

Roundtable

Judicial Activism v. Strict Constructionism

HONOURABLE MICHAEL KIRBY AC CMG^{*}

Moderator: JUSTICE CHANG-FA LO
(Justice, Judicial Yuan, Taiwan)

Speaker: HONOURABLE MICHAEL KIRBY AC CMG
(Justice Emeritus, High Court of Australia, Australia)

Discussants: PROFESSOR JAU-YUAN HWANG
(College of Law, National Taiwan University, Taiwan)
PROFESSOR YEN-TU SU
(Institutum Iurisprudentiae, Academia Sinica, Taiwan)

Date: November 13, 2012

INTRODUCTION

The contest between judicial activism and strict constructionism is one of the most important issues in constitutional theories and practices. National Taiwan University College of Law is honoured to have Honourable Justice Michael Kirby in this roundtable discussion to present his insightful perspective on the dichotomy of activism and constructionism. Based on his experiences as the Justice of the High Court of Australia, Justice Kirby elaborates and questions the nature of judicial activism and strict constructionism in the common law tradition, and compares it with the continental law tradition. In answering to comments and questions raised by Justice Chang-fa Lo and other participants, Justice Kirby explains more on the concepts of activism and constructionism, focusing on their implication in countries with different social and cultural contexts.

I. OPENING REMARKS

JUSTICE CHANG-FA LO

The experiences and background of Michael Kirby would take half an hour to detail but I will not do that. Instead I will give a summary of the very rich experience and background of Michael. Briefly, Justice Kirby practiced as a solicitor and then a barrister before his appointment in 1974 as a Deputy President of the Australian Conciliation and Arbitration Commission. He is the youngest person appointed to the federal judicial office in Australia. Michael also served as the inaugural Chairman of the Australian Law Reform Commission from 1975. In 1983 he took up appointment as a judge of the Federal Court of Australia. And in 1984 he was appointed as President of the New South Wales Court of Appeal. In 1995 he was concurrently appointed to the post of President of the Court of Appeal of Solomon Islands. He was appointed in 1996 as one of the seven justices of the High Court of Australia, which is Australia's Supreme Court. Justice Kirby has had long connections with universities and he also served on the Administrative Review Council of Australia, on the Australian Council of Multicultural Affairs, and on the Executive of the Commonwealth Scientific and Industrial Research Organization among other important positions. He was a long-time member of the Executive Committee of the International Commission of Jurists, becoming Chairman, and later President of the Commission. He also served in numerous educational institutions and received a number of honorary degrees as well as honourable awards. These included the Australian Human Rights Medal awarded in 1991, and

the ‘Ten Most Creative Minds’ in 1997. As you can see, we have a very distinguished speaker today.

Michael has been very kind in agreeing to talk about judicial activism today, and he has provided handouts¹ for us to read. Let me invite our colleagues to give a very warm round of applause to welcome our very distinguished guest.

II. SPEECH

JUDICIAL ACTIVISM V. STRICT CONSTRUCTIONISM

HONOURABLE MICHAEL KIRBY

Thank you very much Justice Lo. Thank you all for coming to this talk today. I begin by paying my respects to the people and judges of the Republic of China and to the National Taiwan University. I am very glad to be here with scholars, students and friends. In Australia, unlike in the United States, we do not follow the convention that a person never loses a title. This may be because we are a constitutional monarchy. So we feel very comfortable in the fact that we do not need to have titles. Accordingly, I am no longer Justice Kirby. I am just ordinary old Mr. Kirby or Professor Kirby. So I feel a little uncomfortable to be pretending to be a Justice now that I am so-called retired.

We are going to have a session on so-called judicial activism and strict constructionism. I will talk for about half an hour and then we will have questions and comments. In that way my mind will be enriched and hopefully you will get some new ideas as well.

Now, the starting point is to have an understanding, a basic understanding, of the common law system because the common law system is very peculiar and some people, especially people from civil law countries, tend to think it is a very primitive sort of system. I declare that the common law system is fundamentally a Confucian system because it relies very much on the decisions of powerful men of virtue. The judges of the common law in the past were all men. They all had great power and they were mostly virtuous. Therefore, there is a link, perhaps Confucius walked in the green and pleasant land of England and spread the idea of having powerful men of virtue who would hand out justice according to the law.

The peculiar feature of the English legal system was that it grew up like most things in the English legal history slowly and chaotically. The system

1. The Hon. Justice Michael Kirby AC CMG, “*Judicial Activism?*” – *A Riposte to the Counter-Reformation*, 11(1) OTAGO L. REV. 1 (2005); see generally MICHAEL D. KIRBY, JUDICIAL ACTIVISM : AUTHORITY, PRINCIPLE AND POLICY IN THE JUDICIAL METHOD (2004).

plucked people from middle years who were private practitioners to become these powerful men of virtue. They did not have judge schools. People did not decide at the age of 21 or so that they were going to become judges and then spend their whole lives in that pursuit. The English legal system was one which chose its judges from successful private practitioners who were mostly barristers or advocates. They were chosen and called on by the state, and they received a commission from the Crown. They then took up a new life. One day they were an advocate and the next day they were a judge. That is what happened to me. One day I was a barrister, and then the next day there were lots of ceremonies and I took oaths on a Bible in front of the public and the legal profession and then I was 'Mr. Justice'. That was thus a sort of apprenticeship system. This is because you sit there as a barrister and you stand and address somebody as a judge and you study how he does it. Then you come to that job, at generally about the age of 45 or 50. I came at the age of 35 so I got in there early. Most people start at about 45 or 50. And the important point is that the people in the English tradition who become judges never think of themselves as public servants. They never think of themselves as members of the government service. They always think of themselves as private practitioners who are spending some time working in a public office of a high status. I think that is one of those magical things that give you a high sense of independence from government. You do not see yourself as part of government, although in theory you are part of government. You see yourself as a private lawyer who is working in a public office, who has come to the job not as a public servant but as a private practitioner. It is important to understand that these are the powerful men of virtue who built the common law. They have been doing it for a thousand years. Every country of the common law is a beneficiary of the English legal system. The Americans, the Australians, the Canadians, the Zimbabweans, the people of Bermuda and people from Malaysia, all around the world, are the beneficiaries of the thousand year old history of the common law. Of course they adapted and changed it with their own local habits. Yet, fundamentally, it is all the same and, fundamentally, you have these people who were advocates who become judges and who do their job: building the common law.

The common law never has a gap. This is because the common law is declared by the judges. The judges decide a case according to precedent. If there is no act of parliament dealing with the matter by in the common law, they go to see what previous judges have decided. When you are a common lawyer, your office is full of casebooks. You learn the law from case books where you learn a case and how a judge in the past has solved a problem. You learn how to ascertain the holding or the central principle of the case for it becomes a precedent handed down by a higher court that has to be abided

by the lower courts. It is by a process of logic and logical development from the previous cases that you solve a new case, with new facts and new problems.

This is the system of the common law. It is why this so-called conflict between judicial activism against strict constructionism is really a false dichotomy. This is because the common law came from judicial activism. You would not have the common law without activism by the judges. Why does the common law continue to operate in one third of humanity when all the power of the British Empire has faded? The English language, English sports and the common law are still powerful legacies. They still continue to operate for about one third of the human race. That would not happen if it was not a very adaptable, malleable, changing, growing system developed by a little bit of judicial activism. Whenever people say 'well this is judicial activism, it is a kind of ignorant swear word. This is judicial activism'. It is like a curse saying you are a judicial activist. Well, if I am a judicial activist, that is because that is the system. As a judge I would continue to solve new problems in a way that is relevant to a new time with new technology and new issues for new people in new countries using in the same technique as has been done for a thousand years. It is very important to understand that that is the very essence of the legal system.

At the heart of the dichotomy implied by use of the curse word of some people, generally conservative formalistic people, is that they do not like the solution that has been made to a particular problem. If they do not like it, they say 'that is activism, not constructionism'. But it is a false dichotomy because every case will call forth previous decisions and new understandings and application of the law, but sometimes there is a necessity to push the law forward, either because the problem is new or because the old law has been shown to have faults.

In Australia, because we are a long way from England, which was the origin of all common law, we like to think of ourselves as the purest of the legal systems of the common law. We are down there in the South Seas. The beaches are beautiful. The sun is shining. Everything is lovely. Strong institutions, stable democracies. People like to think they have the best legal system because they do not have too much judicial activism. We have lots of strict constructionists. We had a very great Chief Justice. He was a Justice of the High Court of Australia from 1928 until 1966. He became the Chief Justice in 1952. I refer to Chief Justice Sir Owen Dixon. When Dixon was sworn in as the Chief Justice, he said that the only safe way to solve legal problems and disputes was by strict and complete legalism.² By that he meant not too much activism.

2. *Swearing in of Sir Owen Dixon as Chief Justice* (1952) 85 CLR 11, at 14 (Austl.).

Nonetheless he was on the High Court of Australia in 1951 when a very important case came up for decision. This was one year after the foundation of the PRC. The PRC was founded in March 1950. In the same year, the Australian Parliament enacted a law to ban the Communist party. This law sought to prohibit the teaching of communism, and to deprive the communists of civil rights. The case was heard when Australia had a battalion fighting in Korea in the Korean War. Still, at that time, the majority of the High Court of Australia) held that the Federal Parliament could not do it because it is against the Constitution. Effectively, the court held that you can deal with communists for what they *do* but you cannot deal with people for what they *believe*. You cannot enter into their brain and punish them for what they *think*. You can punish them if they do things that are dangerous to the public. Under the Australian Constitution, the Federal Parliament had power to make laws for 'defence'. The Government argued that the ban on communists was necessary for the defence of the country. However, Justice Dixon held that we were not at war in the conventional sense. This law was not within the power for defence.

Some people would say that this was a very 'activist' decision, and by a man who opposed activism. Yet that was what he held. There was one dissenter in the case who no doubt thought this was shocking 'judicial activism'. The dissenter was the then Chief Justice, Sir John Latham. He quoted Oliver Cromwell who said 'being comes before wellbeing'.³ In other words, you have to defend the Constitution from people who believe in revolution. That is a necessary thing before you can allow people to have their different points of views. Yet the majority of the High Court said that the law cannot enter into the beliefs of people. That was the decision of the court.

That case, I think, illustrates that one person's 'activism' is another person's 'construction' of the Constitution. Chief Justice Latham no doubt thought this was judicial activism by the majority of the court. However the majority of the court thought that what they were doing was simply construing the Australian Constitution in holding that the anti-communist law was outside the power under the Constitution for defence.

When I was at law school we had a very great law teacher. Law teachers do not generally get their reward quickly. Their rewards come thirty or forty years later. This teacher was Professor Julius Stone. He was a very great teacher of jurisprudence. He said that in our legal system, judges have choices and it is inevitable, the work that judges perform, that the Constitution is expressed in words. Words are often unclear. What do they mean? The judges have to solve that problem. The judges have to interpret

3. *Australia Communist Party v. The Commonwealth* (1951) 83 CLR 1, at 141 (Austl.).

the words of the Acts of Parliament and the subordinate legislations, the regulations and the bylaws. They have to decide between different interpretations. They have to decide the common law. This means taking a case, maybe hundreds of years old, and applying it in a completely different circumstance. Therefore judges have choices. Julius Stone taught that judges have to be conscious of the choices they make. They ought not to pretend that they do not have choices. They ought to be honest that they do have choices. Then they will explain more clearly why they chose one solution over another solution. Julius Stone's writings in the 1940s won through in Australia in the 1970s, '80s and '90s. That is what happens with professors. They have an effect in 30 years, or more. So never give up hope. Your impact is often still waiting to be fulfilled.

By the 1990s we had another very great Chief Justice in Australia, Sir Anthony Mason. He is now serving on the Hong Kong Court of Final Appeal, as a non-permanent judge. He is nearly 90 now but he is still sitting. He is a very brilliant man. He had to face what he thought was a need to update the law of Australia and to re-express it in some cases. One of the cases, possibly the most important that was decided in his time, was the *Mabo* case: *Mabo v. The State of Queensland*.⁴ That was a case which challenged previous decisions of the common law. A previous important decision of the common law said that, when the British arrived in Australia, they expelled the laws of the Aboriginal people. The indigenous people of Australia accordingly had no right to land.⁵ Yet, under Chief Justice Mason in the *Mabo* case, the majority of the High Court of Australia said that that rule was a principle that is based on racial grounds. They held that could not be the common law of Australia. Therefore, they said that they would re-express the common law without the racial discrimination against the indigenous people. When they did that, they contended that there must be recognition of the indigenous peoples' entitlements to land, unless the land has been bought by other people. If it had been acquired by other people, then the indigenous people will have lost their native title. But in the very large areas of Australia where there was no inconsistent claim to land, the Aboriginal people still enjoyed their native title.

Some observers said that is judicial activism. They asked the judges, how can you do this? The decision interferes with land law. Land law is always very stable. You must not change it! It is unacceptable judicial activism. You can imagine what the mining companies and the big pastoral companies said about the decision in the *Mabo* case. They said this was shocking 'activism'. But the High Court majority would have said this is not

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

5. See *Queensland Coast Islands Declaratory Act 1985*, No. 27 s 3(a), (b).

activism at all. This is simply removing an element which was racist from the law of Australia. This is something every country has to do today including Taiwan. Looking at the law, removing prejudice against indigenous people, respecting their rights, and thereby having respect in the law as the law for everybody. So whether you can call it 'activism' or whether you say it is a new and principled re-expression of the law constitutes a matter of opinion. It is not much helped by using curse words. Words that say you are cursed because you are a 'judicial activist'.

There were many other cases during the Mason Court in Australia (1988-1995). Another case was the case of *Dietrich v. The Queen*.⁶ Mr. Dietrich was charged with a serious criminal offence. He did not have the money to pay for an advocate at his trial. He asked the state to provide him with an advocate and they declined. That case went up to the High Court of Australia. The court looked around the world at what the position was in other countries including the United States of America. There the Australian judges discovered the case of *Gideon v. Wainwright*.⁷ They then said, in effect, we do not have a Bill of Rights in Australia but we still have independent courts which are independent of the government. The courts are there to preside over fair trials. It cannot be a fair trial of a complicated criminal charge if a person is not legally represented. The judges, the court said, had the power to stop the case, to stop the prosecution, if the accused was not represented, if the accused cannot afford to get a representative, and the state has refused to provide a representative. The court held that this was part and parcel of a fair system of courts. Our courts are not there for a game. They are there for proper trials which are justly pursued. 'Judicial activism' said the opponents. It is shocking that the judges are doing this. Yet others said that it was not 'judicial activism'. It was simply the application of the law to ensure that the courts are just to everybody. Equal justice under the law.

Of course, there are limits to the extent to which judges can create new remedies and solve all the problems of the world. Judges cannot do that. Doing that is normally the role of the legislature. Sometimes in my life, I have had cases in which I took part, where I would have liked to change and re-express the law. However I did not feel I could do so. I therefore confined myself to construing the law as it was even though I felt it was unjust. A judge cannot solve all the problems.

One such case concerned refugees. We have a lot of people who try to come to Australia on little boats. They usually go to Indonesia. They pay thousands of dollars to 'people smugglers' to get on a little boat. Often the

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

7. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

boats are very badly constructed. Many are old, and some of them sink and people drown. In one case, a family of a man, his wife, and two little boys, arrived in Australia. They were Hazari-Afghans, a minority group in Afghanistan. They are greatly hated by the Taliban because they, according to the Taliban, are not orthodox Muslims. This family claimed protection under the Refugees Convention and Protocol.⁸ Australia is a party to that convention. It is therefore obliged to give protection to refugees. When they arrived in Australia, under the Migration Act of Australia, because they did not have visas to enter Australia, they were all detained⁹: father, mother, and two little boys. They were taken to a refugee centre in the middle of the desert in South Australia. They were detained there whilst their application for refugee status was being considered. At that point, pro bono lawyers became involved. A lot of lawyers do pro bono work for refugee applicants in Australia. It is an admirable story. Mostly they are young lawyers. They will do the work for nothing. They found a family of Christians in Adelaide who said, ‘We will not try to convert the boys. We will place the boys into foster homes. We will put them with a family, and take them to the local public school so that, whilst the case of their parents’ application for visas is being processed, they will be looked after in a home and go to school with other children.’

The lawyers sought relief in the Family Court of Australia. The question was: did the boys fall within the Migration Act provision relating to refugees. Those provisions required that every person who arrives in Australia without a visa may be detained¹⁰: “every person”? The Minister for Migration argued that, a child was a “person”. Therefore, the child has to go into detention. However, the *pro bono* lawyers said no. The word “person” should be read as meaning adult, and not child, because Australia is a party to the Convention on the Rights of the Child. In Article 37 of the Convention on the Rights of the Child,¹¹ it says the detention of a child must only occur by authority of law and as a last resort. Arguably, this detention was therefore by authority of law (“any person shall be”). However, it was not a *last* resort. It was a *first* resort. For that reason, the *pro bono* lawyer read the provision to apply to the parents but not to the children. He read the Act down, so that “person” meant “adult person”.

8. UN General Assembly, Convention Relating to the Status of Refugees, July 28 1951, 189 U. N. T.S. 150; UN General Assembly, Protocol Relating to the Status of Refugees, Dec. 16 1966, 606 U.N.T.S. 267.

9. *Migration Act 1958* (Cth) s 42, 189 (Austl.).

10. *Id.*

11. G.A. Res. 44/25, ¶137(b), U.N. Doc. A/RES/44/25 (Nov. 20, 1989). (“No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”).

The judge in the Family Court said that this was a good argument. Then in the law there was an appeal to the Full Court of the Family Court. It decided, by 2:1. The majority held that this was a good argument because Australia is a party to the Convention on the Rights of the Child. Therefore Parliament, when it said any “person”, could not have meant a “child” person. It meant an “adult” person.

The Minister then sought, and obtained, special leave to appeal to the High Court of Australia. This was my court and the supreme court of the country. So the case came before me in the number one court in Canberra with seven justices sitting. The entire court sat on the case. Because I am a sort of Confucianist, and because I am a wise and powerful man of virtue, I naturally thought, if the Family Court interprets the Act that way, have they been shown to be wrong? Is this an available interpretation? Is that not a just solution? The children are not to blame because their parents brought them to Australia in a boat and did not get a visa for them. The children are now happy in a school. Let the process go on for the parents. Let the children stay in the foster home and go to the local school and get an education, not so easy in the middle of the desert with all the disadvantages that entails. It would not have taken much to persuade me as a judge, as a powerful man of virtue, that that was a just and lawful solution to the case. After all, the judge of the Family Court and the Full Court of the Family Court had so decided. So what was the mistake?

However, there were two problems. The first problem was one that the barrister for the Minister drew this to our notice, when we were hearing the argument. He pointed out that, when the Act was being enacted by the Federal Parliament, the officials from the Ministry advised Parliament that if this provision (“any person shall be taken into detention”) is enacted, that may render Australia in breach of the Convention on the Rights of the Child. Nevertheless, the Parliament said ‘do not worry about that’. We will just enact it because we do not want people coming here without visas, “jumping the queue” as they put it. So it could not therefore be said that Parliament had rushed this through. That it had not given it enough thought. They were warned. They were told. The officials did their duty. They drew the problem specifically to the notice of the Minister and the Committees of Parliament. The Parliament still went ahead with the provision “any person”. So that was problem number one.

Problem number two was even more difficult. Problem number two was the Act had specific provisions for searching children in detention. If the theory of the applicants was correct, and the theory that had been adopted by the Family Court was right, there was no need for searching provisions because children were not to be in detention. What required the insertion of the provisions on how to *search* children was that it was assumed that children

would be within the language “any person”. That really undermined, contextually, the argument which had been successful in the court below.

When I was faced with these arguments, it was like *the Titanic*. There were two big icebergs coming out of the water in front of me. Leonardo DiCaprio was on board. We were singing songs. And then up came the icebergs. They made it impossible to accept the interpretation which had been advanced, to read the Act down.

Accordingly, the High Court of Australia unanimously held that “any person” meant any adult person but also any child person. Accordingly, the children had to go back into detention. They were taken out of the school. They collected their goods and baggage from the foster home and their foster parents. They were then taken back to the camp in the middle of the desert in South Australia. Their parents then surrendered. They asked to be deported. So they were deported. When they were last seen they were in Peshawar on the road to the Khyber Pass to go back into Afghanistan.

If Australian law was the law of powerful men of virtue, as a person committed to human rights, and as a person who myself have suffered discrimination and injustice, I would have been very happy to leave those little boys in the foster home. It is a very sad thing that they had to go back into detention and then be expelled from Australia. But the rule of law means that judges do not have a completely open hand. They cannot just fix up every problem. They cannot do exactly what they like. They have to be disciplined by the law. Of course, they can sometimes interpret the law and push new boundaries and solve new issues. They can insist that Aboriginal people have the dignity of any other person in Australia, the right to title in their land. Even hated prisoners are entitled, if they come into our courts, to have a fair trial. That is what courts are for. But sometimes, when the Constitution is clear, or when the Act of Parliament is clear, or when the common law is clear, the judge cannot fix it up. That is why the terms ‘judicial activism’ and ‘strict constructionism’ are suggesting that there is a dichotomy in the law which is clear between the two. However it is not clear. The role of the judge is to decide what can be done, if possible do justly a decision in accordance with universal human rights. However, sometimes you cannot do this. When that happens, the judge is no doubt called a strict constructionist. But in fact, that is the point where the judge has reached the boundary of activism. The judge cannot go further.

So this is what the common law system does. It is how it solves problems. I will be happy to answer questions. The common law is a system quite different from that of Taiwan. Yet the problem that judges have, in any system of law, is sometimes going to take them to the boundaries of what is possible in reaching just and lawful outcomes. That is what I have tried to explain to you today.

III. GENERAL DISCUSSION AND RESPONSE

JUSTICE CHANG-FA LO

Thank you very much Michael, for the very inspiring talk. Before I open the floor to our participants, I would like to raise a number of questions; some are practical ones, some others are of more educational aspects. Regarding the deportation of Afghan children, in Australia, are foreign children also entitled to the Constitutional protection under the Australian law, and if that is the case, would the High Court of Australia be committed to declare unconstitutionality of the law and set it aside?

HONOURABLE MICHAEL KIRBY AC CMG

It did so in the Australian Communist Party case. It declared the Act of Parliament unconstitutional. So it had no legal effect. That is done from time to time, yes.

JUSTICE CHANG-FA LO

But the High Court did not consider that in the case involving the Afghanistan children.

HONOURABLE MICHAEL KIRBY AC CMG

There was no basis suggested that this was an unconstitutional statutory provision.

JUSTICE CHANG-FA LO

The second question is about the boundary for creative interpretation.

HONOURABLE MICHAEL KIRBY AC CMG

I should elaborate. Under the Australian Constitution, the Federal Parliament has power to make laws with respect to immigration and emigration.¹² So this was a matter of immigration, and also one in respect of “aliens”. The Migration Act was a law with respect to constitutional emigration and immigration and aliens. Therefore, there was no doubt that the law fell within at least one constitutional category. There was nothing in

12. Constitution, 1901, s 51 (xxvii) (Austl.).

the law that prevented it from doing so. Under Australian legal doctrine, an international treaty is not, as such, part of the law of the land. At least this is so unless it is specifically made part of the law by an Act of Parliament. Treaties are negotiated by the Executive Government. Yet the law is made by Parliament. The provisions in the Convention relating to the Rights of the Child are not made specific laws in Australia. Even if they were, they would have to compete with the bias toward liberty. With a law made under the migration power and the migration powers which is broad enough to deal with that issue.

JUSTICE CHANG-FA LO

So that means if a specific area is defined by the Constitution as within the authority of legislative body, then the courts would respect the law arising from such authorisation, not to apply for instance, fundamental rights guaranteed by the Constitution?

HONOURABLE MICHAEL KIRBY AC CMG

Generally, there are no fundamental rights in Australia unless they are 'implied'. The Australian Constitution is, I think, the fourth oldest Constitution operating in the world. There was the American Constitution, the Canadian Constitution, the Swiss Constitution, and then the Australian Constitution. So it is the fourth oldest continuously operating Constitution in the world. Like the Canadian Constitution, originally, the Australian Constitution does not contain fundamental rights.¹³ So it is a technical question: Does the detention power fall within the power of the Federal Parliament in Australia to make laws with respect to "immigration"? Yes. If not, would it be a law with respect to "aliens"? Yes. End of question.

JUSTICE CHANG-FA LO

So it is a question about the boundary of judges exercising this creative interpretation, or having their way of interpreting laws in a more creative way, is it?

13. *See generally* Constitution, 1901 (Austl.). There is no general Bill of Rights Charter. There are a few human rights type provision, e.g., Compensation for compulsory acquisition of property by federal authorities (s 51 (xxxiii)), right to jury trial in indictable federal criminal trials (s 80), restriction on federal laws in relation to religion (s 116); prohibits upon some forms of discrimination (s 117).

HONOURABLE MICHAEL KIRBY AC CMG

That is not a constitutional restriction. Rather that is meaning. That is saying yes you have a valid provision in the Migration Act.¹⁴ But what does it mean when Parliament has said “any person”. Did they mean to include children? If you say no, as the Family Court did, then the Act will apply to the parents but not to the children. However, the problem was that, when you actually looked at the history and the provisions of the Act,¹⁵ it was intended to apply to parents and children. Therefore, there was no question as to validity. As to meaning, it was sufficiently clear that it applied to children as well as to adults. Children are “persons” too.

JUSTICE CHANG-FA LO

Just a separate question, I read some articles describing you as “The Great Dissenter”. How do you see the term being used to describe your previous decisions and performance as a justice for the court? Does it mean that you are more liberal than most other judges in the court?

HONOURABLE MICHAEL KIRBY AC CMG

I am not very keen on the descriptions “judicial activism” and “strict constructionism”. I am not very keen on the appellation “Great Dissenter”. I think that title originally belonged to Oliver Wendell Holmes Jr. Perhaps it should not be aspired to by anybody else.

However, it is true that in my time, especially towards the end of my service on the High Court of Australia, I often disagreed with my colleagues. That is a great strength of the common law system. I would find it very difficult myself to operate in a system where I could not give honest opinions of my own. That, I think, is a great strength of the common law system: Dissent. You can disagree with the judges. However, you can be sure they are giving their honest opinions. I disagreed with some of my colleagues on the High Court of Australia because I thought they were needlessly narrow in their interpretation of the law and sometimes formalistic. There were plenty of instances of that. Still, I never doubted that they were completely honest and not corrupted. They were deciding the matters according to their values and their understanding of the law. So the “leeways” for choice were mainly on matters such as the meaning of the Act.

The English language is a very ambiguous language, there is a reason

14. *See supra* note 8.

15. Constitution, 1900, s 51 (xxvii) (Austl.).

for that. The original language of the English was a Germanic-Saxon language of the Anglo-Saxons. After 1066, came the French-Latin language of the Norman Conquest. And so in English, for every idea we have at least two words. This is because we have a mixed language. That is very good for poetry, and for literature. It is why we have this strength of English culture. The strength is not cuisine but literature and poetry. This is because we have this schizophrenic language with always two words for a single idea. For example, compare the two words “Last will” and “testament”. “Will” is the Germanic word, while “testament” is the French word. So most concepts in the law have two words. So it is a very ambiguous language. In the ambiguities lie opportunities and obligations of judges to interpret the law. That gives rise to differences in opinions. That is where you can have a so called “conservative” or “liberal” views expressed in it.

JUSTICE CHANG-FA LO

So do you also imply from this that language plays a very important role in shaping the legal culture or legal practice in the jurisdiction? For instance, in our society we use Mandarin, or Chinese, which is very different in the way of expression and in grammatical rules. So naturally there will be different cultures developed as a result of such situations?

HONOURABLE MICHAEL KIRBY AC CMG

There are some things we have got to be careful of now. We must not stereotype each other’s legal system or disrespect it. If you grow up in your own legal culture, you naturally know its strengths and its weaknesses. Among many things about the civil law system, there are two things especially to be mentioned, that the one third of humanity, who have the common law system, regard as intolerable. The first is the lack of dissent. It is completely unthinkable in our system that a judge would sign an opinion which the judge did not honestly believe in. Some people may argue that the dissenting judicial opinions undermine the authority of the law. In my view, dissent does not undermine the authority. It adds to the authority that somebody feels strongly enough to express a different point of view. That may, or may not, contribute to the ongoing process of the understanding of the law and to the evolution of understanding of the law. Above all, it is an honest and transparent system.

The second thing that common lawyers find intolerable about the civil law is the manner opinions are written by judges in the civil law system. These are, as it seems to common lawyers, designed to mask the real controversies that are involved in an application of a Code and not to express

that question and to justify a stated conclusion.

Now, the people in the civil law tradition say that “We did not want this.” First, you have all these ego-driven people who are writing their own long-winded opinions and giving their own opinions instead of expressing the law. The judge in the civil law tradition is *la bouche de la loi* (the mouth of the law). That is all the judge is. Therefore, spare us your different views. Just give us the authoritative statement of the law. That is all the people want. But the common lawyer will say, “But you have got to be honest and acknowledge and reflect on and explain why you have chosen one meaning over others. Otherwise, you are not really being transparent and open to the people whose law it is. I think there is an essential political issue here. The common law is more respectful of the fact that the people have a right to know, and have explained to them, why particular decisions are made. Whereas the civil law, coming from its Napoleonic origins, is more comfortable with a clear statement of the principle. It does not worry too much about the reasoning and certainly does not be distracted by the fact that there are some people who have a different opinion. It is a very different notion of what law is and how it relates to the people and what rights the people have to know that it is not always clear cut. Law is often uncertain as is demonstrated by that “judicial activism” versus “strict constructionism” debate. The law is often unclear and the common lawyers say better to be honest about it and strive by extensive reasoning to get people to accept your understanding. So that is the second point that distinguishes most civil law traditions – they do not encourage (or even permit) dissent. The outcome will be decided by the majority opinion. The individual judge will not be allowed to file a dissent. He or she will have to pretend that the judge agrees with the majority. That is very difficult for a judge of the common law to understand.

JUSTICE CHANG-FA LO

For your reference, our Constitutional Court does allow dissenting.

HONOURABLE MICHAEL KIRBY AC CMG

Yes, but it is probably like Japan: like once every three years there is a single dissent.

JUSTICE CHANG-FA LO

No, it happens here all the time, in each and every case.

HONOURABLE MICHAEL KIRBY AC CMG

I am glad to hear it. I used to go, every September, to the Yale Constitutionalism Seminar. In that seminar, there was generally a Justice of the Supreme Court of Japan participating. If during that year, somebody had given a dissent in the Supreme Court of Japan, it was a red letter discovery. We were really excited that this had actually happened. Whereas in Australia it is not an uncommon thing at all. I may have been named in the High Court of Australia “The Great Dissenter”, but there are plenty of minor dissenters.

JUSTICE CHANG-FA LO

Any questions?

Questions:

I would like to continue with the dissenting discussion because in Sweden, it's we that have had a famine where the judges generally do not dissent from the judgments. This year however, we have had two judgments where all five justices in the Supreme Court have given five different opinions, so it is kind of a new situation for us. It is very hard for us to see a new rule, and it is a new experience seeing that there are five voices, not acting as one voice, for the court. How would you actually cope with that, finding one way out of the situation we have?

Honourable Michael Kirby AC CMG

Well, just get used to living with diversity. We are human beings. We have diverse ways of seeing a problem, or whether there is a problem. And at least you can say, in that Swedish case, we may disagree with some or all of them. But we have received their honest opinions. I do think that, so far as possible, in collegiate courts, judges should try to get agreement. At least to get agreement in what is the majority decision. When I was President of the Court of Appeal of NSW (which is the most populous state and busiest Appeal Court in Australia), I had the power as the President to assign to myself or to another judge, the writing of the first draft. Often it would become the decision of the court. I think it was in about 76% of cases where I wrote the first draft, that became the decision either of one other judge or of the three judges. Normally the Court of Appeal sits three.

However, sometimes, the judges will have different opinions, because the question is complicated. There may be subordinate questions. The judges will have different views. In many cases, judges should strive to have a clear binding rule of the case so it is easier for lawyers to know what the case

stands for in legal doctrine. I think the position in Sweden, as described, is a sign that the legal systems of the world, because of globalism, are now, not merging, but they are taking on each others' attributes. In Europe I think people have become much more comfortable with dissent, and with its legitimacy, because of the role of the European Court of Human Rights. When there are strongly argued positions, people can say well, I disagree with Judge Petiti. But I can see his point of view. I can see it is a legitimate opinion that he has expressed. Therefore, it is better that it should be on the table, than that there should be pretence that there is only one opinion in the matter in order to uphold "the law" and to make sure "the law" is not undermined by dissenting opinions.

We are sophisticated enough as human beings to be able to live with a situation where there are different opinions about the law and we know that, in the nature of courts, there will be more conservative judges who will often not want to change what pre-exists. There will also be more liberal judges who will think, well, a little bit of change is a good thing. What about in civil cases, in civil disputes, not constitutional cases, can you have dissent there? I think my point is made. You have got to loosen up. And, above all, be more honest. It is a shocking thing for common lawyers when judges are not honest to the community they serve. Why do people not have a right to *know* the debates that would definitely go on in the civil courts in Taiwan? And know that there is a controversy here, which we have resolved by majority? Why do you demand that the minority pretend that they agree with the majority? To a common lawyer that is a shocking thing for a judge to have to do. Honesty and incorruptibility are the most important things that judges bring to the table in a courtroom. They are going to be honest to the litigants, who are the most important people. Also to the lawyers; to the legal community; and the academy; and to the citizens. Honesty is a very important element. I think, in this respect that the common law has it all over the civil law system which still bears the mark of the authoritarian features of Napoleon who was a military dictator. Let us not mince words about it. Napoleon said "When all of my battle honours are laid to rest and all of my conquests are forgotten I will be remembered by my Codes." That is true. That is what has happened. The Codes and the French system of government constitute a highly authoritarian system. The common law is, let a thousand flowers bloom. Another thing, perhaps Confucius came to England. Perhaps he said that to the English. "Let a thousand flowers bloom." To this, the English probably said "That is a good idea. Powerful man of virtue. So let a thousand flowers bloom."

Professor Jau-Yuan Hwang

Just a quick comment and question: when talking about judicial activism, you seem to imply or suggest that there is a strong link or relation between judicial activism and the common law tradition. If my understanding is correct, what would the relation of judicial activism with the civil law tradition be? Would you argue that judges in a civil law country should be given or granted the same rooms for judicial activism?

Honourable Michael Kirby AC CMG

They should have but they do not want it. I have spoken to judges of the *Conseil Constitutionnel* in France. I asked: “Do you want the right to dissent”? They said no. You see we are all the children of our legal systems. We all grow up with them. It is a bit like my attitude in Australia to the Queen. Rationally, I am a Republican. But emotionally, and looking at a governmental system that works pretty well, I do not want to change it. Now, some people will say, including many Australians, well that is ridiculous, that we should have the Queen of England as the Queen of Australia. But I say, well, it works all right. She comes when we invite her. She does not come when she is not invited. She does not cost us anything. She has always been faithful in performing her duties including to Australia. An absentee head of state is not a bad system. Therefore, I do not want to change it. Now, that is an example that teaches me that I must respect the judges of the French *Conseil Constitutionnel*. They had a new judge, a female judge, Judge Lenoir. Women are always much more willing to think outside the square. She was appointed a member. She tried to persuade them to adopt the right to dissent. Yet, this is in the Constitutional Council of France. They said no, it is not our system. We think it would undermine the authority of the Council. We think it will create ego-driven people who will be writing for “history”, writing for the academy. Just look at the fight between Justice Scalia and Justice Breyer in the United States. We do not want that. We like the anonymity of our system. It is much less ego-driven. True, it is a bit secretive. But that is alright. We do not want to oblige people to worry about these things. So they do not want to have the common law system. We are all the children of how we grew up, especially as lawyers. Lawyers, above all, tend to be very conservative about their basic institutions. They are willing to change things at the margins. But they rather like to have stable, basic institutions. That is why it is very unlikely that the civil law systems will change much, or that the common law systems will change much. Yet, at the boundaries, they will adopt aspects of the other system, such as in Japan.

It was General MacArthur who insisted that the post-war Japanese Constitution should provide for dissent in the Supreme Court of Japan. He suggested that this would produce a loosening, a freeing up of the law. It would allow debate which is instinctive to America. Although dissent came into operation, it is almost never used. This is because Japan is a country which is very respectful of tradition. It does not believe in letting it all hang out.

Justice Chang-fa Lo

Japan believes in that everything is under control and should be in order.

Honourable Michael Kirby AC CMG

Yes, that is just in their culture. It is in their tradition. But from what you tell me, it seems as though dissent might have taken hold here in the Constitutional Court of Taiwan. Maybe you have had a bigger continuing American influence in intellectual and cultural perspectives.

Justice Chang-fa Lo

It depends. Well, last question if there is any? Yes you will be the second last.

Questions:

I believe each person comes from different backgrounds of religion, childhood upbringing, or the education. Each person has his subjective approach to each question. So my question is, as a justice under the common law tradition, whether you intentionally made an effort to exclude the personal feelings, religious beliefs or some other personal factors from influencing your decision when you decided a case?

Honourable Michael Kirby AC CMG

Well, here I think the common law system facilitates being conscious of personal considerations because you have to give reasons. And the reasons are elaborated. If you have allowed illicit personal considerations to creep into decision-making, it is likely that you may betray or reflect that in your reasons. In that case I told you about the refugee boys, I revealed in my reasons that, if I could have agreed with the Family Court of Australia, I would have. Because I believe in international human rights laws. I believe

in the Universal principles of human rights, I believe in kindness to children. But I could not give way to these considerations in that case. So I was revealing all my attitudes. But I had to keep them under check. This was because the law required me to do something contrary to my conscience. So I think the secret is, every judge is a bundle of attitudes and philosophies and religion, and education. It will involve what your parents taught you; whether you have a happy lovely life and so on. Everybody is an individual human being. But the point is to be conscious of that. To keep it in check. To focus on the legal problem. This is not to forget your commitment to universal principles of human dignity and human rights. Still, I do think that the more discursive reasoning of the common law is more likely to flush out the kinds of irrelevant considerations. If that is so, then appellate courts will say, “Well that has to be decided again by somebody who does not have an immaterial bias one way or the other.”

Professor Yen-Tu Su

Maybe not a question, but a short comment, as I want to continue our dialogue, the common law versus civil law dialogue, by offering some of my observations about how people in Taiwan’s legal academia think of the dichotomy of judicial activism and strict constructionism. So, as you suggested in your presentation, judicial activism is a kind of curse word in your country. It is similar in the United States. Like Professor Hwang and Justice Lo, many of us here were educated in the U.S., so we are relatively familiar with that culture. In the U.S. system, judicial self-restraint is considered a virtue. We have a great book by Alexander Bickel calling for “the Passive Virtues,”¹⁶ praising the passive virtues of judges, whereas “judicial activism” is often used as a derogative term. Linda Greenhouse, a famous legal journalist in the U.S., started one of her essays by saying that “no one likes an activist judge.”¹⁷ But here in Taiwan, or in Japan or Germany—maybe it is a general observation about civil law countries—I think judicial activism is not a bad word. People like activist judges! They like the sense connoted by this word. But they do not like judicial self-restraint, for they think judicial self-restraint would be an abdication of judicial duty. A sitting Justice in our Constitutional Court, also a colleague of Justice Lo, when he was a famous law professor in Taiwan, was known for criticizing the Court for being “hyperactive.” Because saying the Court is active is not considered a criticism, he had to refer to the Court as

16. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

17. Linda Greenhouse, *Activists by Invitation*, N. Y. TIMES, (June 15, 2011), <http://opinionator.blogs.nytimes.com/2011/06/15/activists-by-invitation/>.

“hyperactive” to serve that kind of criticism. But still, I think, Justice Kirby, you are right in suggesting that there is indeed a great divide in these two legal traditions, because even in Taiwan, we also consider the judges as the mouth of the law. Even though they want to be activist judges, they seldom acknowledge that they are making laws.

Honourable Michael Kirby AC CMG

Well, first of all, I agree with your main point, which is that it is a culture-bound concept about whether judicial activism is a curse. For example in India, where the problems of society are enormous, probably the courts are the most respected institutions in that country. The Indian courts have on the whole had a pretty good history of constitutionalism. They have the biggest election in the world in India. It is all over in two or three days. They have military who do not interfere in politics. They have a good court system. Yet in India, judicial activism, at least in many circles (including legal circles) is not a curse; rather, it is a praise of the Indian Supreme Court. For example, Justice Bhagwati and Justice Krishna Iyer developed the so called epistolary jurisdiction.¹⁸ Anybody who sends a postcard to the court, at least theoretically, can activate the court. They have done this in an amazing number of cases, simply on receiving a letter, say, from a prisoner. So that what would be unacceptable in a country like Australia, is acceptable, though even in India now there is something of a backlash and the profession is mustering numbers now to say, that as India gets more prosperous, we need more stability in the law. We do not need these judges to go out on a white horse to solve every problem in society.

It may be that, in Germany, the idea of a bit of activism being acceptable comes from what happened to the judiciary during the Nazi period. At that time, the judiciary only once spoke up against Hitler. That was when Hitler moved to reduce judicial pensions. They never spoke up about all the shocking and wicked things that were done. They only became ‘activists’ when their own pensions were affected. Of course, Germany was *Rechtstaat* during the Nazi period. It was just that it had black holes where the law did not run. Every country reacts to this in accordance with its history and its culture and legal traditions. In India, by and large, a little bit of activism is thought to be a good thing. I think most people in Australia today would think that the *Mabo* decision about Aboriginal claims to land rights was a very good decision. It is significant that we had elected legislatures since 1850 and they had never corrected the denial of Aboriginal rights. The elected parliaments never corrected it. It was corrected by the highest court

18. Sunil Batra v. Delhi Administration, (1978) 4 SCC 409 (India).

in the land in an individual case. So, sometimes, a little bit of judicial activism is a good thing.

Justice Chang-fa Lo

Thank you so much. Although I enjoy sitting here to hear the discussions and lectures of Michael but we still have to stop at this point in order to continue our next scheduled meeting. To conclude our lecture by a sentence, that would be, we need more judicial activists in Taiwan. I would consider our judicial system to be full of judges who are conservative, too conservative in a lot of areas. Thank you so much for giving us a very inspiring lecture. Again I invite my colleagues to express another warm round of thanks to you Michael. Thank you so much.

REFERENCES

- Australia Communist Party v. The Commonwealth* (1951) 83 CLR 1, at 141. Constitution, 1900 (Austl.).
- Bickel, A. M. (1961). The Supreme Court, 1960 Term-Foreword: The Passive Virtues. *Harvard Law Review*, 75, 40-79.
- Constitution, 1901, (Austl.).
- Dietrich v. The Queen*, 177 CLR 292 (1992).
- G. A. Res. 44/25, ¶37(b), U.N. Doc. A/RES/44/25 (Nov. 20, 1989)
- Greenhouse, L. (2011, June 15). Activists by invitation. Retrieved from <http://opinionator.blogs.nytimes.com/2011/06/15/activists-by-invitation/>
- Gideon v. Wainwright*, 372 U.S. 335 (1963).
- Kirby, M. D. (2004). *Judicial activism : authority, principle and policy in the judicial method*. London: Sweet & Maxwell.
- Mabo v. Queensland [No.2]*, 175 CLR 1(1992).
- The Hon. Justice Michael Kirby AC CMG (2005). “Judicial Activism?” – A Riposte to the Counter-Reformation. *Otago Law Review*, 11(1), 1-17.
- Migration Act 1958* (Cth) s 42, 189 (Austl.).
- Sunil Batra v. Delhi Administration*, (1978) 4 SCC 409 (India).
- Swearing in of Sir Owen Dixon as Chief Justice (1952) 85 CLR 11, at 14. (Austl.).
- UN General Assembly, Convention Relating to the Status of Refugees, July 28 1951, 189 U. N. T. S. 150.
- UN General Assembly, Protocol Relating to the Status of Refugees, Dec. 16 1966, 606 U. N. T. S. 267.

司法積極主義與嚴格建構主義

Honourable Michael Kirby AC CMG

摘 要

司法積極主義與嚴格建構主義之間的辯論是憲法理論與實踐的相關議題中最為重要者之一。國立台灣大學法律學院非常榮幸邀請到 Michael Kirby 法官參與本次圓桌論壇，並分享其對於積極主義與建構主義的二分法之洞見。基於他擔任澳洲最高法院法官的經驗，Kirby 法官詳盡闡述並質疑普通法傳統中司法積極主義與嚴格建構主義的本旨，並且將其與大陸法傳統相互比較。在回答羅昌發大法官與其他參與者的評論與問題時，Kirby 法官並且更進一步解釋積極主義與建構主義的概念，並聚焦於其如何在不同社會與文化脈絡下的國家發生效用之上。

關鍵詞：司法積極主義、嚴格建構主義、憲法解釋