Judicial Activism in the High Court —A Response to John Toohey

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In a paper published in Volume 28(1) of The Law Review, *John Toohey, a former Justice of the High Court of Australia, considered what significance the judicial oath, established by King Edward III in 1346, has for judges and magistrates today. In this reply, Professor Greg Craven, a constitutional law expert, examines two points that were raised in Toohey's paper — namely, (i) the meaning of 'judicial activism' and its role under the Australian Constitution, and (ii) the dangers of politicising the process whereby judges are appointed to Australia's highest court.*

BY way of preliminary, it is abundantly clear that the paper 'Without Fear or Favour, Affection or Ill-Will'[1] was not intended by the former High Court judge, John Toohey, to comprise some exhaustive statement of his legal and constitutional philosophy. Nor will it be treated as such here. What Toohey's paper purported to be was a modest defence of the modern Australian judiciary in the discharge of their official duties. As such, it may readily be accepted as an interesting contribution within its own genre. What follows is intended to be a piece of similarly finite scope and ambitions.

Toohey's paper has an interest that goes well beyond the purposes which it was, presumably, intended to serve. That interest derives largely from Toohey's own considerable position in Australian legal history. The then Justice Toohey was a judge of the High Court of Australia from 1987 to 1998. From 1987 to 1995 he was a member of the Mason Court, which took the High Court into uncharted

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1. (1999) 28 UWAL Rev 1.

seas of judicial innovation, most notably — though hardly exclusively — through its discernment of an 'implied' right of freedom of political communication in connection with the Australian Constitution.[2] Indeed, together with Sir William Deane and Justice Gaudron, Justice Toohey could reasonably be regarded as having constituted the 'radical' wing of what was, at least by historical Australian standards, a remarkably radical court.[3]

The result is that Toohey's essay is less interesting as a perfectly worthy contribution on the role of the courts in Australia than as revealing a range of fundamental assumptions upon which he — as an activist member of the Mason Court — was inclined to base the discharge of his office as a justice of the High Court. Moreover, the brevity of the piece, and its relative informality of style, mean that these assumptions tend to be presented in an unusually overt and unadorned manner. In short, the essay 'Without Fear or Favour, Affection or Ill-Will' represents a remarkably candid snapshot of the more radical wing of the Mason Court — a snapshot which helps us to build up a detailed psychological profile of the serial judicial activist.

More particularly, there appear to be five basic assumptions in the essay by Toohey.[4] The first is that judges routinely make law. The second is that they do so indiscriminately in every context of the law. The third is that legal reasoning is essentially subjective. The fourth is that judicial activism is no threat to Australian conceptions of constitutional government. The final assumption (or, in this case, assertion) is that there can be no justification for altering the system of judicial appointments in Australia, either towards election or confirmation. All of these assumptions will be briefly addressed here.

JUDGES ROUTINELY MAKE LAW

It is a nostalgic exercise to read Toohey's revelation that judges make law,[5] complete with the obligatory reference to the views of Lord Reid.[6] The exposition is undertaken with such evident enthusiasm that it seems almost impolite to point out that, whatever may have been the position in the United Kingdom in 1972 when Lord Reid expressed his view, no intellectually respectable Australian opponent of judicial activism has subscribed to any position so self-evidently absurd as the purely declaratory theory of law for at least 20 years. In search of

2. See *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.
3. See eg *Leeth v The Commonwealth* (1992) 174 CLR 455, Deane and Toohey JJ.
4. A closely related piece is J Toohey 'A Matter of Justice: Human Rights in Australian Law' (1998) 27 UWAL Rev 129.
5. Toohey supra n 1, 5.
6. JSC Reid 'The Judge as Law Maker' (1972) 12 JSPTL 22.

legally conservative champions against which to tilt, therefore, it would be preferable that Toohey rode past this windmill and into the real lists of argument.

Here, the question is not whether judges make law — everyone cheerfully accepts that they do — but rather in what contexts they make law, and to what extent. This is a very real distinction. The fact that it may be appropriate for the judges carefully and incrementally to develop the law in a particular context may no more be regarded as conferring upon them a general competence to mould the law in their own image than that the cautious acceptance of the concept of self-defence constitutes a general tolerance of homicide.

The problem with Toohey's views, as expressed in his essay, is that they seem to adopt just such an absolutist stance in relation to judicial law-making. Apparently, once one accepts the general truth of Lord Reid's remarks (uttered specifically in relation to the common law), one has embarked upon a course whereby the whole of the law is laid like a patient upon the operating table, and the judicial scalpel is restrained only by judicial conscience and judicial wit. Certainly, there is obvious nowhere in the essay any strong appreciation that the acceptability of judicial law-making varies dramatically according to context, a matter which will be considered in the next section of this article.[7]

Nor does Toohey advert to the question of degree in relation to judicial activism. Surely it is one thing for an ultimate court of appeal, after serious consideration, to make some slight adjustment to, say, the law of insurance, in the interests of social equity or commercial convenience. Yet it would be an entirely different thing for the same court to purport to abolish the tort of slander, or — at a throw — to negate forseeability in negligence.[8] An acceptance that the judges may properly be involved in a process of careful, slow legal renovation does not involve authorising the use of dynamite.

Toohey's disregard of such distinctions reflects his indifference to another question critical to the role of judges as law-makers. Assumed throughout his essay is the tendentious proposition that judges possess the slightest skill as policy-makers. Toohey rightly stresses the integrity and honesty of Australian judges, but he is strangely unmoved to make out the slightest utilitarian case for their employment as the policy innovators which he so clearly envisages them to be. The closest he comes is to observe that Parliament can clean up any inappropriate mess left behind by a judicial decision[9] — hardly a ringing qualitative endorsement of judicial activism.

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7. See infra pp 217-219.
8. Some commentators would perceive the decision in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 as being of this order of magnitude.
9. Toohey supra n 1, 3.

Nor, it would appear, is Toohey overtly troubled by any difficulties of democratic theory which might be thought to inhere in his position. One looks in vain in his essay, strongly supportive of judicial activism as it is, for any advertence to time-honoured debates concerning the democratic legitimacy of unelected judges effecting significant changes in social or other policy by judicial decision. Once again, the nearest point of conjunction between the essay and such trifling concerns is the less than compelling apologia that, at least in the context of the common law, the decisions of judges may be reversed by Parliament,[10] while, in the case of constitutional interpretation, the curative of the referendum is always at hand.[11] Both these matters will be considered below.[12]

In assessing Toohey's essay, it is appropriate to keep in mind the fact that the speech upon which it was based was delivered to a mixed audience of lawyers and laypeople, which necessarily would have involved some attenuation of argument. Nevertheless, even accepting this constraint, perhaps the most interesting aspect of the essay on this crucial issue of judicial law-making remains the extent to which it assumes, without argument, an entire range of highly contentious political, constitutional and jurisprudential propositions. The essay is striking on these points, less for the argument which it advances than for its very lack of argument, and indeed, for its apparent lack of awareness that argument is even required in support of such seemingly self-evident truths. Reading it is a little like reading a work which advocates the re-introduction of capital punishment without any reference to the incidence of serious crime or the question of its effectiveness as a deterrent.

JUDGES ROUTINELY MAKE LAW REGARDLESS OF CONTEXT

This issue is closely related to that previously addressed, and has been adverted to briefly already. Accepting for the moment that judges may properly mould the common law in their own image, at a rate of innovation referable only to the quality of their own wisdom and imagination, how does it follow that this judicial liberty extends to the 'creative' interpretation of statutes enacted by elected Parliaments, let alone to the Constitution itself?

This is a difference of context which, whether regarded as conclusive or not, can hardly be overlooked. Necessarily, there must be some difference between the judges further developing what initially was, after all, judge-made law, and effectively amending instruments which are the emanation of an authoritative

10. Ibid.
11. Ibid.
12. See infra pp 221-222.

democratic will. Remarkably, however, Toohey's essay does not advert in any detail to this distinction. Having pronounced Lord Reid's activist shibboleth, he seems unconcerned substantially to distinguish the development of the common law from judicial activism in other contexts. Indeed, his dismissive reference to concerns 'expressed by some at what is referred to as "judicial activism", particularly in the area of constitutional interpretation',[13] as with his undifferentiated allusions to 'changing the law',[14] and indeed his own past judicial pronouncements,[15] make it quite clear that Toohey does not accept the idea of some 'cordon sanitaire' between the Constitution itself and judicial activism.

Much the same inference could be drawn from Toohey's confident assertion that judicial interpretations of the Constitution can, in any event, be reversed by means of that convenient instrument, the referendum.[16] Ironically, of course, the fact that the Constitution may be changed by referendum is precisely the reason that judicial activism is entirely inappropriate in relation to its provisions. The Australian Constitution was drafted by elected representatives of the Australian colonies.[17] It was adopted in each colony after popular referendum.[18] By section 128, it is expressed as being alterable only by a referendum proposal which has been approved by a majority of the electors of the Commonwealth and a majority of electors in a majority of States. Far more than the United States Constitution, with its somewhat misleading fanfare of 'We the People', it is Australia's constituent document that is, in its genesis and continuing means of textual rejuvenation, fundamentally democratic.

In these circumstances, one might expect that Toohey would carefully except the interpretation of the Constitution from any general theory of judicial creativity, or, at the very least, limit the application of such a theory in a constitutional context. Failing this, one would certainly anticipate some detailed explanation as to why the apparently democratically-generated and authoritative text of the Constitution should fall for judicial revision according to much the same process as the law relating to straying cattle. Yet Toohey's essay does none of these things.

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13. Toohey supra n 1, 5.
14. Ibid, 3, 8-9.
15. See eg the judgment of Toohey J (jointly with Deane J) in *Leeth v The Commonwealth* supra n 3, 482-485, and the joint judgment of Mason CJ, Gaudron and Toohey JJ in *Theophanous v Herald & Weekly Times Ltd* supra n 2, especially 126-127.
16. Toohey supra n 1, 3.
17. On the democratic pedigree of the Australian Constitution: see generally G Craven 'The High Court and the Founders: An Unfaithful Servant' in Senate *Papers on Parliament (No 30): The Constitution Makers* (1997) 63.
18. See ibid 83-84. This was true of every colony participating in the Great Convention of 1897-1898, except Western Australia, whose delegates were appointed by Parliament.

We are faced simply with a blanket assertion of the mutability of the law at the hands of the judges, and nothing concrete which would suggest that the interpretation of the Constitution is fundamentally different in this respect from any other area of the law.

Once again, it is the absence of argument, and the failure to employ the language of distinction and qualification in relation to the Constitution, that is most remarkable about the essay. It is redolent of a juridical psychology according to which the Constitution stands ready to be developed by judicial pronouncement in essentially the same manner as any other area of the law, if perhaps by the use of rather different argumentative techniques.[19] The concept of the Constitution as the creature of the High Court, rather than the opposite, is implicit within this psychology.

GENERAL SUBJECTIVITY OF LEGAL REASONING

One of the most noticeable features of Toohey's essay is the extent to which it seems to turn upon the notion that the character of judicial reasoning is essentially subjective, a position profoundly consistent with his view of a general judicial supremacy over the law. This is, perhaps, most clearly evident in his discussion of the 'activist' judge who chooses to change the law, and his 'non-activist' brother who does not. To Toohey, there is no essential difference between the two:

> One judge may decide that the true nature of the relevant law demands some change; another judge may recognise an injustice but consider that any change is for the legislature. The question is not so much whether one is right or one is wrong; the point is that each has to arrive at a decision by the same process of decision-making, the non-activist judge no less than the so-called activist judge.[20]

Again, speaking of the judicial function, he says of the judges: 'Their function is to apply the law *as they see it*',[21] a formulation which is not markedly confining of judicial choice.

It thus appears that, under Toohey's understanding of the judicial function, what is critical is not that this function should be restricted by some notion of the intellectual character of legal reasoning, or by a conception of the constitutional relationship between the legislature, the executive and the judiciary, let alone by

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19. Most notably by the use of 'implications', which in reality are merely broad extrapolations from the Constitution, and reflective of the justice's own subjective vision of that document: see G Craven 'The High Court of Australia: A Study in the Abuse of Power' (1999) 22 UNSWLJ 216.
20. Toohey supra n 1, 7.
21. Ibid, 8 (emphasis added).

reference to some abstract idea of democratic theory. Rather, he seems to be moved almost entirely by a quite narrow notion of legal process: so long as the judge is directing his or her inquiries as to what the law is — or, more correctly, what the law *should be* — then the inquiry is properly directed. It does not seem to matter greatly how subjective or unusual the views of the particular judge may be upon this question; nor does the size of the change which may be wrought in the law matter. All that is of concern is that the judge is conscientiously following his or her 'legal instincts'.

It is this perception that allows Toohey to say that there is no difference between the 'activist' and the 'non-activist' judge, because each is simply exercising their subjective judicial choice. There is, in reality, an enormous difference between the two. This is observable, not in the shallow fact that each makes a different decision — Toohey seems to perceive an essential similarity in the still less profound fact that each has made 'a decision' — but in their divergent understanding of the nature of the judicial task, and the constitutional and social relationships upon which that task is premised. To the non-activist judge, a decision not to enlarge the law may be referable to an acknowledgment of technical incompetence on the part of the judiciary; a lack of confidence in judicially-orchestrated, sudden change; a deference to democratic institutions; an acceptance of the inability of the judiciary to assert a moral claim to shape society; or a combination of all, or any, of these things. Correspondingly, to attempt to deny that an activist judge is implicitly taking a profoundly different position on all of these basic issues betrays a certain wilful myopia.

Yet this implausible identity between the activist and non-activist judge is clearly important to Toohey. Nearly all his references to activism as a concept have a derisory ring, as if the term is one used only by the unlearned and uncouth. Thus he refers to 'so-called activism',[22] the 'so-called activist judge'[23] and 'cries of activism'.[24] It is a curious process of legal thought that would deny the distinction between a judge such as Sir Daryl Dawson,[25] whose constitutional position was essentially to interpret the written text of the Constitution as an embodiment of the intentions of those who wrote it, and Sir William Deane, who followed the progressivist view that the Court should interpret the Constitution, as far as possible, so as to promote the fulfilment of the contemporary needs of the Australian people.[26] Nevertheless, the determination of jurists like Toohey to down-play this divergence

22. Ibid, 5.
23. Ibid, 7.
24. Ibid.
25. See D Dawson 'The Constitution — Major Overhaul or Simple Tune-up?' (1984) 14 MULR 353.
26. Craven supra n 19, 231.

is significant. In arguing for judicial activism, it is immensely useful to claim that stoic passivity is no different from frenzied, though divergent, activity.

JUDICIAL ACTIVISM AND CONSTITUTIONAL GOVERNMENT

Throughout his essay, Toohey maintains the constant impression that there is nothing in judicial activism that remotely could be regarded as threatening to accepted notions of Australian constitutional government, turning as they do upon conceptions of democratic legitimacy, the separation of powers and the rule of law. This impression is derived both implicitly and explicitly. Implicitly, Toohey's failure to discuss such issues as the democratic authority of the Constitution, and the democratic deficiencies of the courts, operates to deny their relevance. Explicitly, he is at pains to de-emphasise the dangers of judicial supremacy, by demonstrating the ease with which inappropriate judicial decisions may be overcome and the inability of the courts to set anything like their own 'legislative agenda'.

As regards the first point, Toohey argues that Parliament may legislatively overturn decisions of the courts concerning the common law and statutes,[27] while a referendum may be employed to negate a regrettable judicial interpretation of the Constitution.[28] Yet, as justifications for at least the more extreme forms of judicial activism, neither of these answers is remotely convincing. Thus, take the example of a major innovation in the common law which proves to be highly undesirable for the not improbable reason that the judges deciding the relevant case lacked the policy skills and information necessary to ground their decision. The fact that the appropriate organs of the state may, at enormous expense and possibly with considerable political difficulty, be able to ameliorate its effects hardly constitutes a sufficient justification for its having been made in the first place.

The case of judicial activism in a constitutional context is far worse. There, even the most egregious misinterpretations — such as those involved in the implied rights cases[29] — cannot be remedied without the full deployment of the awesome amendment machinery embodied in section 128. As Toohey must be fully aware, the financial and political costs which must attend any use of this machinery are such that its deployment against an activist Court, in all but the most exceptional

27. Toohey supra n 1, 3.
28. Ibid.
29. For a critique of the High Court's jurisprudence of implied rights: see Craven supra n 17, 79-83.

of circumstances, would be an empty threat. A constitutionally activist High Court, therefore, hardly lives in fear of a referendum.

Of course, there is another factor at work here, which is the popular respect for the judiciary that Toohey rightly is so concerned to protect. There can be little doubt that, in many circumstances, a referendum seeking to overturn a constitutional decision on a controversial subject would face probable rejection on the grounds that it constituted an inappropriate rejection of a judicial decision of Australia's highest court. On the surface, this might suggest some popular support for constitutional activism. Yet the reality is quite different. Popular support for the High Court flows precisely from the fact that the population at large does not see the Court as an active legislator — unlike the despised politicians who make up our Parliaments — but rather as the impartial interpreter of the Constitution. Thus, paradoxically, any popular support for the outcomes of judicial activism essentially tends to be parasitic upon popular rejection of that very phenomenon. Were the electorate ever to form the opinion that the Court comprised merely an alternative set of social engineers, rather more elaborately dressed than the members of the House of Representatives, there is little doubt that its prestige would diminish dramatically.

Toohey is also concerned to argue that the capacity of the High Court to fashion the body of law is limited by the fact that it is, as an institution, purely reactive to the cases which litigants choose to bring before it.[30] According to this theory, the Court is a little like a priest in a confessional, unable to turn away litigant-penitents no matter how loathsome their sins may be. The kindest response to this contribution to the debate over judicial activism is that it is so old a chestnut that it may now profitably and permanently be discarded. As an ultimate court of appeal, the High Court of Australia is more than capable of attracting a significant proportion of the cases that it wants to decide. Thus, for example, by expressing in both curial and extra-curial utterances its interest in notions of constitutional rights and progressive interpretation,[31] the Mason Court can hardly have been surprised (though it may have been more than a little gratified) when litigants played back just such legal lyrics in subsequent cases. Similarly, the deciding of *Australian Capital Television,*[32] the first of the implied rights cases, was necessarily an open invitation to attempts to demonstrate the existence of further rights in the Australian Constitution. Particularly in a constitutional context, the notion of the High Court as the long-suffering victim of activist lawyers is not to be taken seriously.

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30. Toohey supra n 1, 7.
31. See eg the coat-trailing on the question of constitutional rights: A Mason 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 FL Rev 1, 10-13.
32. Supra n 2.

APPOINTMENT OF JUDGES

Perhaps the centrepiece of Toohey's essay is his heart-felt appeal to readers that the Australian judiciary be spared the horrors of appointment by election, or (more plausibly) by confirmation hearings such as occur in the United States. Toohey argues[33] — it is contended rightly — that such hearings focus almost exclusively upon factors which may be thought to disqualify judicial candidates, and are aimed mainly at predicting the likely course of decision-making by the candidate, with a view to securing the curial balance most favourable to the political interests of the questioner. Toohey cites one constitutional lawyer as stating, in a radio interview, that any proposal to adopt such a method of judicial appointment in Australia would be 'loopy'.[34] The writer is not sure whether he was or was not the commentator referred to, but is in any event proud to associate himself with the sentiment.

The strange aspect of Toohey's well-founded fears concerning calls for the re-structuring of the judicial appointment process is that he appears only imperfectly to understand the very close connection between such calls and judicial activism. True, he acknowledges that it has been the 'cries of activism'[35] that have prompted proposals for a more elaborate process of appointment, but it is the very wording of this acknowledgment that is significant: to Toohey, it apparently is not judicial activism as such that has exposed the judiciary to the dangers of an inappropriate system of appointment, but rather the irresponsible criticism of those who decry it. It is all a little like the schoolboy who believes he is in trouble, not because he broke the rules, but because his sister told on him.

In reality, there is an inseparable link between our present mechanism of judicial appointment — and the judicial independence which it supports — and the eschewing of judicial activism. So long as judges may be regarded as the interpreters of a law which is, if not microscopically determinate then at least broadly ascertainable, an appointment process which contains no political element can be justified. Once it is accepted, however, that the fundamental task of the judge is to mould the law according to his or her policy conceptions, the case for introducing an element of political accountability for an essentially political task becomes vastly stronger. Unsurprisingly, therefore, a strong strand in opposition to judicial activism in Australia has been based precisely upon a strong desire to prevent the courts from arguing themselves out of their own independence. An appreciation of this serious tension is not a feature of Toohey's essay.

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33. Toohey supra n 1, 8-11.
34. Ibid, 7.
35. Ibid.

CONCLUSION

The essay 'Without Fear or Favour, Affection or Ill-Will' is not to be criticised as failing to comprise some elaborately argued thesis in constitutional theory. Given its genesis — a speech to the general public — it was never intended to comprise such an exercise, nor has it been treated as such here. Its interest lies in providing a brief and essentially informal glimpse of a strand of judicial psychology which was, during the years of the Mason Court, broadly representative of Australia's most significant judicial mind-set. Most significantly, the essay reveals a remarkably ready and apparently uncritical adoption of a whole range of positions which might have been thought, at the very least, to require considerable supportive argument before they could confidently be advanced. In short, the piece falls squarely within the genre of argumentation usually advanced in defence of judicial activism, and particularly constitutional activism, in Australia: essentially uncritical of its own claims; prone to indiscriminatory generalisation; and seemingly unreceptive to arguments of constitutionalism and democratic theory which range more widely than the preservation of the judicial arm of government.