica)* [1983] AC 719, 734.

57. *Raghubir Singh v State of Haryana* AIR 1980 SC 1087.

58. *Maneka Gandhi v Union of India* AIR 1978 SC 597.

59. *Varghese v Bank of Cochin*, AIR 1980 SC 470.

However, to some critics, this is an unconvincing defence of judicial activism.⁶⁰ In India, from the highest level of the judiciary there has been a recognition that excessive or ill-judged activism may sometimes damage the very institution which gives birth to it. Thus, the Chief Justice of India has suggested that the phenomenon of judicial activism, evident in India today, may be seen as a temporary one, responding to the peculiar needs of the nation at this time.⁶¹ The law abhors a vacuum. Into a vacuum left by the failure of the other branches of government to respond to urgent legal and social needs, the courts have sometimes stepped. Whether this is a good thing or wise or fraught with peril or positively damaging to the judicial institution are questions exclusively for Indians to judge. It is the point of this contribution that such questions are not new. They are as old as our system of law. They are certainly not confined to India. They exist in every land where judges of our tradition perform their busy duties.

FOUR GUIDEPOSTS

There are four guideposts which may be useful to keep in the judicial and public mind as we approach this vexed problem of the occasions and limits of the judicial role. They are opportunity, need, inclination and methodology.

1. Opportunity

There is a crucial difference between courts and legislators. It exists at the threshold of their respective work. Courts do not choose their controversies. They do not entirely control the matters which they decide or the issues which they tackle. Many chance considerations affect the ascent of a controversy to a nation's highest court. These include the perception of the importance of an issue by the lawyers; a foolhardy willingness of the litigant to press on with appeals; and the availability of funding to permit all this to happen.⁶² This point was made well by SG Pollack J in a recent essay on 'The Art of Judging':

Artists begin with a creative impulse. Judges do not begin at all until someone starts a law suit. Even the most activist judges do not create causes of action, but

60. TR Andhyarunjina *Judicial Activism and Constitutional Democracy in India* (Bombay: Triparti, 1992).

61. AM Ahmadı *Zakir Hussain Memorial Lecture* (1996).

62. R Sackville 'Continuity and Judicial Creativity — Some Observations' (1997) 20 UNSW L Journ 145, 157; D Dawson 'Do Judges Make Law? Too Much?' [1996] 3 *Judicial Rev* 1.

must wait for someone else to start the process. Once the process begins, most judges depend on the adversary system to shape the case. The process is inherently rational and controlled.⁶³

This truism has limitations. The courts may signal an issue. Some judges have suggested that a point will not be ripe for development of the law until such a signal is given.⁶⁴ Some courts, including my own, can control the issues they deal with, to some extent, by the gateway of leave to appeal. The court can afford a welcoming environment for legal innovation or one which repels every attempt at change. The requirement to afford procedural fairness to the parties; the limits on the admission of the submissions of strangers to the litigation; and the abiding judicial obligation to provide reasons for decisions puts a brake on purely idiosyncratic judicial change. This is why the history of the common law has tended to be one of incremental or interstitial change, made on notice, rather than abrupt and revolutionary alteration. It should, in my view, continue in this tradition for that is the tradition of law as distinct from pure policy.

2. Need

Judges know, or ought to know, the limits on their legitimacy. Such limits derive from the fact that, at least in India and Australia, the judges are not elected. True, they are appointed by elected officials. But they are only rendered accountable to elected legislatures for their office by the most extreme and exceptional power of removal.⁶⁵ Accordingly, judges must accept that their undemocratic office and their limited function puts a check on their creativity. Breyer J of the Supreme Court of the United States recently remarked that the recognition of the 'undemocratic' nature of the judicial function was the single most important restraint on judges.⁶⁶ By that I took him to mean that the boldest strokes, largest leaps and the most complex, detailed acts of reform ought ordinarily to be left to parliaments. This is so in most cases for the simple reason that, if the people do not like what is done, they can render those who did it accountable. They can replace them with other law-makers more to their own liking.⁶⁷ Yet the difficulty with this, oft repeated theory of judicial

63. (1996) 71 NYUL Rev 591, 593.

64. P Devlin *The Judge* (Oxford: OUP, 1979) 11.

65. Indian Constitution s 124(4); Australian Constitution s 72(ii). See also *Sub-Committee on Judicial Accountability v Union of India* [1991] 4 SCC 699; *Krishnaswami v Union of India* [1992] 4 SCC 605; *S Ramaswami v Union of India* [1992] 4 SCC 506.

66. C Meritt 'US Judge Puts the Case for Judicial Activism' *Aust Fin Rev* 29 Oct 1996, 4.

67. Doyle supra n 4, 207.

deference to the elected legislature is that parliaments today all too often appear disinclined to attend to important issues of law reform. In part, this may be the result of the interaction of the media and legislatures today. Issues must be simplified, even trivialised and, if possible, politicised. Unless they are part of the 'game' of politics, the needs of reform tend to be dismissed by many politicians on the spurious footing that there are 'no votes in it'. Judicial assertions that a particular reform is up to parliament ring rather hollow in the ears of those who hear them. I suspect that this is why, in recent decades, abhorring the vacuum in law-making, judges of the common law tradition have been more inclined to see particular areas as suitable for judicial development and reform. This is most especially true of questions involving court procedures where the judges feel comfortable, know they have expertise and see the unjust results of unreformed laws and practices.⁶⁸

However, innovation may extend to other areas of substantive law where the original rules were judge-made and where the judges of today have no real conviction that reform, if left to parliament, will ever be seriously addressed. This may be a presumption on the judges' part. But if so, it is one born of long experience and frequent disappointments despite the urgencies of reform presented in societies undergoing extremely rapid change. Nevertheless, even in the face of clearly established needs, a point will be reached where the judge should stay his or her hand. If the permanent values of the community are clear and the issue is relatively discrete and manageable, the judges may feel willing to do what predecessors have done and develop the law.⁶⁹ India, like Australia, is a multicultural society where the 'permanent values' of the people are often hard to find.⁷⁰ Moreover, both are societies undergoing rapid social and economic change.⁷¹ Social and economic changes create at once the urgent needs for judicial innovation but also the obligation to restrain the largest and boldest temptations.

3. Inclination

The judiciary is the last empire of governmental individualism. Every judge is aware of the importance of certainty and predictability in the law, at least in those areas where the people's liberty or their major investments of capital and wealth are

68. *Halabi v Westpac Banking Corp* (1989) 17 NSWLR 26, 35-42; *Commissioner of Police v NSW District Court* (1993) 31 NSWLR 606, 617; *Kriticos v NSW* (1996) 40 NSWLR 297, 303.

69. Cf *R v Dietrich* supra n 5, Brennan J 322-324; *Doyle* supra n 4, 199. See also *Wik Peoples v Qld* supra n 8, Gummow J 167-205.

70. A Mason 'Courts and Community Values' (1996) 6 (No 9) *Eureka Street* 32.

71. Cf *Doyle* supra n 4, 186.

involved.⁷² Judges vary in their inclination to develop or change the law. Some are by nature conservative, some activist, and some selectively evidence both tendencies at different times.⁷³ There are judges who have a large confidence in their own abilities to foresee the direction in which the river of the law is flowing. If such confidence is combined with assurance that they can perceive the 'permanent values of [their] community'⁷⁴ and if they have great technical skills, much valuable reformist work may be done which is seen as a justifiable adaptation of underlying legal principles.⁷⁵

Every judge, especially in the higher courts, nudges the law forward a little. Even judges whose inclinations are rule-based and whose personal predilections are conservative will occasionally come upon a topic for which the sense of justice in the particular facts moves them to do what judges of our tradition have been doing for seven hundred years. Nor is it appropriate to limit judicial creativity to the highest courts. After all, such courts can accept only a small proportion of the important issues of legal principle and policy which confront a nation at any time. In Australia, the High Court has emphasised the need for the intermediate appellate courts to play their role in the development of legal doctrine.⁷⁶ Inevitably, this extends the opportunities for judicial creativity. Even dissenting judgments may play an important part in furthering new legal ideas and promoting the eventual emergence of new legal principles.

4. Methodology

In terms of day-to-day working, the methodology of the common law judge also tends to impose a measure of restraint. Adversary trial limits most proceedings to a contest between particular parties who rarely, if ever, have an esoteric interest in purely legal developments. They just want to win the case. The stimulus to new legal authority must often come from the judge's own reading and perceptions encouraged by a sense of grave injustice to which the law or legal procedures seem directed. The adversary trial tends to limit the material available to the judge, particularly on the social and economic consequences of alternative solutions to the problem in hand.⁷⁷ In an often unformulated way, the judge will be conscious of

72. Ibid, 172.

73. Ibid, 199.

74. Ibid.

75. R Dworkin *Law's Empire* (Cambridge, Mass: Belknap Press, 1986) 243, 255.

76. *Nguyen v Nguyen* (1990) 169 CLR 245, 268-270.

77. Doyle supra n 4, 172, 204.

the need to avoid large changes which would have very large economic and social ramifications. This is simply because such changes and their consequences may not be wholly predictable.⁷⁸ Appeals to judicial commonsense are increasingly seen today to be suspect, given the comparatively narrow band of persons from whom the judiciary is typically drawn and their specialised education and experience.

No established protocol exists for the introduction of important new legal principles. Because appellate courts are ordinarily limited to the evidence adduced at trial, some of them resist the admission of the economic and social data that would help them to make correct policy choices, if that is their wish in a particular case.⁷⁹ Reading law books on the resolution of past cases will but rarely be a suitable preparation for an important step of judicial creativity. If the role of judges in developing legal principle is to be recognised overtly and not secretly in whispers, it behoves judges today to adopt a new protocol or methodology for the judicial function. This would identify the leeways for legal choice; invite the provision of sufficient information and materials on social and economic consequences of the competing choices; and expand the opportunities for selected interest groups to be heard to assist the court to come to the conclusion which, in the new context, most soundly conforms to established legal doctrine.

Yet all of this must be achieved within the framework of judge-like activity in a court disposing of real cases for real parties in a true dispute. Otherwise, courts will run the risk of expanding their procedures to take on the appearance of a legislative committee and enlarging their function beyond the disposal of the case before them by reference to legal norms. True, the norms may need to be expanded and adapted. But the judge is not, and should not be, a completely free agent. A measure of creativity is allowed. But it is a limited one whose parameters are fixed by the very nature of the judicial function.

CONCLUSIONS

The modern judge of the common law, in Australia, India and far beyond, is controlled in any temptations to excessive activism. The judge's boldest ambitions are held in check by opportunity, need, inclination and the judicial method.⁸⁰ Of judges, the community expects honesty, integrity and learning. Increasingly, it also expects efficiency, timeliness and attention to case management. Prejudice and partiality have no place in the judicial function. The people have a right to expect

78. *Ibid*, 197.

79. *Ibid*, 208.

80. FG Brennan 'The Judicial Method' (1996) 8 *Judicial Officers Bulletin* (NSW) 73.

the judge to be calm, objective and neutral.⁸¹

Society is slowly and somewhat reluctantly coming to realise that the 'fairytale' of the declaratory theory of the judicial function is false and always was. But there is no clear divide which marks off the limits of judicial creativity and activism. Our communities have come to understand that some measure of 'judicial activism' is not only permissible but is traditional in our system of law. Moreover, it is beneficial to the noble cause of justice under the law.

The challenge for modern judges is to find where the line lies in a particular case, at a particular time and place. Each judge knows that limits exist. Most judges I know would agree with the recent remarks of Anthony Kennedy J of the United States Supreme Court that a society which leaves all (or most) of its hardest decisions to the courts is a weak society.⁸² The burdens which society casts on its judges are greater today than ever before. We, the judges, are the servants of the law and of our societies. We must continue to find the sources of our discipline in legal authority. But when new problems arise, when the common law has no exactly analogous decision or where (as it so often the case) the Constitution or the legislation are ambiguous, we must also look to legal principle and legal policy in addition to the authorities received from the past. Judges do not usually have the privilege to decline the obligation of decision. Sometimes we will err, for that is inherent in the human condition. But if we search for the solution to the particular case with the illumination of legal authority, legal principle and legal policy, and are sometimes called 'judicial activists', we must accept that appellation with fortitude. Our activism has limits, as every one of us knows. But in a real sense the common law itself is the product of 'judicial activists'. The most we can hope is that we are successors, worthy in our time, to the great spirits who have preceded us.

Let me finish with the words of two of the noblest of those spirits, great judges: one Indian and one American. Khanna J — a pillar of judicial rectitude — once warned us: 'The bosom of the judiciary is not wide enough for the hopes and aspirations of all the people.'

But for all that, as Khanna J himself demonstrated, it is an ample bosom which seeks to respond to the problems presented to it with a love of justice under the law.

Oliver Wendell Holmes J, nearing his 60th birthday, and unaware that he was shortly to be elevated from Chief Justice of Massachusetts to the Supreme Court of the United States of America said:

I ask myself, what is there to show for this half lifetime that has passed? I look into my book in which I keep a docket of the decisions of the full Court which it

81. R Cooke 'The Courts and Public Controversy' (1985) 5 Otago L Rev 357, 356.

82. J Rosen 'The Agoniser' *New Yorker* 11 Nov 1996, 90.

falls to me to write, and find about a thousand cases. A thousand cases, many of them upon trifling or transitory matters, to represent nearly a half a lifetime. A thousand cases when one would have liked to study to the bottom and say his say on every question which the law has presented.... I often imagine Shakespeare or Napoleon summing himself up and thinking: 'Yes, I have written 5 000 lines of solid gold and a good deal of padding — I, who would have covered the Milky Way with words that outshone the stars.' We are lucky enough if we can give a sample of our best and if in our hearts we can feel that it has been nobly done.⁸³

May each of us, lawyer and judge, evidence the same humility and aspire to the same noble contribution as the best of our forebears have made to the living law.

83. JH Wootten 'Creativity in the Law' (1972) 4 Aust Journ Forensic Sci 107.