

Original Paper

Legal Coherence and Judicial Activism in Australia

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Abstract

The principle of legal coherence and the role of judicial activism are active but controversial topics in in Australian common law. Usually, the application of the principle of legal coherence lead to a different award compared to judicial activism. Both of them have contradiction and restrict mutually, which have their own implications but safeguard the judicial system to develop cautiously. So I would like to discuss the benefits and limitations of application of legal coherence and judicial activism by examples of HCA cases.

Keywords

legal coherence, judicial activism, Australian common law

1. Introduction

The principle of legal coherence and the role of judicial activism are active but controversial topics in in Australian common law. Undoubtfully, they are so important that they can be relied on by the High Court in statutory and constitutional interpretation; they even could be the important reference or basis of the judgements. Especially, the importance of principle of legal coherence is not only acknowledged within common law, but also could be found between statute law and common law. Generally, legal coherence seemed to stand on the opposite side of judicial activism because they will lead to the different result in the same case with totally contrary reasons.

Compared with the notion of consistency in the law, as to my understanding, legal coherence seemed to set higher standard for the judges. Usually the legal reasoning of the case should include both explanation of this case and comparison of the differences between two cases. Therefore, some criticisms are due to over-emphasis on the strict compliance of legal coherence, which limited the judge's judgement and lost the benefits of common law.

This article is intended to discuss the benefits and limitations of application of legal coherence and judicial activism by examples of HCA cases. So I will introduce overview of the principle of legal

coherence and activism briefly in second part. The third part will focus on the application of coherence and judicial activism of laws and cases. Further, I try to analyze limitations and benefits of application from the cases. In the Part IV, I will try to discuss the future development trend of the principle of legal coherence and judicial activism in Australian common law and provide my recommendations.

2. Background

The “legal system” consists of the laws, the proceeding of making laws and enforcement. Australian common law system was developed from the England, because Australia was a Britain colony for a long time after 1770. So both of two countries’ legal system have many similarities. The common law system came since the establishment of Kings Courts from 11th century in England, which is earlier than the formation of parliamentary system indeed.

At the very beginning, the court solved the problem relying on the local customs. Although common law has been developed for many years and statute law has come to the main source of Australian law, principle of precedent is always the key of the common law system and common law is preferable in conflicts. Namely, lower courts are binding by the decision of higher courts in the same issue, especially the judgements from the High Court of Australia. High Court of Australia was established in 1903. The High Court of Australia was to have two principal functions: to resolve disputes as to the meaning of the Constitution and to decide appeals from State Supreme Courts and other Federal Courts. Appeals to the Privy council from the HCA stopped long before 1986. There is now a single common law of Australia, ultimately determined by the High Court. So the judgements from the High Court do have meaning for the development of Australian common law.

3. Legal Coherence

Indeed, coherence theories come from philosophy, which is supposed to have special relevance in the legal realm. Gradually, it have been noted that principle of precedent seemed to be illuminated via some kind of coherence explanation. In a practical sense, it was considered as the most significant principle in statutory interpretation by the judge.

The legal coherence reflected in virtue of indication of common value or fulfilling common principle in similar cases. Basically, we would like to conclude that the principle of legal coherence is closely linked to the principle of precedent, or both of principles have something in common.

On the other hand, legal coherence is also relevant to interaction between common law and statue law, which constitute Australian common law system. And in this area, the definition or specific clarification of coherence seemed to so more necessary that the separate part could be more cohesive in the whole system. However, the meaning of concept of coherence is yet to be fully articulated.

For instance, in *Miller v Miller*, the judge stated that when deciding on whether the illegal conduct of the plaintiff constitute tort, the principles applied in relation to the tort of negligence must be congruent with those applied in other areas of the civil law (most notably contract and trusts). But the method they given is to pay careful attention to identify the purpose of statute, it seemed to be one-sided. What we expected are more comprehensive clarification of nature of this inconsistency.

With potential expansion of the applications of the principles of negligence and unjust enrichment, the possibilities of appearance of overlap and contradiction have been highlighted within the common law. In this circumstance, courts rely on various “second-order” principles such as principle of legal coherence, try to prevent such conflicts between norms of different categories.

On the contrary, some critics the requirements of application of legal coherence limit the development of judiciary, which has deviated from initial purpose and conservative.

In particular, some legal scholars seemed to support international coherence or appeal to set up overall system of law, which won't be discussed in this article. In my view, in this step, it is hard to achieve and many complicated relationship need to be clarified.

The insistent of applying of legal coherence is necessary because it will bring stability to judiciary, which make judiciary more reliable, traceable and foreseeable. In fact, the advantages of common law is flexibility which resulted to some areas of law lack certainties as well, but generally, in most fields it is reasonably ascertainable.

4. Judicial Activism

The phrase judicial activism appears to have been coined by the American historian Arthur M. Schlesinger, Jr., in a 1947 article in *Fortune* at the first time. Generally, judicial activism is view as function of judiciary beyond constitutional structures and historical role, which seemed to challenge the role of the government or legislature. In other way, the judiciary show their ambition in play a more important role on the political issues or administrative substantial and merits part.

An opposite concept of judicial activism is judicial restraint. On several cases concerning government acts, people advocating judicial activism may claim to use power of judicial review to withdraw related behavior, which was described as an unprovoked invasion. However, the supporters of judicial restraint may advocate political issues should be solved by democratic politics, unless constitutional limits have explicitly been violated.

Heydon J., who was a judge in High Court of Australia, was criticizing judicial activism has created threat to the rule of law publicly. Activist judges and their defenders, who were usually called “activists” or “imperial”, are in favor of using judicial power in some specifically political, moral or social cases to lead novel change of existing law. And judicial activism seemed to rely on the judge's untrammelled discretionary power instead of objective existence of rule of law.

For a long time, the function of judiciary was thought to dilute and diffuse administrative power. Sir Owen Dixon stated that court's sole function is to interpret a constitutional description of power or restraint upon power in his speech at his swearing in as Chief Justice in 1952, which has been emphasis added. Moreover, he emphasized the line between law and politic so that a strict and complete legalism should be taken as a guide.

However, there are many influential judges choosing to stand for the point of judicial activism. They claimed law-making is part of the judicial function and the judges are law-makers. The function of law made itself have to adjust to changing of the times and circumstances. They considered the success of the common law system is because it has the capacity to stand still at the very time that it finds the momentum to move forward.

Even Dixon J, who has been considered as a form supporter representative of 'strict legalism'. In the Australian Communist Party Case, in the leading and the majorities' judgement, he stated that judiciary should not be used to provide protection for government to suppress opponent or obstruction. Hence, judicial activism or judicial restraint is not always playing stubborn role of unwarranted intrusion.

The question of judicial activism was used to discuss separation of powers in the final. Namely, what respective role does executive, legislative and judicial play, how to tread the razor's edge in the specific circumstances and how the judges use their knowledge and intelligent to create frameworks and set principles.

5. Cases

5.1 *Miller v Miller*

Miller v Miller is regarded as a classic case, which indicated the application of principle of legal coherence in the High Court of Australia's decision-making. The appellant of the case, Danelle Miller, then aged 16 years, stole a car after drinking. At first, she asked her older sister (Narelle) to drive the stolen car to take them home. Danelle Miller was aware that Narelle had been drinking and unlicensed. The respondent, Maurin Miller, who is a cousin of Danelle's mother, was at a cab near the car park. He took over the stolen car and some of his friends also entered the car.

At first, everything is normal, but soon after driving safely, he began to speed and to drive through red lights. Danelle asked Maurin twice to stop to let her out of the car. Afterwards, the car struck a pole resulted in the death of passenger and tetraplegia of Danelle.

The key issue of *Miller v Miller* is whether Danelle Miller can recover damages for negligence from Maurin, at the circumstance of combination of both her theft and her use of the car. Namely, although Danelle had stolen the car and used it, which means she was engaging in a joint illegal enterprise of illegally, whether another party who joined the illegal enterprise of illegally owe Danelle a duty of care. The judges have to consider two complicated relationships at least. Firstly, the application of the tort of

negligence in this case need to be coherent with tort of negligence in other areas of law (especially contract and trusts). Secondly, according to s 371A of The Criminal Code (WA) (“the Code”), taking or using a motor vehicle without the consent of the owner or person in charge of the vehicle is an offence. Therefore. The question is: if the court allowed the appellant recover the damages from the negligence in implementing illegal acts, incoherence would come to appear between the statute law and common law.

As a result, the judges advocated to pay more attention on the purposes of that statute law in analyzing the present case in order to seek consistency between statute and common law. The purpose of the statute proscribing dangerous driving is to deter and punish using a vehicle in circumstances that often lead to reckless and dangerous driving.

That is to say, once the circumstance of offender can be proved not to be consistent with the statutory purpose of the law (371A of the Code), the conflict of incoherence between statute and common law could be eliminated.

In the line of criminal law, withdrawal from a joint illegal venture can remove liability for complicity. Hence, respondent would admit that he did owe appellant a duty of care when the appellant was regarded withdrawal from a joint illegal venture. Judges agreed with the above proceeding of legal reasoning so the final debate has become the twice requirement of stop from the appellant constituted all the reasonable steps to prevent the commission of crime. At last, most judges held the view that the appellant has withdrawn from her illegal use of the vehicle by requesting to be let out of the car on two occasions, so the respondent owed a passenger who was not then complicit in the crime which he was then committing a duty to take reasonable care.

5.2 Australian Communist Party Case

Australian Communist Party Case is recognized as one of the Court’s most significant judgements, and a celebrated victory for the rule of law, and judicial review of legislative actions, and meaningful case touched the key of judicial activism.

On 19 October 1950, the *Communist Party Dissolution Act 1950* (Cth) was passed by the Australian Parliament, at the behest of Robert Menzies’ Liberal-Country Party coalition government. The purpose of the Act was to dissolve the Australian Communist Party, and to confiscate all its property. The Act was received the Royal Assent from the Governor-General, and entered into law on 20 October 1950. The Act has caused great social controversy and extensive discussion. The High Court of Australia has struck down the Communist Party Dissolution Act by a 6:1 majority (Latham dissenting).

In this case, the High Court of Australia raised two issues: whether the validity of the Act depended only on the truth of the “facts” asserted in the preamble, and whether evidence could be adduced by both parties to prove or disprove these “facts”.

In Australia's system of government, law-making is constrained by the Constitution, and only the Constitution has the power to determine which area can Parliament make laws. For this reason, the defense power and nationhood power, which are stated in the Constitution, were mostly like to be origin of power of law-making for Parliament. Hence, if the power of law-making by Parliament is not from these "heads of power", the law is invalid.

Despite the whole society is skeptical of communism at that time and the government which led by Robert Menzies' Liberal-Country Party, the Act received a lot of opposite voice from the lawyers and journalism.

Latham CJ, who is the only judge held the dissent, stated that the Act was supported by the defence power in s 51 (vi). Also, he highlighted the importance of the defence of the Commonwealth.

Even Dixon J, who was regarded as a firm advocate of strict legalism, made a judgment that seemed completely contrary to this concept. He asserted that the Act lacked objective criteria and exaggerated the current situation in Australia deliberately. He also stated that constitutional powers should be governed by constitutional limitations and the rule of law. The role Parliament played in the law-making has exceeded the boundary defined by Constitution. Under these circumstances, the judiciary should exercise the power to decide whether exercise of powers of Parliament is under limit instead of keeping silence.

on the other hand, once the society or the court itself considered judiciary has the final word on the question whether legislation is within power, the boundary between relative power of Parliament and the judiciary won't be vogue any more.

Indeed, the High Court of Australia adhered to the principle of legality to refuse to classify the Act of 1950 as within the federal constitutional heads of power, which spared Australia from taking path of colonialism and racism and protecting rights and liberties.

5.3 Australian Capital Television Pty Ltd v Commonwealth

Australian Capital Television Pty Ltd v Commonwealth was considered as the earliest in a series of cases in which the High Court found implied rights in the Constitution. In 1992, the High Court struck down the Political Broadcasts and Political Disclosures Act 1991. The reason for decision is that the High Court considered the *Political Broadcasts and Political Disclosures Act 1991 (Cth)* infringed the implied right to freedom of political communication of the Constitution.

In 1992, the government of Australia ("the Commonwealth") under Prime Minister Bob Hawke passed the *Political Broadcasts and Political Disclosures Act 1991* in order to regulate the political advertising on the social media. The broadcasters are forbidden to provide the free time to political parties to air advertisements.

The Commonwealth stated that the aim of the law was to prevent corruption and give the party opportunity to social media, who did not have lots of money and power. According to sections 10, 29,

31, 51(36) and 51(39) of the Constitution, the Parliament has the power to protect the integrity of the electoral process. Moreover, the Commonwealth highlighted that the implied right to freedom of political communication cannot override valid legislation.

The court asserted that, compared to the countries which has the Charter of Rights and Freedoms or the First Amendment to the United States Constitution, the system of representative government in Australia has gave all voters an equal share in political power. So the restriction of right to freedom of political communication is the breach of the Constitution.

The recognition of the implied freedom of political communication by the High Court is typical case as the practice of judicial activism. Because the establishment of explanation of implied right the Constitution has beyond the literalism. Namely, judges found the way to play the role of law-makers.

The case *Theophanous v Herald & Weekly Times Ltd* gone the furthest in this way. The judgement held that implied freedom of the Constitution included the right to publish material discussing government and political matters. Hence, the performance of this kind of right form a defense to defamation.

However, three years later, Mason CJ and Deane J retired from the High Court, and Gummow J. and Kirby J. had been appointed, the court overturned its earlier decisions in *Lange v Australian Broadcasting Corporation*, the court held that no direct right to free speech could form a defense to defamation.

The HCA said the implied right derived from the common law and not the Constitution. It was not absolute either as it must conform with the Constitution. The court expressed that the implied freedom of communication in Constitution was not absolute. It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution. Similarly, in *Cunliffe v The Commonwealth*, the court stated that the implication is negative in nature. And its aim is to limit executive and legislative power. Under this understanding, judges suggested to use proportionality to test whether the law is reasonably appropriate and adapted to the fulfilment of a legitimate purpose. In 2015, in *McCloy v NSW*, High Court revised the test of whether the law in question impinges on the implied freedom of political communication through a three-step test.

From the proceeding, we can find that the judges keep modified and weighted the argument and try to seek the rules. But whatever the decision was supported by the citizens, we have to admit that the discussion about the scope of law-making for debatable judicial value judgements, at least highly discretionary.

6. Discussion

At first , the consistency is a feature or advantage of common law. The doctrine of precedent provides stability and consistency in the legal system. So the compliance of principle of legal coherence in cases is undoubtful and naturally. Especially in legally and socially conservative Australia, the challenge on

precedents is considered as serious and strict for a long time. Flexibility, which is considered as another feature or advantage, provided the authority for the amendment and law reform. Hence, compared to the coherence, judicial activism is always controversial or unpopular. Because the judicial activism seemed to expand the scope of judicial interpretation, appearing in emphasizing the function of judges and limit the power of making laws of Parliament.

In summary, it is significant to insist the principle of legal coherence. At first, with the continuous improvement of statute law and common law, the whole legal system needs to eliminate conflicts in order to reduce the difficulty of applying the law. Whatever the statute law or common law, the applicable materials only more and more, so the judges need to take more considerations. If there is a conflict between the common law and the statute, or if there is a conflict between the case and the case, the judgement will be questioned and uncertain.

Secondly, stable law system is more trustworthy and maintain deterrence for illegal behavior. Rules are respected because it does not change because of the will of the governor or the judge.

Thirdly, the application of legal coherence reflects the most basic principle of fairness in law. Like I mentioned before, if the law could be changed easily, the different judgements on the same thing are unfair to the party who received the unfavorable judgement.

However, we find that, to some extent, the over insist on legal coherence limited the thinking of judges and lose flexibility. On the other hand, the emphasis the legal coherence may lead to the incompatibleness between judgements and the current social conditions, especially in some new cases with scientific and technical factors.

The law moves and changes and does not stand still. And the capacity of common law to adjust to radically changing circumstances is the very essence of its genius. Hence, under the best assumption, judicial activism should be a supplement to legal coherence. But, especially in conservative Australia, it is a very common thing to describe the case of overthrowing precedent as bad judicial activism. There was an especially potent cause of the apparent judicial passivity in Australia. The High Court has to repeatedly demonstrate rationality and necessity of the judgement if they made the opposite judgement. Because they don't have capacity to bring the legal change, which can only come from binding decisions.

In my view, any debate about judicial activism will infer to two issues finally. The first one is the function of judges and judiciary. The second one is the boundaries of executive, legislative and judicial. A lot of people questioned about that whether the power of judicial interpretation belongs to the judges. The judge stated that they are law-makers and law-making is part of the judicial function. In addition, even in different democracy institutions, the power of executive and the head of government enlarged. And they seek to govern and manage the country by making laws as well. Under this situation, some judges know that they will be criticized, but still make a respectable judgment. For example, in several

cases concerning implied freedom of political communication mentioned above, completely reversing the situation and protecting freedom of speech. Rather than saying that this is the judge's maintenance of rights, it is better to say that this is the maintenance of the system.

True conservatives uphold their institutions as they are. In my opinion, common law itself has already created framework within which the creative aspects of judges can thrive. The potential function of law is to channel destructive energies into orderly courses. So the judges should reconsider the basic and fundamental function of law, and make the fairness and justice to be realized case by case rather than exaggerating the superiority of any one principle.

7. Conclusion

Generally, whatever a judge is considered progressive or conservative, he or she emphasizes the legal coherence and respect for precedent for sure. These cases which appealed in the High Court possibly have several disputes to be solved. Different cases have their own backgrounds and particular problems. Compared to application of any principles, techniques of reasoning are the promise to let the Australia common law to keep orthodox.

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