

JUDICIAL ACTIVISM: POWER WITHOUT RESPONSIBILITY? NO, APPROPRIATE ACTIVISM CONFORMING TO DUTY

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[This article was originally delivered as a contribution to a conversazione held in 2005 at the Melbourne University Law School in which judges, legal academics, journalists and others discussed issues of 'judicial activism'. Developing ideas expressed in his 2003 Hamlyn Lectures on the same topic, the author asserts that creativity has always been part of the judicial function and duty in common law countries. He illustrates this statement by reference to the Australian Communist Party Case, and specifically the reasons of Dixon J, often cited as the exemplar of judicial restraint. He suggests that 'judicial activism' has become code language for denouncing important judicial decisions with which conservative critics disagree. By reference to High Court decisions on the meaning of 'jury' in s 80 of the Australian Constitution and cases on constitutional free speech, legal defence of criminal accused and native title, he explains the necessities and justifications of some judicial creativity. He illustrates the dangers of a mind-lock of strict textualism and the futility of media and political bullying of judges who simply do their duty. Finally he calls for greater civility in the language of discourse on the proper limits of judicial decision-making.]

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Constitutional dangers exist no less in too little judicial activism as in too much.¹

I NOSTALGIC THOUGHTS

It is a special pleasure for me to present these thoughts in a session chaired by Sir John Young. It is 30 years since I first met him in his chambers in Melbourne as Chief Justice of Victoria. I had just been appointed to chair the Australian Law Reform Commission, a new federal agency established to advise on the reform of federal laws. I had the privilege of meeting the distinguished judges of the Supreme Court of Victoria who were members of the Chief Justice's Law Reform Committee. They included Sir Oliver Gillard, Sir Murray McInerney and Mr Justice Cliff Menhennitt. They were fine and talented judges. I learned much from them and from Sir John Young himself.

He, in turn, had learned from his mentors, especially Sir Owen Dixon. He served for a time as associate to that great Australian judge and Chief Justice. Dixon J has been praised for his adherence to the legal method. However, like all great judges of the common law tradition, he knew that the law cannot stand still. It moves and adapts to changing circumstances and different times. Those who deny this fact are wilfully blind to the realities of the judicial tradition to which we, the people of Britain, the United States and Australia, are heir. In *our* legal system, the judges are law-makers. They are not law-makers in the bold tradition of the other branches of government — the legislature and the executive. But law-making is part of the judicial function. Let there be no mistake about this.

To the blind or false-sayers who ignore or deny these simple facts, a question must be posed. Where else did the common law of England and its offshoots in America and Australia come from, if not from the judges? Look around the room of any judge or lawyer of our tradition and you will find bookshelves full of casebooks with legal exposition, explanation and development. It is not that the judges cannot help themselves. It is that, being a judge in our legal system necessarily involves the office-holder in a creative function. Recorded in those law books, indeed found on virtually every page, are the legal principles that form the bedrock of our system of law and precedent. It is as well that these home truths should be stated at the beginning of this conversazione so that those who live in the dream world where judges make no law can be given a rude awakening. Let them throw off their slumbers and be alert to the reality that surrounds them, if only they will look.

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

¹ *A v Home Secretary* [2005] 2 AC 68, 110 (Lord Bingham), quoting *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, 754 (Simon Brown LJ).

application, extension, confinement or elaboration of old principles of the common law to new facts, circumstances and times.

I did not think, so long after I was taught these basic rudiments about judicial choice, by my great professor and teacher of jurisprudence Julius Stone, that I would be obliged to come to an intellectual occasion to repeat the self-evident truths that he imparted nearly 50 years ago at the Sydney Law School. Stone was a disciple of Roscoe Pound. Indeed, Stone was almost appointed Dean of the Harvard Law School in succession to Pound in the 1930s. Had that happened, we would, to our great disadvantage, have lost the impact of his intellect and teaching in the Southern Hemisphere. But he came to these parts. He taught the truths that Roscoe Pound had taught. He made us face the realities of judicial choice. He required his students to acknowledge those realities. The students went on to become judges, lawyers and law teachers. The mask or blindfold of choice-free legal and judicial activity was cast aside. The debate moved to a higher plane.

In that plane we ask not whether there is judicial activism. Of course there is. It is the very essence of the brilliant system of law that the ancient English judges developed and bequeathed to us. The real debate is, and should be, when faced with inescapable choice, whether judges should take this step or that. Whether they should prefer this meaning to the other. Whether they should accept this interpretation and reject the opposite. In short, the debate about judicial activism is largely a phoney debate. Judicial activism has become a code phrase for denunciation and demonisation, mainly by people of a conservative social and professional disposition. If we pretend to an intellectual approach to the judicial function, we must do better than this. We must attempt to identify the circumstances when a further step in legal doctrine is justifiable according to past authority, legal principle and policy. And when it is not.

So I start these remarks with the briefest of obeisance to nostalgic thoughts, yet with a clear-sighted realism about the way judges actually perform their duties. And an appreciation that the success of the common law system has derived from the very way in which it combines, in judicial choices, the capacity to stand still at the very time that it finds the momentum to move forward. Denial of this inherent dualism in our legal order is absurd. It is also unworthy because the capacity of our law to adjust to radically changing circumstances is the very essence of its genius.

II THE AUSTRALIAN COMMUNIST PARTY CASE

Sir Owen Dixon, who was successively a Justice of the High Court and Chief Justice of Australia from 1929 to 1964, is famous in Australia for his defence of 'strict legalism',² particularly in the resolution of the hard-fought battles over the division of powers in the Federation. However, even in such matters, Dixon J was far from being an advocate of standing still. He realised that, in controversies of great moment, it was frequently necessary to reach for new tools and new ways of resolving issues of legal and social significance.

² *Swearing in of Sir Owen Dixon as Chief Justice* (1952) 85 CLR xi, xiv.

Dixon J showed his skills most clearly in his leading opinion in *Australian Communist Party v Commonwealth*.³ It is a decision that I have a personal reason to remember quite vividly. It was, in my view, Dixon J's wisest and finest judicial hour. It is appropriate that we in Australia (and perhaps our friends elsewhere) should remember the case at a moment, such as the present, when unrestrained voices are raised urging us to cast aside our traditional liberties in response to the perceived threat of terrorism.

In 1950, the terrorists, so far as Australia was concerned, were the communists.⁴ They, or their Russian and Chinese comrades, had undoubted access to weapons of mass destruction. They, or their 'evil empire', made claims to world hegemony. They propounded their doctrine, rather like a religion, and were intolerant of those who did not share their messianic views. There was a real concern, reinforced by then recent acts of invasion, occupation and suppression, that the communist terrorists would take over our form of government and destroy it from without and within. To say the least, there appeared to be much greater risks from the global communist threat in 1950 than from anything that al-Qa'eda could muster in the current age.

In December 1949 the Australian government changed at a general election. The new Prime Minister, Mr R G Menzies, was elected on a platform which promised to ban the Australian Communist Party and to impose civil restrictions on its members.⁵ As it happened, this proposal came to my attention because my grandmother had remarried. She had married a communist. He was a brave, idealistic man who had fought at Gallipoli and been gassed in the Somme. He had thrown off Catholicism and embraced communism as his new religion. To him it seemed to offer ideals and a better way. To me, as a boy of 10, my grandmother's new husband was a friendly man who was suddenly facing considerable personal risks of arrest, detention, interrogation and loss of civic rights.

It was at that point, soon after the passage of the *Communist Party Dissolution Act 1950* (Cth) that a challenge was brought to the High Court of Australia asserting that the Act was beyond the powers of the federal Parliament and therefore invalid. Various grounds of attack were made on the Act.⁶ Only one of the Justices of the High Court of Australia upheld its validity. This was

³ (1951) 83 CLR 1, 174–205 ('*Australian Communist Party Case*').

⁴ For an overview of the historical and political background to the *Australian Communist Party Case*, see generally George Winterton, 'The Significance of the *Communist Party Case*' (1992) 18 *Melbourne University Law Review* 630.

⁵ *Ibid* 630, 635, 638.

⁶ *Australian Communist Party Case* (1951) 83 CLR 1, 8:

the plaintiffs attack the validity of the Act and of its separate provisions upon the grounds: (i) that its provisions are outside the scope of any legislative power of the Commonwealth and are not brought within any legislative power by the statements contained in the preamble because, amongst other reasons, the statements or some of them are not in accordance with fact; (ii) that provisions of the Act conflict with Chapter III of the *Constitution*; (iii) that provisions of the Act conflict with s 92 of the *Constitution*; (iv) that provisions of the Act conflict with s 51 (xxxii) of the *Constitution*.

As a matter of constitutional law, the most significant ground of attack was the argument that the provisions were outside the scope of any legislative power of the federal Parliament: at 174–5 (Dixon J), 252 (Fullagar J), 271–2 (Kitto J).

Latham CJ. At the heart of his reasons lay his invocation of the words of the Lord Protector, Oliver Cromwell. Latham CJ said:

[The defence powers] are perhaps the most important powers intrusted to the Parliament of the Commonwealth. The continued existence of the community under the *Constitution* is a condition of the exercise of all the other powers contained in the *Constitution*, whether executive, legislative or judicial. The preservation of the existence of the Commonwealth and of the *Constitution* of the Commonwealth takes precedence over all other matters with which the Commonwealth is concerned. As Cromwell said, 'Being comes before well-being'. The Parliament of the Commonwealth and the other constitutional organs of the Commonwealth cannot perform their functions unless the people of the Commonwealth are preserved in safety and security.⁷

Powerful words. But they were answered by Dixon J, writing as one of the majority:

History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected. In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based on a conception, if otherwise adequate, adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend.⁸

Dixon J and his colleagues in the majority had a choice. They could either classify the Act of 1950 as within the federal constitutional heads of power, most particularly the defence power, or they could refuse that classification. As we know, they refused. In doing so, Dixon J expressed, most clearly for the first time, the implied principle of the rule of law that lies at the bedrock of Australian constitutional arrangements:

[Our government] is [a] government under the *Constitution* and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption. In such a system I think that it would be impossible to say of a law of the character described, which depends for its supposed connection with the power upon the conclusion of the legislature concerning the doings and the designs of the bodies or person to be affected and affords no objective test of the applicability of the power, that it is a law upon a matter incidental to the execution and maintenance of the *Constitution* and the laws of the Commonwealth.⁹

So there you have it. The implied principle of the rule of law was invoked to require objective criteria for the taking away of ordinary civic rights under a valid federal law of this country. The judges had their choice. In effect, they chose business as usual. They adhered to the principle of legality. They refused

⁷ Ibid 141–2.

⁸ Ibid 187–8.

⁹ Ibid 193.

to be swayed by emotional words, whether of Cromwell or others more closely contemporaneous.

I remember the day in March 1951 that the decision in the *Australian Communist Party Case* was handed down in Melbourne. My grandmother's new husband was (as I now know) ready to go into hiding. He was the Treasurer of the Australian Communist Party and he was under constant surveillance. The snoops probably recorded, with suspicion and alarm, his visits to the Sydney Zoo with three young boys, the eldest of whom was myself, by March 1951 almost 12 years of age. Of course, I did not know of the legal ramifications. I never thought that one day I would serve on the Court whose decision lifted a cloud from my 'Uncle Jack'. All I knew was that the shackles of fear were suddenly removed.

I ask you to notice that this decision was made by judges of the High Court of Australia without a Bill of Rights to reinforce their conclusions. Not for them was an appeal available to entrenched rights of free speech or guaranteed constitutional rights of assembly and association. What a contrast the Australian decision makes to the contemporaneous decision of the United States Supreme Court in *Dennis v United States*.¹⁰ For all the grand language and eloquent jurisprudence of the First Amendment, the Supreme Court upheld as valid in that country a law with many similarities to the Australian *Communist Party Dissolution Act 1950* (Cth). There followed the House Un-American Activities Committee, witch-hunting and Joe McCarthy. But the Australian Act was struck down. At the same time in South Africa equivalent legislation was to become the foundation upon which was built the apartheid state. In Malaya and other parts of the fading British Empire, legislation for the suppression of communism and terrorism became features of the armoury of colonial power that was soon handed over to the post-independence governments. In Australia, the High Court spared us from taking that path. We need constantly to reflect upon that decision in the current age.

Australians know that the government immediately moved to amend the *Australian Constitution* to overturn the decision of the High Court. In accordance with the *Australian Constitution*,¹¹ a referendum was held in September 1951. It failed to gather the constitutional majority of the people of the Commonwealth and a majority in a plurality of the states.¹² The attempt to ban the communists and to limit their civil rights had failed. Australia went on. Civilisation did not finish. The alleged dangers to the 'being' of the nation did not weaken it or even really trouble it. A lot of the talk about the communists was shown, in retrospect, to be so much official hype.

¹⁰ 341 US 494 (1951). The decision upheld the validity of the *Smith Act*, 18 USC §§ 2-3 (1946) by a vote of 6:2. Vinson CJ wrote the opinion of the Court with Frankfurter and Jackson JJ both concurring in separate opinions. Black and Douglas JJ dissented.

¹¹ *Australian Constitution* s 128.

¹² The referendum 'achieved only 49.44% of the national vote, and majorities in only three of the six states (Queensland, Western Australia and Tasmania)': Michael Crommelin, 'Constitutional Challenges Posed by National Security: An Australian Story' (Research Paper No 51, Public Law and Legal Theory Research Paper Series, Faculty of Law, The University of Melbourne, 2003) 5, citing Brian Galligan, *A Federal Republic* (1995) 119.

Of course, there were those, at the time, who criticised the High Court of Australia for frustrating the judgement of the elected Parliament and government of the country. At the beginning of the referendum campaign the opinion polls showed an overwhelming majority (80 per cent) of people would have voted to uphold the ban on the communists.¹³ But gradually wiser opinions prevailed. Was this a case of judicial activism? Was it the kind of outrageous intrusion of the judges into the collective wisdom of elected personnel which judges have no business to question? How dare the judges second-guess elected officials and replace their opinions with judicial views? Yet that is what the Court did in discharging its duty under the *Australian Constitution*.

Now, looking back, most Australians would say that the Court was wise to speak in the calm, clear voice of the rule of law and the principles of constitutionalism. Judicial activism? Nonsense. This was the performance of the very task that judges are required to fulfil. Sometimes, as Lord Bingham observed in a recent case on terrorism, the greater risk to constitutionalism can arise from too little judicial activism rather than too much.¹⁴

III TEXTUAL MIND-LOCK

Some jurists suffer from acute nervous anxiety at the thought of doing anything that strays from a legal text. Thus, in a case such as the *Australian Communist Party Case* they would look at the *Australian Constitution* and see nothing whatsoever to prevent the Parliament from banning communists. They would certainly not be willing to draw an inference limiting the legislative power from anything so nebulous as the principle of the rule of law as an ordinary foundation upon which the *Australian Constitution* is said to operate. Yet, in recent years, we have come to understand more clearly that interpreting written texts is not as simple as this. Indeed, in giving meaning to a written text and particularly a national constitution, it is essential to construe the *text* in the given *context*. Any other approach is likely to lead to error in deriving the meaning.

In April 2005, I was confined to hospital for a few weeks. This gave me a chance to read books on topics far from the usual legal concern. One of the books was concerned with what the German people really knew about the horrors that were performed in their name by the Nazi rulers.¹⁵ As I read the book, I could see, reflected in the Nazi experience, some aspects of the debates over text and context that are important for the resolution of the issue of judicial activism.

The researchers in Germany, like many before and since, sought to get to the bottom of the anti-Semitism. It was prevalent in that otherwise civilised country and provided fertile soil for the Nazi policies that culminated in the death camps and the gas ovens. Overwhelmingly, the victims of those policies were Jews —

¹³ Crommelin, above n 12, 2: 'An Australian Gallup Poll taken in May 1950 showed that no fewer than 80% of voters favoured the ban.'

¹⁴ *A v Home Secretary* [2005] 2 AC 68, 110, quoting *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, 754 (Simon Brown LJ).

¹⁵ Eric A Johnson and Karl-Heinz Reuband, *What We Knew: Terror, Mass Murder, and Everyday Life in Nazi Germany — An Oral History* (2005).

simply because of their ethnicity and religion. However, there were others who were singled out: communists, socialists, gypsies, Jehovah's Witnesses, homosexuals and others. The big quandary was why the Nazis put to death six million Jews and why they had the effective complicity of so many apparently decent Germans in doing so.

One point to which the inquiries in Germany kept returning was a biblical text. It was, in fact, a text in the *Gospel of St Matthew* in the *Christian Bible*. In Chapter 27, there is recorded the well-known exchange between Pilate and the mob in Jerusalem. Pilate, you will remember, asks the people who it is that he should release unto them: Jesus or Barabbas.¹⁶ The people insist on Barabbas.¹⁷ Pilate accedes, in accordance with convention. Like mechanical judges everywhere, he simply washes his hands declaring 'I am innocent of the blood of this just person'.¹⁸ He tells the assembled crowd 'see ye to it'.¹⁹ There then appears this telling expression, '[t]hen answered all the people, and said, His blood be on us, and on our children.'²⁰

In Germany, for many, this passage of scripture became the foundation of the legitimacy of the hatred of Jews and the visitation upon the children of Israel of the wrongs due to them for their collective racial guilt of the murder of God's son.

As I reflected on this excuse for genocide, it demonstrated, once again, the grave mistake of literalism. Taking a passage out of context, whether from the *Bible*, the *Australian Constitution* or any other text of law, and ascribing meaning to the words viewed in that way is positively dangerous.

How, for example, could a rabble in Jerusalem, a minor city in Judea in the Roman Empire, possibly be authorised to call onto the heads of all the children of all of Israel for all future time a blood curse such as would justify the horrors of Auschwitz and Bergen-Belsen? How, in the context of a religion dedicated to the message of the love of God, and of one another, could such a passage possibly be so interpreted? How, other than by the most mindless literalism, could anyone construe the verse, as German churches and German Christians did, to justify their hatred of the Jews and the dreadful acts perpetrated against them and others? It is, I think, a good illustration of the dangers of literalism. And it is not the only example in the *Bible*. Taking passages from *Leviticus* out of context and using them to demonise homosexuals is of a similar order. Yet it happens all the time.

There are people in the law who accept the banal simplicities of this way of construing texts. Just take the words, they say. Do not bother about the context. Do not trouble about the setting. Do not worry about meaning. Just stick to the words. That is the only sure way to escape 'judicial activism'.

This is such a debased and discredited approach to the interpretation of language (whether in the *Bible* or in a constitution, a statute, a contract or a will)

¹⁶ *Gospel of St Matthew* (King James Bible, 2003 ed) 27:17.

¹⁷ *Ibid* 27:21.

¹⁸ *Ibid* 27:24.

¹⁹ *Ibid*.

²⁰ *Ibid* 27:25.

that it hardly seems necessary to elaborate why it is so misguided. Yet the literalists and the textualists are now in full flight. They want judges to stick as closely as possible to the text of the statute and even, *mirabile dictu*, to the original intention of the framers of the *Australian Constitution*.

Any judge who seeks to find meaning from context — as Dixon J did in the *Australian Communist Party Case* from the context of wrongful assertions of executive power in the past and from the principle of the rule of law that underpins the *Australian Constitution* — will be charged with activism. It would be a pathetic accusation if it were not so serious. Yet serious it is. And we can learn from the dramatic example of the verse in the *Gospel of St Matthew* of how dangerous, foolish, wrong-headed and misguided it is to believe that the judicial task of interpretation requires nothing but a text, a magnifying glass and a dictionary or two.

It should not be necessary to say these things. But in the current age of calumny and insult, it is important to go back to basic principles. To remember how the task of interpretation is performed in real life. Of how we understand words by reference to the sentence and the page and the context and the shared assumptions of the reader and the writer.²¹

IV ORIGINAL INTENT AND ANCESTOR WORSHIP

Trembling, fearful that they may import the slightest personal opinion into the meaning of legal words (but overlooking the fact that they do so all the time, as their philosophy reveals itself), judges of the most extreme opposition to ‘judicial activism’ resort, in constitutional and other elaboration, to notions of ‘original intent’. This is the way, they suggest, and the only way, that a fixed meaning can be given to a text, specifically a constitutional text, so that the judge remains a mere mechanic. He or she plays no ‘active’ part in the meaning. All that is required of the judge is to discover what the framers of the text meant when they chose the given language. For this task, historical research and a dictionary written at about the time the constitution was adopted will ensure the discovery of the true ‘objective’ meaning.

This theory has only to be stated to be seen for the error that it is. Justice Ian Binnie of the Supreme Court of Canada described it as a quaint American form of ancestor worship.²² There is no Australian judge who embraces this approach to ascertaining the meaning of the language of the *Australian Constitution* today. True it is, since *Cole v Whitfield*,²³ the High Court of Australia will look to the Convention Debates that preceded the adoption of the *Australian Constitution* to help in the ascertainment of the purposes for which a constitutional provision

²¹ *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 397 (Brennan CJ, Dawson, Toohey, Gummow and McHugh JJ), applying *R v Brown* [1996] 1 AC 543, 561 (Lord Hoffman).

²² Justice Michael Kirby, ‘Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?’ (2000) 24 *Melbourne University Law Review* 1, 2, citing Justice Ian Binnie, ‘Session Two: The Future of Equality’ (Session conducted at the Liberty, Equality, Community: Constitutional Rights in Conflict? Conference, Auckland, 20 August 1999).

²³ (1988) 165 CLR 360.

was adopted.²⁴ However, no-one in this country suggests that such purposes, ascertained in that way, lock the constitutional meaning to the original intent without any regard to other interpretative considerations — such as the purpose of the language, the operation of the text as a whole and the differentiation between the core meaning of concepts and peripheral meanings that can change (as the English language changes) over time.

There are many illustrations of why this is so. One will suffice.

In s 80 of the *Australian Constitution* is one of the few provisions that appears to afford an individual a constitutional right, namely to jury trial. Relevantly, the section reads:

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

I leave aside the question of the meaning of ‘indictment’ and whether by such a simple sleight of hand as providing for summary trials (or differentiation of factors relevant to punishment as between judge and jury)²⁵ the federal Parliament could erode the right to jury trial provided in the section. I wish to concentrate, instead, on the word ‘jury’. What does that constitutional word import?

Upon that question, the High Court of Australia has faced many recent challenges. In *Cheatle v The Queen*,²⁶ the question arose as to whether a federal trial, in a state court exercising federal jurisdiction, could pick-up and apply a state law permitting the reception of a majority verdict from fewer than the 12 original jurors. Or did a federal trial by jury require unanimity on the part of the jurors, as had been traditional to jury trial in England? The Court concluded that unanimity was required. A state law for a majority verdict could not be imported. It was inconsistent with the federal constitutional norm.²⁷

Yet this did not mean that the Court was embracing an original intent view of jury trial. On the contrary, it made it clear that, whereas at the time the *Australian Constitution* was written, all jurors were male, and indeed were men of property, neither of these requirements needs now to be observed.²⁸ Women could be sworn to the jury. Jurors with no substantial property could serve, simply because they were citizens. So the meaning has shifted. But the core of the meaning includes the notion of unanimity.

In *Brownlee v The Queen*,²⁹ the question arose whether, if jurors had died or been excused for illness or the like, a verdict could validly be received in a federal trial from fewer than 12 jurors? Was that consistent with *Cheatle v The Queen*? The Court had to make a choice. It decided that an unanimous verdict of the remaining jurors could be received, at least in circumstances where the remainder still answered in their number to the description of a ‘jury’ for

²⁴ Ibid 385–91 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

²⁵ *Cheng v The Queen* (2000) 203 CLR 248.

²⁶ (1993) 177 CLR 541.

²⁷ Ibid 562 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

²⁸ Ibid 560–1 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

²⁹ (2001) 207 CLR 278.

constitutional purposes.³⁰ Moreover, whereas, in 1900, a jury was locked up during deliberations, the Court concluded that the non-sequestration of the jury overnight during the trial and deliberations did not affect the validity of the ensuing verdict.³¹

In *Ng v The Queen*,³² the question arose as to whether additional and reserve jurors could be sworn, particularly in lengthy trials. This was unheard of in 1900 when the *Australian Constitution* was adopted. Then, most trials were over in a day or two. But now reserve jurors are a necessity for the effectiveness of jury trial. The Court upheld that new feature, concluding that it was within the core meaning and compatible with the constitutional notion of a 'jury'.³³

These cases illustrate, clearly enough, that the simple use of an old dictionary will not solve the constitutional questions so presented. Instead, a functional analysis is required. It is a functional analysis apt to a constitutional charter of government. Concentrating on words and dictionaries may make some judges feel better — but it hardly fulfils the function of achieving the government envisaged by the constitutional text, in totally, or significantly, different circumstances calling forth new meanings for words passing beyond the original contemplation of those who wrote those words.

To adopt the original intent approach is to condemn a constitution, which is designed to function indefinitely as a charter of government, to a historical role quite alien to its operational function. The founders of nations ruled under written constitutions did not have the power, nor did they intend, to limit all future generations to their understandings of language in the circumstances in which they viewed the text. The text was set free to operate, functionally, as an instrument of government in future decades and centuries. This does not mean that words have no discernable meaning at all. Words continue to have an essential meaning. But that meaning can change over time. In ascertaining the meaning, the context is of central importance. And in a constitutional instrument, that context is the role of the constitution as a charter of governance. The language of the text must be given meaning apt to that legal context.

V DECISIONS UNDER ATTACK

During the 1990s, Australia was blessed with a High Court of great intellectual strength. Under the leadership of Mason CJ, the Court became famous far from Australia for the way in which it tackled hard problems which earlier generations of judges had put to one side or left unrepaired. Yet for this, in recent years, the Mason Court has been demonised by critics who, in my view, are seriously misguided. There is no time to deal with all of the criticism. Three cases will suffice.

³⁰ Ibid 289 (Gleeson CJ and McHugh J), 303–4 (Gaudron, Gummow and Hayne JJ), 341–2 (Kirby J).

³¹ Ibid 290 (Gleeson CJ and McHugh J), 302 (Gaudron, Gummow and Hayne JJ), 342 (Kirby J).
³² (2003) 217 CLR 521.

³³ Ibid 539–40 (Kirby J).

A Constitutional Free Speech

First, the Court found in the *Australian Constitution* an implication, necessary to the parliamentary and electoral form of representative government there provided, that there should be minimum requirements of free speech, in the media and elsewhere, essential to the fulfilment of the democratic constitutional design.³⁴

This approach has been attacked as pure invention and serious judicial activism. Yet implications from a text — especially a constitutional text — are nothing new. I have already shown that Dixon J drew an inference from the implication of the rule of law as a common assumption upon which the *Australian Constitution* was based.³⁵ In another landmark case his Honour drew an implication from the arrangement of the Chapters of the *Australian Constitution* to reinforce his strict view of the separation of the judicial power appearing in Chapter III.³⁶ So there is nothing new in implications; simply a dispute about whether particular implications should be drawn or not.

As to that, the elected parliamentary system, laid out in Chapter I of the *Australian Constitution*, is so central to its design that it would be remarkable if there were not implications existing in the bare text that restricted limitations upon free discussion of the subject matters of political debate. If the Parliament or a government could restrict such debate, the detailed constitutional provisions about the parliamentary system would be reduced to a charade. The hollow shell of representative democracy would be there; but the reality would be denied by incompatible restrictions.

There was, accordingly, much wisdom in the decision of the High Court of Australia finding the implication of free speech; expressing it, ultimately, in a unanimous opinion.³⁷ The Court with one voice restated the rule in terms that limit legislative restrictions that effectively burden freedom of communication about government or political matters where that legislation is not reasonably appropriate and adapted (or proportionate) to serve a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.³⁸ That rule, as re-expressed, is the law of the land. Its justification is necessity.³⁹ Without such a rule the achievement of parliamentary democracy would be undermined in a serious way.⁴⁰ Working out the operation of the implication in particular cases is not always easy. Differences of view will exist.⁴¹ But that is not unusual in constitutional adjudication. The finding of the implication is scarcely a case of

³⁴ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.

³⁵ See above Part II.

³⁶ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268–76 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

³⁷ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

³⁸ Ibid 561–2, 567–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

³⁹ Ibid 557, 560–2 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

⁴⁰ Ibid 557–62, 566–7 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

⁴¹ See, eg, *Roberts v Bass* (2002) 212 CLR 1; *Coleman v Power* (2004) 220 CLR 1.

activism. Once again, it is a case of judges defending the real operation of the *Australian Constitution* as a functional instrument of government intended to uphold basic principles of accountability in an environment of public discourse. The accusation of impermissible judicial activism is seriously misguided.

B *Legal Defence for the Indigent*

A second case, not strictly constitutional, concerned the right of persons facing a serious criminal charge to have legal counsel provided for their defence if, without fault on their part, they could not secure counsel because of lack of funds or otherwise.⁴² One might have thought that such a decision would be welcomed as upholding a minimum requirement of fairness and justice in the criminal trial process in Australia in which the liberty of a person may be at risk. Surely that liberty should not depend upon the means of the person. Ultimately, to force an unrepresented person to defend a serious criminal charge without a lawyer is a form of cruel and unusual punishment. Yet that was what the previous law had been held to be.⁴³

Formalists there still are in our law. They would force poor people who could not secure legal aid, as decided within the executive government, to defend themselves and just do their best. Such an indifference to the fate of another human being is astonishing to me. It is far from astonishing that the High Court of Australia should have concluded that the courts had the means to prevent this from happening. The means included the provision of adjournments of the trial as necessary and the ultimate provision of a stay of proceedings, if legal assistance was denied without justification.⁴⁴ The outcome of this decision has been a major improvement in the provision of legal assistance to indigent persons facing serious criminal charges. It is fairer for the accused but also fairer to the judge, the jury and the community. It is a protection against wrongful convictions. It is a recognition that the law is not content with a charade of justice but is concerned with the reality. Yet critics of the *Dietrich* decision continue to fulminate against its wise and prudent rule. They call it judicial activism. It was nothing of the sort.

C *Native Title*

A third decision, also of a non-constitutional kind, that is the butt of critics of the Mason Court, is the leading decision on native title in Australia.⁴⁵ This was indeed a very bold judicial move. 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

⁴² *Dietrich v The Queen* (1992) 177 CLR 292 ('*Dietrich*').

⁴³ *McInnes v The Queen* (1979) 143 CLR 575.

⁴⁴ *Dietrich* (1992) 177 CLR 292, 297–8, 311–12 (Mason CJ and McHugh J), 331–3 (Deane J), 356–7 (Toohey J).

⁴⁵ *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo*').

accession to the Crown of the radical title in land throughout Australia by reason of that sovereignty.⁴⁶

Ultimately, in *Mabo*, the High Court of Australia changed this line of legal authority. Essentially, it did so for two reasons. The first was the acceptance that the old theory of law had been founded on a factual error.⁴⁷ That error was a belief that the Aboriginal people were wandering nomads who had no connection with land and therefore no interest in land of a kind which the common law should recognise. The intervening studies of anthropologists and social scientists found that this assumption was factually erroneous. If ever there was a people who had a close connection with land it was the indigenous people of Australia. For them, land had a spiritual value and it lay at the heart of their culture. The factual error required correction⁴⁸ and with that change came an alteration of the legal doctrine that rested on it.⁴⁹

The second stimulus to a changed approach was the international law of human rights. If there is one point upon which that body of law speaks with a single voice it is that no person should suffer diminished legal rights by reason only of his or her race.⁵⁰ In the development and expression of the Australian common law the deep principles of international human rights law inevitably affect the expression of the common law of Australia.⁵¹ In this way, the High Court of Australia reversed a century of land law. It upheld the continued existence of native title to land, at least where that title had not been extinguished by super-vening and inconsistent rights.⁵²

The High Court of Australia did not invent the *Mabo* case. The case was brought to it for decision. The judges were obliged to reach their decision and to express their conclusion upon it. The matter did not involve interpretation or application of the *Australian Constitution*. It was open to the Parliament, as it quickly did, to move under powers enjoyed by it, to enact the *Native Title Act 1993* (Cth) and, in due course, to amend that Act so as to regulate the incidents and various claims of native title. Views may differ over the validity of the judicial role in re-expressing the common law on such a subject, when that law was shown to be deeply flawed. I can understand the opinion that the matter might have been left to the Parliament because of the several interests involved, the large economic implications and the importance of preserving a predicable land law. On the other hand, a great wrong had been done to the original inhabitants of Australia. Their descendants brought a claim to the highest court in the nation to correct that wrong.

History will, I believe, consider favourably the Justices in the majority in the *Mabo* decision who re-expressed the law of Australia in this regard in a way that

⁴⁶ *Cooper v Stuart* (1889) 14 App Cas 286, applied in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

⁴⁷ *Mabo* (1992) 175 CLR 1, 181, 189 (Toohey J).

⁴⁸ *Ibid* 103–4 (Deane and Gaudron JJ), 180 (Toohey J).

⁴⁹ *Ibid* 15 (Mason CJ and McHugh J), 58 (Brennan J), 109 (Deane and Gaudron JJ), 182–4 (Toohey J).

⁵⁰ *Ibid* 215–16 (Toohey J).

⁵¹ *Ibid* 42 (Brennan J).

⁵² *Ibid* 68–9 (Brennan J), 89–90, 94, 100–1, 110 (Deane and Gaudron JJ), 196, 217 (Toohey J).

was more just and less discriminatory. It is not by accident that Brennan CJ, who wrote the leading majority opinion in *Mabo*, is shown in his official portrait holding vol 175 of the *Commonwealth Law Reports* in which appears the decision in *Mabo*.

Formally, it would have been understandable if the High Court had left the law as it was, with pious injunctions to the democratic legislatures to do what they had refrained from doing for nearly 150 years. But courts are about law and justice. That is the oath that judges take. Most settler societies, peopled initially from Europe in the days of empire, have, in recent years, been readjusting their land law as it affects indigenous peoples. Australia is no exception. Most Australians would, I think, recognise the wisdom and timeliness of the decision in the *Mabo* case. Most lawyers would appreciate the need to re-express the previous legal principles. The High Court of Australia, unlike its American counterpart, is a court of common law and general legal appeals. That function shapes its approach to legal doctrine and its role as a final and constitutional court for the nation.

Sometimes, the common law takes bold steps. Sometimes courts journey through a period of creativity. Such a period is often followed by an interval of consolidation and reluctance to change. I have no doubt that Australian society, and its law, were greatly enhanced by the three decisions that I have mentioned and others besides. Yet the criticism of them as ‘judicial activism’ is endless in the muttering circles of conservative lawyers. What they need to be told is that law moves and changes and does not stand still. Basic considerations of legal principle and common justice in true equality for all sometimes require change. For eight centuries, judges of our tradition have been responding to the needs of change. The judges of our generation are, and should be, no different.

VI MEDIA BULLIES AND JUDGES

A phenomenon of the present age is the frequency with which the media — especially the print media and particularly some varieties and publication houses — have taken to the judges with venom. We know about it in Australia. We have seen the campaigns against particular judges and campaigns against judges generally.

One form of bullying is directed at so-called judicial activists — and especially at judges who look at the law in context; exhibit concern over proved wrong-turnings in legal doctrine; express a desire to cure identified injustices; and resist the pure formalism and abject submission to erroneous notions of so-called ‘parliamentary sovereignty’ that superficial media critics of this variety most ardently desire.

In the written *Australian Constitution* there is no ‘parliamentary sovereignty’. Sovereignty belongs only to the people. For their governance, the people accept many institutions to exercise power on their behalf. Parliaments — federal, state and in the territories — are one kind of law-making institution. But there are also the executive government, the public service and the courts. It may have been correct in England in the 19th century to talk of ‘parliamentary sovereignty’. It

has never been correct when speaking of one of the Parliaments under the shared powers of the *Australian Constitution*.

It astonishes me that media bullies of this persuasion and their allies persist, against all the evidence, with their infantile notions concerning the character of Australian governance. As if one can trust implicitly and unquestioningly officials who submit every three years to a single visit to the ballot box, but reject the longstanding and legitimate law-making functions of the judges, whose duty it is to interpret and apply the law as text and context permit, with justice and discretion.

Such a superficial and infantile view of democracy is deeply troubling. It ignores or forgets the current crude practices in ‘democratic’ electioneering (to which the media itself contributes). It overlooks the growing defects in accountability of government to the legislature. It ignores, even now it seems in matters of appropriation of funds from the Consolidated Revenue Fund, the effective unaccountability to the Parliament of many, potentially most, executive appropriations.⁵³ It turns a blind eye to the erosion of parliamentary power and the enlargement of executive power and, specifically, the power of the head of government whom the media themselves build up to a position of untrammelled importance undreamed-of when the *Australian Constitution* was written.⁵⁴

People who have such childlike faith in triennial encounters with the ballot box have a debased vision of the *Australian Constitution*. It is not the one that functional reality or the text dictates. Reality requires of a well-functioning democracy an interaction between the different branches. It envisages checks and balances and contributions by all sources of law-making, opinion and action — including in the legislature now substantially controlled by the executive, but also, in the minor key, in the judiciary as well. Protecting basic rights remains an important function of the judicature, at least as it is envisaged by the *Australian Constitution*. Some scribblers in the media cannot understand this. Every time they and their friends cry ‘judicial activism’ they betray their childlike notions and unsophisticated concepts of democratic governance.

The one branch of government that the legislature, the executive, capital, unions and the media cannot control — indeed the one source of power that is not (and should not be) subject to bullying and control from any source — is the judiciary. From their bully pulpit the scribblers and those who are intolerant of views other than their own, can thunder and attack the judges as activist and illegitimate. We heard some of those attacks during the conversazione. Well, I have a message for those of that ilk. The judges will simply ignore them and do their duty. In the cases that come to the judicial seat, the judges will continue performing their functions with independence and integrity according to their best notions of the law and their conscientious appreciation of the justice of the

⁵³ *Combet v Commonwealth* (2005) 221 ALR 621.

⁵⁴ Cf Paul Kelly, ‘Re-Thinking Australian Governance — The Howard Legacy’ (2006) 65 *Australian Journal of Public Administration* 7, 7–9, 16; Justice Michael Kirby, ‘Law Reform, Human Rights and Modern Governance: Australia’s Debt to Lord Scarman’ (2006) 80 *Australian Law Journal* 299, 311–13.

particular case. If sections of the media or others do not like this, it is just too bad.

If journalists, in particular, want to carve out exceptions from the rule of law for communists, terrorists, gays, women, racial or religious minorities or other groups — they can forget about it as far as the judiciary is concerned. At least they can forget it unless exceptionalism is supported by the clearest law which is valid under the *Australian Constitution*. Without this, the judges will defend the rights of all. Not just of the popular or the majority. Everyone. The true test for a democracy comes when the rights of unpopular minorities and individuals are under attack, including in the media.⁵⁵ The unpopular minority may be the communists. It may be the Jews, Jehovah's Witnesses or it may be gays. It may be poor people accused of crimes. It may be troublemakers, the heterodox and agitators who stand against political orthodoxy. It may be Aboriginals claiming the justice of their rights to land. Alas, for all of these groups, the media are fickle, unreliable champions. Governments, officials and Parliaments also sometimes fail. The courts have their part to play. And that part includes a creative part, as judges of our tradition have demonstrated for nearly a millennium.

VII CONCLUSION

Activism to some degree is inherent in the judicial function. This is power, it is true. But it is not without responsibility. No branch of government operates more transparently, explains its actions more openly and is subject to internal checks, appeals and review conducted in public, so much as the judiciary. There are limits. Sometimes, doubtless, there are mistakes, as is inherent in every aspect of human government. But the serious, faithful, principled servants of the law deserve better than to be traduced by a new media, arrogant with power, sometimes too close to the hothouse of executive government and its acolytes. The judiciary should not be undermined from within by those whose formalism has temporarily blinded them to their sworn duty to do right to all peoples, to the full extent that the law permits, whilst they occupy the judicial seat.

It is to be hoped that out of the conversazione will emerge the beginnings of a more realistic understanding of the duties and responsibilities of the judiciary, the genius that lies behind its creative capacity, the complete legitimacy of properly fulfilling that capacity and the serious error of formalism, originalism and other non-contextual approaches to the ascertainment of the content of law. Truly, it is those who preach these doctrines who are the activists. They are seeking to change the creative features of our law and the functions of the judicial branch that have existed for centuries. They must not succeed for theirs is a counter-reformation⁵⁶ that would put back the course of legal history,

⁵⁵ *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 124 (Latham CJ).

⁵⁶ Justice Michael Kirby, *Judicial Activism: Authority, Principle and Policy in the Judicial Method* (2004) ch 3, based on Justice Michael Kirby, 'Judicial Activism: Authority, Principle and Policy in the Judicial Method' (Speech delivered at the Hamlyn Lectures, 55th Series, Cardiff, 23 November 2003).

condemn us to a Dickensian world of formalistic rules and formularies and diminish our search for just principles of law at home and dialogue about them with fellow professionals abroad.

Of course, there are those with a shrivelled view of the judicial function. That truly is a vision of the operation of law by people with power and without a sense of responsibility for its just and proper deployment.

So long as law is something more than mere rules, so long as it speaks of deep values and human aspirations, of human dignity and fundamental rights, there will be people called judges who have the responsibility to express and apply the law and, in new circumstances, to push it forward and adapt it in a principled way. So long as judges do this, there will be critics. And sometimes the criticism will be fair and require correction. But let us resolve that the criticism will be voiced in civil language. We can leave out the bullying. Childish demonisation and name-calling should be left to infants' schools. They are contemptible and anti-intellectual. We should resolve to replace swearwords with analysis and bullying with open-minded dialogue.

The three countries represented in the Boston, Melbourne, Oxford Conversazioni are blessed with independent, uncorrupted, professional judiciaries. Their judges deserve better than the denunciation and bullying they have received on this topic in recent years. The demon we should fear in our free societies is not the excessively 'activist' judge. It is the judge content with formulae who loses sight of the deep historical currents in the *Australian Constitution* and the law and misses the significance of big cases when they present.

This, Dixon J never did. We, his successors, must find, and constantly re-find, the wisdom and creativity, within bounds, that led to the *Australian Communist Party Case* and like decisions in Australia. Getting the big decisions right is the constant challenge for the judiciary, especially the judiciary in the highest court. History judges us all. But it judges most harshly those who fail to perceive the big challenges when they come or who respond to them with formulae that deny the judiciary's creative role despite the overwhelming evidence of its precious existence and benefits over the centuries.