Chapter Nine

Reflections on Judicial Activism: More in Sorrow than in Anger

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Judicial activism probably is a more popular topic of conversation in Australia now than at any time in its history. We live in an age of prevalent judicial controversy, where the doings of the courts are discussed almost as frequently and with as much venom as those of our more usual anti-heroes, the politicians.

Moreover, within this emerging pattern, our politicians are themselves viewing the activities of the courts with ever-increasing interest and mounting overt hostility. The consequence is that we appear to have entered a new constitutional era, in which the courts and the executive government regard each other with semi-permanent mutual suspicion from behind the battlements of purported constitutional principle.

Underlying all of this has been a dramatic change in judicial psychology, whereby some among the previously deferential judges have been transformed, and have transformed themselves, into self-conscious heroes of human rights, and have taken on the mantle of defenders of a supposedly cringing Parliament and populace against the pretensions of the executive heirs to the Stuart Kings.

What all this amounts to is a truly fundamental change in some of the most important constitutional suppositions and relationships operating within our Commonwealth. Inevitably, this shift is producing intense dislocation in our wider constitutional system, with different components of that system jostling with each other for power and influence within an increasingly unstable constitutional paradigm.

What this paper first seeks to do is to define the phenomenon of judicial activism. Secondly, the psychology which lies behind that phenomenon will be analysed. Thirdly, the paper will address the legitimacy of judicial activism within both constitutional and legal theory. Next, the paper will ponder the plausibility of activism on the part of the courts as an effective and efficient means of policy development. Finally, the paper will consider the dangers inherent in the present surge of judicial activism, dangers which are both manifold and manifest.

Of course, the irony of this paper and the whole current debate is that the vast majority of judges are not judicial activists. Many view the actions of their adventurous brethren with scarcely concealed horror, resenting each deviation from traditional judicial method far more bitterly than any public critic of the courts. Nevertheless, it is with the increasingly prominent activism of the confident and growing proportion of judicial activists that this paper is concerned.

The Notion of Judicial Activism

Judicial activism is one of those phenomena far more often talked about than defined. Indeed, one of the chief deficiencies in the debate over judicial activism is an enormous imprecision in the use of that term. This is compounded by the fact that there are, in reality, three essentially different processes which may in various contexts be regarded as constituting judicial activism.

The first, and certainly the most prevalent of these, relates to the common law. In this connection, a charge of judicial activism ordinarily will refer to the actions of a court in consciously developing the common law according to the perceptions of that court as to the direction the law should take in terms of legal, social or other policy. Activism on the part of

judges in this sense may be dramatic, or decidedly *sub fusc*. Thus, for example, the High Court of Australia has over the course of many decades made numerous gradual and entirely uncontroversial adjustments in such areas of the common law as torts and contracts, on the at least implicit understanding that such adjustments were necessary for the better effectuation of certain legal, social or commercial principles.

More dramatically, the Court has in recent times effected major changes of legal policy in both these areas of law, with overt and extensive reference being made to the desirability of the law operating so as to foster the achievement of certain social results. Similar movements have been observable in such areas as the administrative law, particularly in relation to natural justice.

Of course, the greatest example of judicial activism within the field of the common law in an Australian context occurred in the decision of the High Court in *Mabo*. In that case, the Court clearly effected fundamental changes in the common law of Australia, essentially on the basis that social necessity required the law to be developed so as to facilitate the recognition of some concept of native title.

The second, and rather less obvious form of judicial activism, concerns parliamentary enactments. Activism here ordinarily will be comprised in a court consciously adopting an interpretation of statutory language which goes well beyond the ordinary import of the words: either because the court concerned believes that such an extended interpretation is necessary to give effect to the true intention of the enacting legislature, or (perhaps more commonly) because the court wishes to frustrate an unpalatable legislative intention which appears all too clearly from the words.

Examples of a court throwing itself into a transport of enthusiasm for the effectuation of parliamentary intent are relatively rare, but some did occur in relation to the interpretation of taxation statutes as a delayed reaction to the perversely restrictive constructions applied to those statutes by the Barwick High Court. Rather more prevalent is the action of a court in consciously restricting the application of a statute by reference to its own view of socially desirable consequences. Good examples of such behaviour occur in relation to the ousting of a court's own jurisdiction by parliamentary enactment, where such legislative provisions typically are interpreted quite consciously by courts so as to frustrate their effect. In a different context, we already have noted the determination of the Barwick High Court to make the Commissioner of Taxation work heroically for his money.

It should be noted of such statutory judicial activism, however, that it often takes the quite legitimate form of a court applying common law presumptions against statutes being accorded particular meanings. Thus, for example, a court will not accept that a statute is intended to impose a fine or penalty without the clearest of words being used. To the extent that a legislature does not employ words of sufficient clarity, therefore, it will have only itself to blame if a court fails to give effect to its less than transparent intention. Much judicial interpretation of statutes which otherwise might be regarded as constituting activism is entirely unexceptionable on this basis.

The final context in which judicial activism may be said to arise is in relation to the interpretation of the Australian Constitution. What is involved here is a phenomenon best described as "progressivism". This is an approach to constitutional interpretation which essentially posits that the High Court should so construe Australia's constituent document as to continually up-date it in line with perceived community and social expectations, rather than according to its tenor or in conformity with the intentions of those who wrote it.

This form of judicial activism, which naturally has profound social and political implications, has taken the High Court by storm over the past decade. Thus, the Court cheerfully has invented an implied freedom of political communication (along with other associated freedoms), a freedom which in reality emerges neither from the words of the Constitution themselves, nor from the wildest imaginings of the Founding Fathers.

Of course, well before such rights fantasies were even a glimmer in the eye of the late Mr Justice Lionel Murphy, successive High Courts cheerfully had dismantled much of the structure of Australian federalism on the progressivist basis that it did not best serve Australia's constitutional needs, although this deconstruction admittedly was achieved under cover of a comforting literalism. Consequently, it would not be unfair to say that constitutional progressivism has been and is the most prominent form of activism practised by the Australian judiciary.

The Psychology of Judicial Activism

The fundamental point to be made here is that judicial activism always will be a question of degree, although the debate over its occurrence is none the less important for that. Thus, it is quite inevitable that an element of activism will be present within any judicial system: the real issue always will be as to the extent of such activism, and its prominence within the relevant legal construct. The answer to these questions in turn will depend on certain fundamental aspects of judicial psychology. By this is meant the general attitude of the judges as to their right and capacity consciously to make law, and even more fundamentally, their confidence in their title to be the ultimate or penultimate arbiters of social policy.

Traditionally, the psychology of Australian judges in this context has been very much against the free deployment of judicial activism. Australia's judges believed that their role, generally speaking, was not to make law but to interpret it. While they were prepared to acknowledge a limited role in the making of the common law, even this was approached with caution.

At least two reasons underlay this basic judicial caution. The first concerned matters of principle. The value of the separation of powers operates not only to protect judicial power from encroachment by the executive or the legislature, but also to segregate legislative power from the roaming fingers of appropriately-minded judges. Moreover, within a construct of constitutional democracy, there always will be problems of legitimacy attached to the exercise of legislative power by an unelected judiciary.

However, the reluctance of judges to involve themselves in policy went deeper than mere constitutional nicety, and was founded on certain basic political and social facts. Thus, the emergence of democratically elected Parliaments during the nineteenth Century, electorally responsible to the populace at large, was seen as precluding the judges in the most basic way from any real pretensions to power over the fundamental political and social dispositions of society.

This basic social perception was backed by the unanswerable fact that the exercise of political power by democratically unaccountable judges, in the face of an elected legislature which enjoyed the confidence of the mass of the population, not only was politically untenable, but from the point of view of the judges, politically and personally dangerous. In short, the conviction of the judges could be summed up in the immortal words, "we'll never get away with it".

Recently, however, there has been a fundamental shift in much of the judicial psychology of Australia. This shift may best be summed up as amounting to a form of judicial triumphalism. The central element of this judicial mind-set is encapsulated in the proposition that the judges should feel free to take control of the law, and to develop it in accordance with their perceptions

of the needs and desires of contemporary society. This proposition is in turn based on a series of assumptions, both positive and negative, concerning the right of the judges to take such action.

The assumptions which are positive in character chiefly concern the character of the judges themselves. Thus, an increasing number of our judges now are confident that they are clever, socially sophisticated, dispassionate and fully adapted to the role of analysing social trends and predicting the best legal response to those trends. Not surprisingly, the negative assumptions of these judges concern the institutions whose traditional constitutional boundaries will be transgressed by such judicial activism.

Thus, just as the judges see themselves as wise and objective, the democratic Parliament to which they previously deferred is now perceived as being composed of politicians who are stupid, venally populist, short-sighted and unethical. Consequently, in the competition between the judicial Adonis and the parliamentary Quasimodo, the judges cannot fail to be seen as the preferable source of legal policy- making.

In all this, these judges are strongly supported by large sections of the legal profession, although pockets of resistance are said to hold out not far from this room. One fascinating question concerns the reason for this fundamental change in judicial attitude to their own role in law-making, and in relation to the law-making activities of Parliament. This is not something that can be considered here, although I have addressed it at length in my Alfred Deakin Lecture earlier this month.

Briefly, many Australian judges now are besotted with the learning and legal style of the United States, where a free-wheeling Supreme Court wields a Bill of Rights to the destruction of any pervasive claim of legislative supremacy. Moreover, this obsession with curially enforced rights as a means of asserting judicial supremacy over legislature and executive is powerfully reinforced by the current international fashion for broadly framed guarantees of human rights. Finally, the need for the legal profession generally to re-invent itself from what has been seen as a privileged and unresponsive professional élite, into a modern, vibrant force for the protection of civil rights against governments, cannot be over-estimated.

Of course, appropriately-minded judges are wont to locate their new found enthusiasm for activism in an alleged decline of Parliament from Cromwellian protector of rights, to executive toady. The reality is, however, that today's Parliaments are not noticeably less interested in the protection of human rights than were their predecessors, as is evidenced by the passage of large quantities of rights legislation over recent decades. The more proximate reason for judicial activism in this country thus lies not in any deficiencies in the other arms of government , but in the psychology of the judiciary itself.

The Legitimacy of Judicial Activism in Constitutional Theory

The critical point here is that the legitimacy of judicial activism varies radically according to the context in which it occurs. Thus, it simply is not possible to stigmatise such activity as constitutionally or legally illegitimate unless one fully understands the circumstances in which it is being undertaken.

One critical aspect of this concerns judicial activism in the context of the common law. No issue of constitutional legitimacy arises concerning the capacity of the judges to develop the common law in line with their views as to desirable social or other policy, for the simple reason that the courts always have moulded the common law, and are perfectly entitled to continue so to do. Likewise, Parliament is fully entitled to indicate by Act that a development embarked upon by the judiciary constitutes the very latest in bewigged nonsense. Thus, not only is the judiciary free

to develop the common law, but Parliament is free to reject any such development. No element of constitutional illegitimacy conceivably is involved.

Of course, this does not mean that judicial activism in a common law context cannot be criticised on other grounds. One criticism which may be levelled at judicial activism in relation to a particular area of the common law matter is that it has failed to adhere to the requirements of common law technique; that is, that the law should be developed slowly, cautiously, and with great regard to precedent. This is a grave charge, but is one which goes to judicial methodology, not constitutional permissibility.

Another criticism of a given bout of judicial activism in respect of the common law may be that the policy result which it embodies ranges from the inadvisable to the suicidal. Again, depending upon the nature of the criticism, this may well constitute a grave defect in the judicial excursus in question. Moreover, the essential implausibility of middle-aged barristers as social arbiters might be thought to point to the frequency with which such a conclusion will be reached. Nevertheless, the issue is not a constitutional one, but simply one of policy and plausibility. In any event, no matter how bad the judicial depredation, it always may be reversed by statute.

Indeed, this is why much of the political criticism of the decisions of the High Court in *Mabo* and *Wik* is essentially wrong. Both of these decisions essentially involved the amplification of the common law as it operated upon the question of native title, rather than the interpretation of statute or the Constitution.

It is perfectly possible to argue, particularly of *Mabo*, that these decisions were inappropriate as a matter of common law method, in the sense that they altered the law too radically, too fast and with too little regard for precedent. It likewise is possible to argue that the legal principles which they embody are not good policy, on the grounds that they ultimately will not operate in practice to deliver promised benefits to Aboriginal people, just as it is possible to maintain that these principles represent a major advance in social justice.

However, it simply is not open to commentators to criticise these decisions on the grounds that they are constitutionally improper: whatever their legal sins, no issue of constitutional interpretation was essential to their holdings concerning native title, and they thus fall to be evaluated as common law decisions which it was well within the purview of the High Court to make.

This is an important point, as much of the debate over constitutional judicial activism proceeds from mis-assumptions concerning these two decisions, when the real basis for criticism of the High Court's performance as a constitutional activist lies readily to hand elsewhere.

As regards the issue of judicial activism in a statutory context, the simple position is that the courts are bound by both democratic and constitutional theory to give effect to parliamentary enactments. Consequently, a court in interpreting a statute has no right to the latitude that it quite validly might exercise in developing the common law. This follows inexorably from the fact that, whereas the common law is made by the courts themselves and is their creature, statutes are made by Parliament, and can be altered or unmade only by the legislature.

Consequently, where a court consciously pursues an "interpretation" of a statute that is in reality designed to substitute, for the intended operation of that statute, an operation which the court believes to be preferable, then the court in question is acting quite invalidly. Inevitably, therefore, judicial activism in a statutory context is a constitutional issue, striking as it does at the root of the relationship between the courts and Parliament. Nevertheless, it is by no means so serious an issue as the form of activism that we will now consider.

This is the constitutional variant of judicial activism that we already have noted as progressivism, being the notion that the court -- and most usually the High Court -- may substitute for the intended operation of the Constitution its own view as to the most socially desirable outcome in contemporary circumstances.

This form of activism is utterly unacceptable as a matter of democratic or constitutional theory. The Constitution, as Australia's constituent document, was drafted by delegates who (generally speaking) were popularly elected for the purpose, and was ratified by the colonial populations. It is amendable only pursuant to a rigorous democratic and federal formula contained in s. 128. The necessary consequence of this must be that it is entirely invalid for any court to seek to usurp the prerogatives of the Australian people by informally amending the Constitution in accordance with its own fancies as to what passes for good public policy.

Of course, this is precisely what the Court has been doing on a long term basis in relation to the Constitution's federal structure, and even more vigorously over the past decade through the interpolation of extraneous human rights into the Constitution's text. A number of arguments have been advanced from time to time with a view to justifying this behaviour. One of the more hopeful is that the Founders intended that the Court should operate in such a manner. Suffice to say, there is not the slightest historical support for this view, with every contemporary source redolent of an entirely contrary intention.

A second argument, turning on the nature of democracy, is that there is nothing inconsistent with democratic theory in seven unelected judges unilaterally moulding the shape of the Constitution, given that democracy is itself an imprecise and elastic conception. The answer to this would seem to be that while democracy is elastic, it is not infinitely so, and it is difficult to imagine a construct less supportive of popular democracy than the undermining of a popular mechanism of constitutional amendment by seven unaccountable public officials nominated by the executive of the Commonwealth.

A third justification often proffered for progressivism is that, without such beneficent action by the High Court, the "dead hand of the past" would render the Constitution unalterable. The difficulty with this argument is that the failure of proposals for constitutional alteration over the course of Australian history has in no sense been the result of some morbid dominance of the Founding Fathers, but rather stems from the very much alive determination of the Australian people to reject proposals to alter the Constitution.

Thus, what the High Court proposes to do is not to save us from the Founding Fathers, but from ourselves. The net result must be that there is no convincing argument of law, constitutional principle or democracy that possibly could be regarded as justifying the constitutional progressivism of the High Court.

It may be noted at this point that it has been the chief achievement of the constitutional Left to convince whole sections of the public that the debate over constitutional progressivism is effectively the same debate as that which has raged in the past over the general power of judges to make law. In reality, of course, the two are entirely different. No intelligent person now denies that judges do to some extent make law, most particularly in the common law context that has been outlined above.

But to say that judges cautiously may vary the common law, which they have themselves made, says absolutely nothing as to their right to alter the Constitution of which they, in the form of the High Court, are themselves merely creatures. Indeed, to argue from a permissive proposition about judge-made law in the context of the common law, to a defence of judicial alteration of the

Constitution, is a little like saying that homicide is generically justifiable on the basis that there do in fact exist certain narrow forms of lawful killing.

Thus, the notion of an unauthorised constitutional amendment by the judiciary is fundamentally different from any issue concerning the capacity of the courts to develop the common law. The judicial activism comprised in progressivism constitutes a basic attack on Australian notions of constitutional democracy, which, in the case of such purported constitutional freedoms as that of political communication, have been thinly disguised as constitutional implications with a view to paying derisory lip service to the interpretative process.

The Plausibility of Judicial Activism

Plausibility is an issue quite different from that concerning the legitimacy of judicial activism. The question here is not whether such activism is democratically, constitutionally or legally proper, but rather whether it is an effective means of promoting sound change to the law. In short, the issue is not whether judicial activism is appropriate, but rather whether it is efficacious.

The key to answering this question lies in an understanding of what occurs in practical terms when a judge determines to alter the law in line with his or her conception of what is or is not desirable. In essence, what will be involved is a judgment of legal policy: that is, a polycentric assessment of the diverse issues pertaining to economic, social, cultural and political considerations relevant to the formation of an intelligent opinion as to the desirability of a particular change in the law. Thus, it is vital to understand that the term "legal policy" is not merely a convenient euphemism for some intrinsically legal activity. Rather, it encapsulates a decision-making process that is deeply founded in wider, social and entirely non-legal considerations.

The critical question, therefore, is whether the judges possess the skills necessary to resolve issues of this type. The first point here must be that judges are chosen precisely because they have skills in an area quite distinct from such fields, namely, the law. Typically, judges have little or no experience of policy formulation, and it would be an amusing thought to imagine most High Court Justices attempting to make head or tail of the sort of documents usually utilised by the bureaucracy to inform itself in the taking of a policy decision, let alone seeking to intuit a comprehensive understanding of the process of rational policy formulation.

Thus, judges will not normally possess the wider skills necessary for policy creation. They generally will have no profound experience of economics, politics or administration. They will not be experienced in the field of policy analysis. They will have no understanding of the process involved in undertaking a comprehensive cost-benefit analysis of competing proposals. Nor is this the end of their disqualifications.

In an intensely political task, judges (with certain limited exceptions) not only will rarely have political experience, but today also seem to have a positive distaste for the practice of politics, except judicial politics. Their typical mode of decision-making, adjudication as between litigating parties, is utterly unsuited to the development of general policies applying across society and based on multifarious non-legal considerations. Their experience in dealing with neatly packaged evidence ill suits them to the task of sifting through the multiplicity of factors and material that typically will inform the making of a major policy decision. They have no experience in designing or even foreseeing the systems necessary to translate a policy decision into reality. All in all, it is scarcely possible to imagine a group of individuals less obviously suited to the formulation of policy than Her Majesty's Judges, with the notable exception of legal academics.

Indeed, I am sometimes amused when supporters of judicial activism querulously ask me who would be better at policy formulation than judges? The obvious answer to this is, an elected Parliament composed of members who at the very least are legitimate, and certainly are both reasonably socially diverse and experienced in the art of government.

Another, more light-hearted but nevertheless valid answer, would be to observe that there are many groups in our community that would have as great a claim to policy-making capacity as the judiciary, at least in terms of the likely quality of their decisions. Thus, for example, the armed forces possess all the virtues commonly claimed for the judiciary in this respect, such as a dispassionate commitment to the state, a disinclination to party politics, and a highly trained and skilled leadership. On the whole, however, I prefer the operations of a parliamentary democracy to either option.

Perhaps the saddest aspect of this whole sad debate over the capacity of judges to make effective legal policy is the genuine hurt evident on the part of many judges when their deficiencies in this direction are the subject of public comment. After all, no-one is denying the intelligence of the judges, which is undoubted. No-one questions their mastery of the law which is, after all, their field of peculiar expertise. No-one disputes their integrity in the discharge of their judicial functions. All that is being maintained is their incapacity in a field entirely outside their experience and expertise. For judges to resent charges of policy ineptitude is a little like a physicist being irked at not being recognised as a concert violinist.

The Dangers of Judicial Activism

The dangers posed by judicial activism fall into two categories. The first concerns dangers posed for society as a whole by the judges engaging in such activity. The second comprises dangers flowing from judicial activism which threaten the position of the judiciary itself.

The fundamental danger of judicial activism from the point of view of society, particularly in the case of constitutional progressivism, is its fundamental inconsistency with democracy. Putting aside the case of common law activism, which already has been acknowledged to fall within a special category, judicial activism in a statutory or a constitutional context quite literally laughs in the face of popular democracy. It posits the existence of an oligarchic group of judicial philosopher-kings, with a greater title to the disposition of fundamental issues concerning the nature of society than the members of that society themselves.

Not only is such a contempt for democracy profoundly disturbing in both theory and practice, but it is immensely damaging for the entire democratic psychology of any state which finds its commitment to popular government qualified in so radical a fashion.

A concomitant difficulty arises out of the value of separation of powers. Some judges are immensely fond of asserting this value whenever some unwary legislature or executive wanders across the path of judicial power, and there is no doubt that certain Australian executives have been less than circumspect in their dealings with the judicial arm. But separation of powers cuts both ways, and in point of constitutional principle, it is equally objectionable for the judiciary to usurp legislative power as it is for the executive to lay siege to the castle of judicial prerogative.

It follows from this that a contempt by the courts for the doctrine of separation of powers can only promote a corresponding contempt in other branches of government, with potentially disastrous consequences. Indeed, there can be little doubt that today's politicians already view with intense cynicism the pleas of an activist High Court which depend for their acceptance upon a genuine commitment to the separation of powers.

A third and often overlooked difficulty is ethical in character. When such courts as the High Court ritually assert the value of the separation of powers, and formally deny any intention of

interpreting the Constitution in a manner inconsistent with the constitutionally expressed desires of the Founders, and yet are perceived by every intelligent observer (whether with approval or disdain) to be doing precisely those things, a great inconsistency is generated at the heart of Australia's constitutional jurisprudence.

It can do nothing but harm for Australia's lawyers, judges and citizens to behold their highest court solemnly presiding over a demonstrable constitutional subterfuge. Thus, it should worry us a great deal more than it actually does that, when we read a judgment of the High Court on a constitutional matter today, we typically do not ask ourselves if the reasoning is convincing -- for this is essentially irrelevant -- but rather whether we agree with the result. It is difficult to expect the law to be within the realm of ethics, when the highest functionaries of the law in the highest reaches of their functions regard intellectual consistency as dispensable.

Finally, judicial activism over most of its range is potentially socially dangerous for precisely the reason that the judges are ill-equipped to discharge any major policy role. Thus, given that judges have no particular aptitude for policy, it is most unlikely that their forays in that direction will meet with general success, on the simple basis that the judges do not possess the resources of experience or practical intellect to regularly produce policy solutions which are adapted to the problems to which they are directed.

Whichever view one takes of decisions like *Mabo* and *Wik*, and there undoubtedly is much moral force embedded within those decisions, they reveal clearly enough the incapacity of the courts to enunciate enduring, comprehensive solutions to complex policy problems.

This is not to belittle the judiciary: the federal Parliament would make an equally bad fist of writing a judgment on the operations of s. 92 of the Constitution. The point remains, however, that the crafting of far-reaching policy options is as little the province of the courts as is the penning of judgments the milieu of the legislature.

The dangers of judicial activism for the judges themselves are equally intense. The first danger is to judicial independence. Judicial independence necessitates the independence of the courts not only from politicians, but from politics itself. Once a court embarks on a routine course of policy formulation, it inevitably becomes part of the political process, and this by definition. It therefore makes no sense to talk of the independence of the judiciary from politicians, if the judiciary has itself chosen to be an integral part of the very political process which defines the very concept of a politician.

Crucial to an understanding of this point, is an appreciation that the public respect which underlies true judicial independence cannot survive the politicisation of the judiciary. That respect is based on a communal perception that judges operate above and beyond the despised field of politics, and genuinely are engaged in the resolution of disputes according to law.

This is why judges traditionally have enjoyed an enormously high respect within the community, while politicians have ranked slightly above tiger snakes. Were the population to come to the view that the highest officers of our judiciary are, at least in a constitutional context, little more than highly specialised political operatives, judicial respect would decline dramatically.

This feeds into the next point. If it becomes generally accepted that judges are no more than social politicians wearing wigs, then the real politicians will feel not the slightest hesitation in treating their new found brethren in precisely the same manner in which they treat any other political opponents. That is to say, the judiciary will be subjected to their full repertoire of political tricks, brutality and cheerful chicanery. This is a process which the judiciary will not survive intact, most obviously because the public respect which traditionally has preserved them from such assaults already will have been substantially eroded.

Just as critically, it must be appreciated that those very judges so confident of their own skills as policy makers, are in reality truly appalling politicians, who confidently can be relied upon to lose any bout with the genuine article. This has been demonstrated in recent years with almost depressing regularity.

Thus, for example, when Deputy Prime Minister Tim Fischer criticised the High Court, the reaction of the Chief Justice, Sir Gerard Brennan, was to write him an eminently leakable letter, and then to be genuinely astounded when that missive rapidly found its way into the waiting arms of the media.

Again, the Victorian Chief Justice has blithely promised to defend judges whenever he feels that criticism is "unfair", seemingly without a realisation that future silence on his part correspondingly will stigmatise any undefended judicial utterance as inappropriate. Finally, the recent comments of Sir Gerard Brennan concerning criticism of the courts, far from moderating those criticisms, predictably were seen as an attempt to stifle debate.

The truth is that if judges are bad policy makers, they are appalling politicians. It presumably is only a fond belief that they will be able to discharge a political role without political accountability that encourages the adventurous among them to pursue their activist fantasy.

Finally, there is the obvious point that if judges are to behave as politicians, then politicians will be appointed as judges. Once the executive is convinced that the occupants of the bench intend to behave as political rather than legal creatures, it is a short step to ensuring that only those persons thoroughly amenable to the programme of the governing party will be appointed to the judiciary. Consequently, the politicisation of the judiciary through judicial activism may be expected to be a self-perpetuating process, which will result in political parties carefully scrutinising future appointments -- particularly to the High Court -- precisely with a view to ensuring that no mere lawyer illicitly finds him or herself upon the Bench. This culminating disaster will set the seal on the loss of independence and prestige inherent in the pursuit of a course of judicial activism.

Conclusion

The inevitable conclusion of this paper is that we must do all in our power to reverse the trend of judicial activism in Australia. While an element of activism may be accepted in the context of the common law, it should there be confined to a slow, cautious progress, mindful of precedent and the limitations of judicial method. In relation to statutory and constitutional interpretation, judicial activism is entirely illicit and must be stigmatised as such.

Unless we fully appreciate the inability of the judges to make the key contribution to complex policy debates, and the truly appalling constitutional consequences that will follow from any attempt on their part to do so, we run the risk of destroying both the independence of our judiciary and the separation of powers. Ironically, we would do so just as the judicial triumphalists are asserting them so self-importantly.