

# Judicial method: activism vs formalism

Sociology



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'Judicial Method: activism versus formalism' A new era has emerged from the societal and legal changes that have occurred in Australia. The age of Judicial activism has taken over the more traditional method of judicial formalism. Supporters of the latter's concerns that it promotes power without responsibility, and blurs the separation of powers, however the supporters of the former agree that inevitable changes in society force the judiciary to acknowledge that judicial formalism is a method that is not completely obsolete, but takes is less of a primary concern as it were, compared to other factors that effect a case.

Those who are in favour of judicial activism argue that social change has increased the need for legal change and judges need to be able to make decisions considering external factors and using processes other than the law that make judicial method more subjective, adhering to legislation and legal policy but giving more significant acknowledgement to situational factors. The Honourable Michael Kirby's pro-activism article centers around the view that judicial method must divert from the traditional method of legalism that Justice Kirby defines as " strict logic and high technique".

It starts by outlining the need for the judiciary to make this transition into judicial activism due to societal changes, where strict legalism is put under pressure. Justice Kirby then goes on to explain that the method of judicial activism should not be abused by the judges, where it should " be anchored in legal authority" and be " neither wholly mechanical or excessively creative". He describes that " restraint" be used when using judicial activism to ensure that a total ignorance of the written law does not occur .

A similar article about pro-activism by Michael Coper agrees that the “phenomenon of social change... has accelerated the rate of legal change” and put a “pressure on concepts like ‘strict logic and high technique’, thus supporting the viewpoint that judicial activism is a reaction to social change. Another article by Frank Carrigan praises Justice Kirby’s use of judicial activism directly, outlining this by comparing Justice Kirby’s methods with Gava, a strong believer in the Dixonian theory of legalism.

It explains that even Chief Justice Dixon J, considered to be a leader in the legal formalism movement, used contradictory methods of judgment, promoting legalism but applying judicial activism. This is evidence that change to judicial activism is inevitable as societal changes occur. Pertaining to the other articles, however, there are some shortfalls in Justice Kirby’s article that must be addressed. Firstly, the article does outline that certain “restraint” must be used when applying judicial activism in the process for a judgment.

However, exactly how this restraint will be measured, or the factors to be considered in which a judge’s judicial method is considered to cross these boundaries are not mentioned in his article. He also fails to describe the consequences of the divergence of judicial formalism, that a failure of the independent judges to keep external factors other than the legal text as impartial dynamics rather than personal ones would result in a cataclysmic failure to achieve justice. A loss in consistency would result in a loss in public confidence in the judicial system.

Also, Justice Kirby's proposal of a more transparent judgment, where the judicial method and processes used to achieve a judgment is open to the general public for critique, may be a technique in which to make sure that a judge does not overstep the restraints, but by openly presenting the judicial method and decision process of a controversial judgment for critique to a society that is already critical of the judicial system may backfire and result in a further loss of public confidence instead of building credibility.

Contrasting against Justice Kirby's heavily biased pro-activism article, is Justice Heydon's article that describes the absolute need for adherence and paramount importance to the impartial application of the legal text. Justice Heydon's article clearly outlines what Justice Kirby's article does not, the downfalls of having a judiciary use judicial activism. Justice Heydon points out that by allowing judges to use judicial activism, it "tends to the destruction of the rule of law" by impairing two qualities that are expected of a judge, a "firm grip on the applicable law [and]...total probity. The article continues to state that there is a blurring of the separation of powers, and this becomes a problem as the facility for a legislature to make laws compared to that of a judge results in concerns about the clarity, inconsistency, decisiveness and retrospectivity of the laws that are changed or made by the judiciary. Justice Heydon proposes that it is not primarily the function of the judiciary to create and change laws, that it should be a limited amount, limited to the legislature, and that the failure to adhere to judicial formalism or legalism would result in failures in various areas of the application of law .

John Gava's article adds to the need for strict legalism, by indicating that human error in judges can create issues in consistency, and that with a "state of mind" the is of legalism, a more "institutional mindset" can be achieved that relies more on a collective wisdom which create decision that conform, rather than those that are more individualized when judicial activism is applied .

Owen Dixon's article further outlines a deeper issue at hand with the abandonment of judicial formalism, the loss of the ability to develop legal principle. It states that there was a "attempt to develop the law as ascience" which would not be possible by neglecting the very "strict logic and high technique" that is constantly used to describe legalism . As with any legalistic paradigm or state of mind, it is inherent that there will be a pro to a con, an advantage to a disadvantage.

According to these articles it is clear that the more common emergence of activism is due mainly to societal change, and the resurrection of formalism has occurred due to concern for the drawbacks that takes place with activism, and rightly so. The former three pro-activism articles and the latter three pro-legalism/formalism articles compliment each other in revealing the advantages and flaws of both judicial methods.

After the analyses of these articles, it is apparent that an appropriate balance between the two judicial methods be maintained, always changing, according to the change in Australia's society. Bibliography Justice j D Heydon, Judicial activism and the death of the rule of law, (2003), 23 Aust Bar Rev 110 John Gava, ANOTHER BLAST FROM THE PAST OR WHY THE LEFT

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