

**FIRST M.K. NAMBYAR ENDOWMENT
LECTURE 2013
ON
THE NECESSITIES AND LIMITATIONS OF JUDICIAL ACTIVISM
DELIVERED BY
THE HON. MICHAEL KIRBY AC CMG***

I. M.K. NAMBYAR REMEMBERED

This inaugural lecture, to honour the memory of Sri Meloth Krishnan Nambyar, is supported by a benefaction of his son, Senior Advocate K.K. Venugopal. In the high traditions of the Bar, father and son have contributed to the rule of law and legal education in India. The common law system, which is a feature of the law of India, depends upon a strong judiciary, a vibrant Bar and excellent institutions of teaching and scholarship in the law.

M.K. Nambyar was born in Chenmanad, in the State of Kerala. He was trained in the law at the Madras Law College and admitted to the Bar in Mangalore in 1924.

In 1931, he travelled to England to appear with the learned King's Counsel in family litigation heard before the Privy Council, then the highest court of the Indian Empire. His side won the appeal. The young advocate stayed in England to pursue studies at the University of London. There he took a master of laws degree in constitutional and international law. In 1933, he was called to the English Bar by Middle Temple.

* Justice of the High Court of Australia (1996-2009); President of the New South Wales Court of Appeal (1984-96); Judge of the Federal Court of Australia (1983-4); Deputy President, Australian Conciliation and Arbitration Commission (1975-83); Hon. LLD (NLSIU, Bangalore, 1997). The M.K. Nambyar Endowment Lecture was instituted by Mr. K.K. Venugopal, Senior Advocate, Supreme Court of India. The first lecture under this endowment was held at the W.B. National University of Juridical Sciences, Kolkata on the 6th of April, 2013.

M.K. Nambyar returned to India and for a time served as public prosecutor at the Bar in Mangalore. By 1947, he had shifted to the Madras High Court and seized the challenges afforded by the heady days of Indian Independence and by the opportunities presented by the adoption of the new republican Constitution.

Soon after, he appeared before the Supreme Court of India in the case of *A.K. Gopalan v The State of Madras*¹ before the new Supreme Court. It helped him to make his mark. The submissions which he presented, in favour of an expansive interpretation for Article 21 of the Indian Constitution, did not immediately find favour. However, later they were to be vindicated in the subsequent reasoning of the Supreme Court.

M.K. Nambyar appeared in many leading decisions involving important constitutional questions, including the *Kerala Agrarian Reforms* case, *The Kerala Education Bill* case, the *Express Newspapers* case, the *Bank Nationalisation* case, the *Privy Purses* case and the *Bennett & Coleman* case. When he died, on 18 December 1975, tributes were paid to him by judges and colleagues at the Bar of the Supreme Court. He was lauded for his scholarly approach to advocacy; the intensity and industry of his preparation; and his determination to go to the roots of a legal problem and to the legal doctrine relevant to it. We do well to remember and honour his memory. His son, K.K. Venugopal is likewise a leader of the Bar. He was appointed a Senior Advocate in 1972. In 1979 he had been designated an Additional Solicitor-General of India. In 2002, he was named Padma Bhushan by the President of India.

In the common law system, advocates play a vital role in the expansion and expression of legal principles. They choose the test cases. They select, and carefully craft, potentially winning arguments. They persuade judges to their cause. They often play a role in legal

¹ 1950 (1) SCR 88; GLANVILLE AUSTIN WORKING A DEMOCRATIC CONSTITUTION—THE INDIAN EXPERIENCE 58 (2001) (The story is told in greater detail in K.K. Venugopal, *Separation of Powers: Drawing the Dividing Line* in CONSTITUTIONALISM AND CONSTITUTIONAL PLURALISM 89,98 (P Ishwara Bhat ed., 2013)).

education. They mentor and support young lawyers who are coming up behind them. I thank and praise Senior Advocate Venugopal for his generosity in establishing this lecture. It may be hoped that many others will follow to present the lecture and to speak on the themes important to the honour and the achievement of the rule of law; the support for independent and uncorrupted courts and advocates; and the development of the principles of law and justice so as to serve the people of India who rely on, and trust, the legal system for its integrity. Although, necessarily, I must speak from the background of a life at the Bar and on the Bench in Australia, my themes will be familiar. This is because India, Australia, and many other lands, share with the United Kingdom the high traditions of a common law legal system and a democratic parliamentary tradition.

II. JUDICIAL ACTIVISM AND THE EYE OF THE BEHOLDER

Although many aspects of the topic of judicial activism are contested and although different attitudes exist towards judicial activism in different places and over time, of one characteristic there is agreement. Judicial activism is a hotly contested notion or concept.² There is no universal agreement about what judicial activism means.

It is probably fair to say (certainly in recent times) that the phrase ‘judicial activism’ has taken on a pejorative, or negative, connotation in most western countries. There, as Professor James Allan recently asserted:³

“At its heart, the label ‘judicial activism’ suggests some degree of illegitimacy. The core charge is that the judges have exceeded their proper role in a democracy. They have moved from the many grey areas, or penumbras of doubt, including in interpreting the laid-down statutes and constitutional provisions (where disagreement and diverging answers are only to be expected from individual judges who bring differing values,

² James Allan, *The three ‘RS’ of Recent Australian Judicial Activism: Roach, Rowe and (no) “Riginalism”*, 36 MELBOURNE UNIV. L. REV., 743,744 (2012).

³ *Id.*, at 777.

concerns, emphases and intellectual abilities to the task) into something that no longer looks like interpretation. It looks more like legislating from the Bench, otherwise described as point-of-application judges, imposing their own first-order moral and political preferences, judgements and sentiments on all the rest of us.”

This attitude towards judicial activism is by no means universal. In many countries of the world, including the common law world, individuals, lawyers and judges know that they must rely, in part at least, upon the judiciary to update, adapt and reform old principles because the other institutions of law-making are distracted, overwhelmed, inefficient and sometimes corrupted. That is why, in such jurisdictions, the notion of judicial activism is far from universally negative. On the contrary, it represents the provision of the healing balm of judicial attention that everyone knows is essential to a beneficial exposition of the law and to a useful and just application of its rules in the particular case in hand.

If a country has a well-functioning legislature and a truly attentive democracy, efficient public servants and well tuned law reform bodies and advisers, there is less need to rely on the judiciary for reform and modernisation of the law than in a country where the institutions of law making are less efficient, prone to log-jams, frozen in inactivity, weighed down by nepotism or influence and delayed by the crushing accumulation of problems awaiting the judges’ attention.

Accordingly, it is essential at the outset of this lecture, to accept the cultural features of attitudes towards ‘judicial activism’ when considering the notion when it is addressed in a country such as India, for example, and in another country such as Australia or the United Kingdom. It would not be surprising that different attitudes should prevail in different jurisdictions. Indeed, this point was made powerfully by Lord Bingham of Cornhill, then Senior Law Lord, when delivering his Maccabean Lecture on *The Judges: Active or Passive*.⁴

⁴ Lord [Thomas] Bingham of Cornhill, *The Judges: Active or Passive?*, MACCABEAN LECTURE (British Academy, London, 2005).

In his lecture, after describing what he called the “traditionalist view of the judicial role”, as held in countries such as the United Kingdom and Australia,⁵ Lord Bingham turned to contrast this notion to the position prevailing elsewhere:⁶

“[J]udicial activism is not everywhere regarded as something to be deprecated. In Ireland, the judges have been thought over the last 30 years or so to have been ‘notably activist’⁷ but much of their work has been judged to be beneficial.⁸ The same is true of South Africa.⁹ In India, the activism of the Supreme Court has been said, with reason, to make it the most powerful apex court in the world”¹⁰

Lord Bingham referred, in this regard, to the text *Judicial Activism in India*,¹¹ written by S.P. Sathe. By reference to this book, he described the ways in which the healing balm had been provided in India:

- By a creative interpretation of the Indian Constitution;¹²
- By relaxing the rules on *Locus Standi*;¹³
- By expanding the bounds of justiciability in relation to public interest litigation so as to investigate a wide and diverse range of complaints into questionable public activities;¹⁴

⁵ *Id.*, at 2.

⁶ *Id.*, at 19.

⁷ D. GWYNN MORGAN, A JUDGMENT TOO FAR? JUDICIAL ACTIVISM AND THE CONSTITUTION 104 (2001).

⁸ *Id.*, at 105-106.

⁹ See generally D. DYZENHAUS, HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY (1991).

¹⁰ S.P. SATHE, JUDICIAL ACTIVISM IN INDIA 3 (2002).

¹¹ In decisions such as *Kesavananda Bharati v Kerala*, A.I.R. 1973 S.C. 1461; *S.R. Bommai v Union of India*, A.I.R. 1994 S.C. 1918; *SC Advocates On-Record Association v Union of India*, A.I.R. 1994 S.C. 268; and in *Re Presidential Reference*, A.I.R. 1999 S.C. 1.

¹² Sathe, *supra* note 10, at 17, 107, 201, 208.

¹³ Sathe, *supra* note 10, at 209, 229, 246.

¹⁴ Sathe, *supra* note 10, at 203, 208.

- By developing new and unique forms of procedure;¹⁵ and
- By giving administrative directions, having the effect of legislation on a wide range of matters.

Although Professor Sathe concluded that the Supreme Court of India had “transcended the limits of the judicial functions that really belonged to either the legislature or the executive”, he wrote:¹⁶

“Admitting all these aspects, it is acknowledged that judicial activism is welcomed not only by individuals and social activists who take recourse to it but also by governments, political parties, civil servants, constitutional authorities such as the President, the election commission, the National Human Rights Commission, statutory authorities including the tribunals, commissions or regulatory bodies, and other political players. None among the political players have protested against judicial intrusion into matters essentially belonging to the executive.”

Of course, there have been important voices for moderation.¹⁷ And also criticism in particular cases, including from distinguished former judges of the Supreme Court of India.¹⁸ As well, there have been undoubted cases of judicial activism in India, where the activism was in the nature of passive acquiescence in measures taken by the government during the 1975 Emergency.¹⁹ Nevertheless, Lord Bingham appears willing to concur with Professor Sathe that, in India:

¹⁵ Sathe, *supra* note 10, at 251.

¹⁶ Sathe *supra* note 10, at 251.

¹⁷ E.g., T.R. ANDHYARUJINA, THE KESARANANDA BHARATI CASE – THE UNTOLD STORY OF STRUGGLE FOR SUPREMACY BY SUPREME COURT AND PARLIAMENT 127-8 (2011); T.R. Andhyarujina, H.M. Seervai – *A Man of Character, Courage and Commitment* in H.M. SEERVAI – DOYEN OF INDIAN CONSTITUTIONAL LAW 50,69 (2008); see also F.S. NARIMAN, THE STATE OF THE NATION 143-146 (2013).

¹⁸ E.g., R.R. Iyer, *Linking of Rivers: Judicial Activism or Error?*, 31 THE INDIAN ADVOCATE 33,37 (2003).

¹⁹ V.R. Krishna Iyer, *Judiciary: A Reform Agenda* in CONSTITUTIONAL MISCELLANY 278 (2nd ed., 2003) (Criticising the Second Judges Case as “A mighty seizure of power

“The people have reposed greater faith in judges than in politicians²⁰ and have come to regard judges as better guardians of people’s rights than the representative legislature.”²¹

I would not be so presumptuous as to speak, in any detail, about ‘judicial activism’ in India. The problems facing Indian society, its economy and the law are so enormous that one can only have admiration for the strong respect and trust that the Supreme Court has won for itself in the institutions of this democratic nation. As a matter of general principle, I can simply agree with Lord Bingham in the observations that I have quoted. In many ways, the Indian judges have thrown off the shackles of earlier English attitudes to legal questions.²² However appropriate those shackles may have been to the United Kingdom at the time of their devising, mostly in the nineteenth century, many of them are neither appropriate nor just in their operation today, whether in India, Australia or even in the United Kingdom. A good instance is the law on *locus standi*, justiciability and costs in public interest litigation.²³ By opening the doors of the courts, and making access to justice more readily available to ordinary people, the Supreme Court of India has given a lead to judges throughout the common law world which I, at least, was always willing to follow.

Instead of impertinently commenting on the Indian scene, I want to illustrate my response to the issue of ‘judicial activism’ by reference to three cases in Australia. In two of them, I participated judicially. The cases illustrate some general propositions concerning

[which] wrested authority to appoint judges from the top Executive to themselves by a stroke of adjudicatory self-enthronement.”); Citing V. Venkatesan, *Judiciary: a Flawed Mechanism*, 20(11) FRONTLINE (2003).

²⁰ Sathe *supra* note 10, at 101 (The Supreme Court’s decision in *ADM Jabalpur v S. Shukla*, A.I.R. 1976 S.C. 1207, one of the *Fundamental Rights Cases*, is discussed by Professor Sathe under the heading “Judicial Surrender”).

²¹ Sathe *supra* note 10, at 247.

²² Sathe *supra* note 10, at 21.

²³ M.D. Kirby, *Deconstructing the Law’s Hostility to Public Interest Litigation*, 127 L. QUARTERLY REV. 537 (2011).

the response that members of the judiciary, respectful of the legislature, should take when confronted by an invitation to innovation which critics declare to be impermissible judicial activism.

III. THE MABO CASE: ABORIGINAL LAND RIGHTS

The first case involves possibly the most radical instance of ‘judicial activism’ seen in the Commonwealth of Australia. Yet, I will suggest that it is one fully justified by the issues presented to the High Court of Australia and by the role of that Court as the supreme expositor in the nation of the common law of Australia.

Although in some senses, the *Mabo* case²⁴ was a constitutional one, it was not formally a decision that invoked or applied the written text of the Australian Constitution. This is doubtless because, that constitution (the fifth oldest continuously operating written constitution in the world²⁵) does not contain a general and express charter of fundamental rights; nor a broad statement of human rights or directive principles. There are few provisions in the Australian Constitution that empower Australia’s judges to invoke universal concepts to over-ride rules of the written law that the passage of time may reveal to be unjust, unnecessary or out of date. The *Mabo* decision was pronounced in 1992. This was four years before my appointment to the apex court. I can therefore take neither praise nor blame for its outcome. I can look on it with dispassion.

When Australia was annexed to the British Crown, by a series of steps taken in Imperial times, it was generally believed that this action extinguished the rights of the indigenous peoples of the land to hold any legal interest in that land. Basically, although the British usually recognised the land rights of civilised territories that they acquired, this rule did not apply to land deemed unoccupied or occupied only by uncivilised nomadic peoples. In such cases, it was

²⁴ *Mabo v Queensland* [No.2], (1992) 175 C.L.R. 1.

²⁵ After the Constitutions of the United States of America, Sweden, Canada and Switzerland.

assumed that the entire legal interest in the land had past to the Crown, to the exclusion of any rights of the indigenous peoples concerned. Although Australia had legislatures in colonial times, partly elected after 1856, no steps were taken to reverse this view of the common law applicable in Australia. Instead principle of exclusion was upheld by the early courts of Australia²⁶, confirmed by the Privy Council in London²⁷ and seemingly accepted as correct by a number of early decisions of the High Court of Australia itself.²⁸

This strong line of judicial authority represented a considerable obstacle to Mr. Mabo who claimed to be a representative of the traditional owners of certain land in the Murray Islands in the Torres Strait off the Northern coast of the present Australian State of Queensland. Every lawyer knows that land rights and land law are serious matters for legal protection. There is a great need for stability, certainty and predictability in land law. Disturbing understandings of land law is something rarely done by courts anywhere, including courts of the common law.

Nevertheless, Mr Eddie Mabo's case involved the invocation of two major arguments that caused the judges of the High Court of Australia in 1992 to go back to basic principles. The first, was the factual premise that the Australian indigenous peoples were nomadic and had little extended connection with any traditional lands. Whilst it is true that many Aboriginal peoples were often nomadic, anthropological evidence in the case demonstrated, to the satisfaction of the court, that Australia's indigenous peoples, including on the Murray Islands, had very strong connections to their traditional homelands. Accordingly, the presumption of the colonial authorities in relation to Aboriginal interests in land was to have been factually flawed.

²⁶ *Attorney-General v Brown*, (1847) 1 Legge 312 at 316, per Stephen CJ.

²⁷ *Cooper v Stuart*, (1889) 14 App Cas at 291.

²⁸ *Williams v Attorney-General (NSW)*, (1913) 16 C.L.R. 404 at 439; *Randwick Corporation v Rutledge*, (1959) 102 C.L.R., 54 at 71; *Wade v NSW Rutile Mining Co.*, (1969) 121 C.L.R. 177 at 194.

Secondly, the judges were convinced that the only real justification for continued denial of the land rights, claimed by the indigenous peoples, was (outside land in respect of which an inconsistent title had meantime been acquired) a view of racial superiority upheld by the law in respect of the indigenous peoples. In *Mabo*, the judges considered that such a principle, if it were ever justified as part of the common law of Australia could not continue to be upheld today. Justice Brennan, (later Chief Justice of Australia) explained why:²⁹

“Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia’s accession to the Optional Protocol to the International Covenant on Civil and Political Rights... brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially where international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.”

²⁹ (1992) 175 C.L.R. 1 at 42.

A majority of the High Court of Australia adopted this approach. One Justice (Justice Dawson) dissented. Six Justices concurred.

Certainly, this was a bold decision. Yet the principle at stake was one that judges, in an earlier time had declared. Now it was held to be the time for the judges to declare a new principle, creating harmonious legal values in Australia conforming to universal principles of human rights.

Needless to say the *Mabo* decision was greatly criticised when it was delivered. However, it was a case that set out to repair a very substantial injustice that had been done by the law to the people who originally lived in the Australian continent and, continued in the case of their descendants. A new principle was fashioned to ensure that the rights of the descendants would be recognised by the common law, unless some intervening and inconsistent legal right had already been granted on the basis of the now discarded misunderstandings of fact and law.

Whilst disturbance and change of land law is rare in any society, it was no answer to say that the indigenous peoples of Australia and the judges should wait until the parliamentary institutions corrected the injustice. For almost 150 years, the indigenous people of Australia had been waiting for parliamentary correction; but it was not forthcoming. The judges therefore offered the healing balm of re-expression: of the common law. What the judges had declared in the past to be the law, the judges could re-express, doing so without the burden of racial discrimination.

Although there is no doubt that the *Mabo* case involved large judicial creativity, and on one view, 'judicial activism', it was a step necessary to assure the integrity of the Australian legal system. Of course, it was much attacked by mining and pastoral interests and other voices. It was also strongly criticised by some lawyers; some still do so. Yet, to readjust the legal system, expunge racism and re-express the law in a just way, is, I would argue, the proper role of a nation's final court. Particularly so, where the legislature had shown

itself unwilling or unable to effect the fundamental correction that the court proceeded to provide.³⁰

IV. ROACH V ELECTORAL COMMISSIONER: PRISONERS VOTING RIGHTS

The second illustrative case is, in every respect, a constitutional one. Ms Vicki Roach, an Aboriginal prisoner serving a sentence for an offence for dishonesty, invoked the jurisdiction of the High Court of Australia in 2007 to challenge the constitutional validity of an amendment to the *Commonwealth Electoral Act* 1918 (Aust.). That amendment excluded all persons serving a sentence of imprisonment throughout Australia from entitlement to vote in future federal elections. The amending Act was enacted by both Houses of the Australian Parliament which then had majorities supporting the conservative Coalition parties led by the then Prime Minister, Mr John Howard. In Australia, exceptionally, citizens are not only *entitled* to vote but are *obliged* by electoral law to cast a vote, in order to avoid a fine. Prisoners have voted in Australian elections from the beginning of the Commonwealth, although prior to 2006, only prisoners serving a sentence of imprisonment of less than three years were entitled (and obliged) to vote.

For more than a hundred years, arrangements had been made in every Australian prison for these shorter term prisoners to cast the vote required of them as citizens. There was no express provision in the Australian Constitution detailing a constitutional right to vote. The extent of any such right was left to inference, derived from the language and structure of the Constitution. In a document otherwise relatively silent on the system of government envisaged for the new antipodean federation, the Australian Constitution has most detailed

³⁰ In 1996, the High Court of Australia extended the *Mabo* principle to apply to land held under pastoral leases in vast areas of Australia. *See Wik Peoples v Queensland*, (1996) 187 C.L.R. 1 (Federal legislation followed the High Court decisions); *see also* Native Title Act 1993 (Aust.). The author participated judicially in the *Wik* decision and was part of the majority.

provisions for the conduct of elections. Federal elections had to be held every three years. Provision is made in the Australian Constitution for persons to be elected to Parliament who have been sentenced to serve a term of imprisonment of less than a year. Only a person, “convicted and under sentence, or subject to being sentenced, for any offence punishable under the law of the Commonwealth or of a State of imprisonment for one year or longer” was “incapable of being chosen, or of sitting, as a senator or a member of the House of Representatives.”³¹

Ms Roach argued that it was implicit in the terms of the Constitution that prisoners (certainly shorter term prisoners) had an entitlement to vote. She so contended by reference to long-standing practice; the constitutional significance attached to voting; the curiosity involved in permitting a person sentenced to imprisonment to take *their seat* in Parliament but excluding all persons sentenced and serving a term of imprisonment from fulfilling the much less onerous and responsible democratic duty of casting a *vote*. She also argued that exclusion from the entitlement to vote in the case of shorter term prisoners would mean that, after their release, during the three year electoral cycle, they would return to freedom in a society in whose governance they had been allowed no part. Ms Roach also submitted that steps taken by a legislature in the matter of elections had to be viewed with great vigilance by the courts; lest electoral measures for which they secured passage through the Parliament were designed to advance the electoral prospect of one side of politics over another.

The government defended the amendment and said that there was no express provision of the Constitution that would have the effect of invalidating the legislation. In short, it urged that the court should respect the right of the Parliament to decide who should vote and who should not vote in Australia’s federal elections. This proposition had certain difficulties, given the history of electoral law in Australia and in the United Kingdom before the settlement of Australia.

³¹ AUSTRALIAN CONST, §44 (ii).

In the United Kingdom – and earlier in Great Britain, until the 1820s, Roman Catholic subjects were disenfranchised from holding public offices and from participating in elections to the House of Commons. Such provisions had a long history dating back to the religious wars in Britain in the 15th and 16th centuries. However, it appeared unthinkable to permit the re-enactment of such laws in contemporary Australia. No one was suggesting that such laws were likely to be re-enacted in 2007. However, the fact that they had existed in the past constituted a reason why the majority in the High Court of Australia could not accept the proposition, advanced for the government, that there were no limitations at all on disenfranchising provisions that the Australian Parliament could enact. As well, in colonial times, various groups had been disenfranchised for racial reasons. In the early days of the Federal Parliament, Aboriginal Australians were disqualified from voting in federal elections. Given the sorry history of disenfranchisement, against the background of which the Constitution was written, very clear and proportionate reasons were needed to disqualify *all* prisoners from voting.

Material placed before the High Court of Australia showed that, if the 2006 law were valid, some prisoners would be disenfranchised for reasons of poverty and their inability to pay court fines. If they were in prison because they could not pay a fine imposed by a court, effectively they would lose their central rights as citizens, simply because of a lack of means. This did not appear attractive to a majority of the High Court of Australia. In the result, by majority,³² the High Court of Australia concluded that the amendment to the electoral law enacted in 2006 was invalid. The law imposed disqualifications on short term prisoners that were not proportional to their offences. The pre-existing laws that provided for disenfranchisement by reference to imprisonment for more than three years were held, by the majority judges, to be proportionate. In the result, the intervening amendment was struck down. The pre-existing law revived.

³² Gleeson CJ, Gummow, Kirby and Crennan JJ; Hayne and Heydon JJ dissenting.

Needless to say, the decision in Ms Roach's case has been attacked as an unjustifiable case of 'judicial activism'. Professor James Allan declared:³³

"[This is a] prime example... of judicial activism... [A] rather blatant example... of illegitimate judging techniques or interpretive approaches taken by the majority justices. The fact the outcomes achieved in both instances are likely to be seen by many (me included) as on balance a good call in cost-benefit terms (if one were in the position of legislating on a blank slate) does not in some magical, ineffable way make the illegitimate interpretive approaches of the majority judges thereby acceptable or legitimate. This is still judicial activism at its worst... [It] rest[s] on the most implausible and farfetched understanding of the Constitution, one that significantly liberates the point-of-application interpreter when it comes to gain saying, indeed overruling, the affected legislature."

With respect to Professor Allan, whilst he is entitled to his view and his criticism, it is not enhanced by the intemperate language in which his view is expressed. His theory of uncontrolled parliamentary power, to take away the foundational privilege of voting in the national elections for the very Parliament whose authority he purports to uphold, is unsustainable. In every instances of constitutional adjudication, a judge (especially in an apex court) is obliged to test the proposition being advanced against various possibilities. This is because it is the duty of the judge to look down the years and to learn from history that, measures taken once can have a tendency to be repeated, extended and pushed further.

The proposition that the Australian Parliament was completely uncontrolled (except by the voting of its members) in disentitling Australian citizens from the precious right to vote is unpersuasive. So is the notion that no check was need be placed upon a parliament enacting a disqualifying provision in the interest, or perceived interest,

³³ Allan, *supra* note 2, at 745.

of the government of the day. Such a measure would quite properly attract a vigilant caution on the part of the judges.

The duty of the judges includes protecting those who may not be protected sufficiently by the democratic process. At least it was arguable, in respect of the 2006 electoral amendment, that it was enacted by legislative chambers dominated by politicians on the conservative side of the electoral divide in order to advance their perceived interests in the forthcoming federal election. That election was expected to be close. The government parties were then fighting for their political life. The risk that they might take measures, and secure passage through a parliament which they effectively controlled, that advanced their own sectional interests as against those of their political opponents, was one against which a constitutional court was obliged to be vigilant. So indeed the court was to prove. In protecting and enhancing the fair rules of political engagement and doing so in respect of the parliament institution, the court was doing no more than protecting the level playing field envisaged, by inference, in the Australian Constitution. Simply to leave it to the Parliament, against an historical background of misuse of power and disenfranchisement of unpopular minorities, would not be consistent with the overall scheme, structure and language of the Australian Constitution. So the majority held.

Was the decision in the *Roach* case an instance of judicial activism? Certainly, there was a degree of activism and a rejection of the passive indifference, on the part of the Court, to any measure that the Parliament might enforce for the arguable advancement of partisan political interests. But would this be the kind of “activism” that is implied in the Australian Constitution, and expected by the electors of Australia? I would think so. The courts are expected to be the neutral guardians of the conduct of federal elections because it is those elections that deliver a parliament elected by the people.

Professor Allan says that the decision in *Roach* was costly “most obviously in terms of the long-term in-roads it makes into Australia’s wonderful democratic traditions.”³⁴ Unfortunately those “wonderful

³⁴ Allan, *supra* note 2, at 782.

democratic traditions” can sometimes be tainted by self-interested measures designed to keep a government in office by removing from the entitlement to vote those who are inferred to be likely to be antagonistic to their partisan interests. No doubt it is considerations such as these that have led other great courts, elsewhere in the world, also to be vigilant against the risks of self-interested legislative measures that disenfranchise particular classes of voters.

Decisions have been made, similar to that in *Roach*, both in Canada³⁵ and in the European Court of Human Rights in respect of the United Kingdom.³⁶ Whilst these instances are explained, and justified, by reference to human rights principles binding in those countries (which are absent from the Australian Constitution), that does not mean that the Australian Constitution is completely silent on the matter. Constitutions are made up of express language and implications properly derived, as necessary, from the text as well from as the “silences of the Constitution.”³⁷ For Professor Allen, open slather by partisan political interests was permissible, indeed necessary. It could then be left to the electoral process to discourage or punish perpetrators. But that process is itself potentially disabled, corrupted and wounded by disenfranchising legislation. To permit an ‘open slather’, in a matter so important as the electoral process, is not a course that courts generally take. They are guardians of the democratic process expressed and implied in the constitutional instrument. That was the view taken by the High Court of Australia in *Roach*, and also in a succeeding case of *Rowe v Electoral Commissioner*.³⁸

If *Roach* upset Professor Allan, *Rowe* enraged him and he declared it was

“one of the worst decisions of the High Court of Australia in years, and by worst, I mean most feebly reasoned and most

³⁵ *Sauvé v Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519 (SC Canada); Cf *Mulholland v Australian Electoral Commission*, (2004) 220 C.L.R. 181.

³⁶ *Hirst v United Kingdom* [No.2], (2005) 42 EHRR 41.

³⁷ (2010) 243 C.L.R. 1.

³⁸ FALI NARIMAN, *INDIA’S LEGAL SYSTEM: CAN IT BE SAVED?* 20 (2006).

reliant on implied assumption... That can never be explicitly cashed out in any convincing or persuasive way."³⁹

Sadly, those who, by inclination or acquired habit, are unwilling to be persuaded are not necessarily the most reliable judges of persuasiveness. Quite apart from the language of Professor Allan's criticism, its substance is unconvincing. Activism in the defence of the democratic foundations of the Constitution (and of participation in its franchise) is the duty of a constitutional court.

V. MINISTER V B: REFUGEE RIGHTS

The third instance to which I will refer illustrates the limitations that are imposed against 'judicial activism', by the duty that judges owe to the Constitution, legislation and the common law and by the fidelity they owe to giving effect to the written law, according to its best available meaning.

In *Minister for Immigration and Multicultural and Indigenous Affairs v B*,⁴⁰ I faced a situation where a conclusion to which I was invited by the advocate of the Government of Australia was one that appeared to be contrary to Australia's obligations under international law, namely the *Convention on the Rights of the Child*.⁴¹ As well, the outcome on the basis of that meaning appeared seriously prejudicial and harmful to young children, who are traditionally in a position of dependency that will be protected (so far as possible) by the judges and the law.

B and his brother (whose names were anonymised to avoid potential retaliation by reportage on the internet) were children who arrived in Australia with their parents and sisters as unlawful non-citizens. Proceedings were commenced in the Family Court of Australia by their mother, as next friend, against the Minister. The proceedings

³⁹ Allan, *supra* note 2, at 771.

⁴⁰ (2003) 219 C.L.R. 365.

⁴¹ [1991] Australian Treaty Series 4, Enter Into Force 2 September 1990; Enter Into Force for Australia 1991; Entered Into Force in International Law, 2 September 1990.

sought under the *Family Law Act* 1975 (Aust.) that the Minister should release the boys from detention. The family was then being held in a detention camp for illegal entrants, situated in the desert in South Australia, far from civilisation.

A judge of the Family Court of Australia in 2002, dismissed the applications, holding that the Court did not have jurisdiction to make the order. An appeal against that decision was allowed by the Appeal Court of the Family Court, by majority.⁴² The majority held that the welfare jurisdiction of the Family Court, in respect of the children, was not limited to disputes between parents concerning custody. It could extend to a case such as the present. The decision was then appealed to the High Court of Australia, pursuant to a certificate granted by the Family Court. The question for the High Court was whether the Family Court majority had been justified in ordering the release of the children. When they were released the two boys were taken into foster care by families who arranged for them to attend a local public school and to meet, and play with, local children. Obviously, the outcome of the Family Court decision appeared to be one in the best interests of the children, a governing criterion both of Australian family law and also of the *Child Convention*. It would not have taken much to persuade me to leave the Family Court decision to stand.

However, in the course of the argument of the case before the High Court of Australia, two serious impediments were presented by the Solicitor-General. The first was that, when the legislation providing for compulsory detention of children was under consideration, contrary to the suggestion of counsel for the children, the officials of the Australian government had drawn to the notice of the Parliament the fact, that such measures (if enacted) would place Australia in breach of its international obligations. Notwithstanding this warning, the government and the Parliament at the time enacted the provision in order, as it was put, to stem the flow of illegal migrants

⁴² Nicholson CJ and O’Ryan J; Ellis J dissenting in part.

and refugee applicants. By this means it was hoped to discourage other immigrants from coming to Australia without proper consideration or from “jumping the queue” as migrants and then pretending that they were “refugees.”

The provisions of the *Migration Act* 1958 (Aust.) required that “any person” entering Australia should first (certain exceptions apart) secure a visa for entry. The children did not have such a visa. But they argued successfully in the Full Court of the Family Court that “person” meant “adult person.” The Act, it was held, should be ‘read down’ so as to protect the interests of the children. Had Parliament intended to provide for universal detention of children, it would have so enacted, explicitly. This argument at first seemed an attractive one to me. However, the Solicitor-General then drew attention to provisions in the *Migration Act* providing for the searching of children in detention and other express provisions in the Act that were inconsistent with a theory that the statute did not apply to children, but only to adults.

When the arguments advanced for the Government were given due consideration, as a judge, I had no option but to accept the Solicitor-General’s submission and join in the orders of the entire court that the children be returned to custody in the migration detention centre. This was, of course, a painful decision for me. But it was required by my duty to the law. No constitutional ground was suggested for invalidating the legislation having this harsh consequence for the children. One of the results of being, historically, an early constitutional instrument is that the Australian Constitution has few protective provisions for fundamental rights and none relevant to the case in hand. In the outcome, the orders of the Full Court of the Family Court were unanimously set aside. The family, including the two boys were again confined in the detention centre. They gave up their struggle to enter Australia. They were deported. When last seen they were travelling through the Khyber Pass to return to the dangers of Afghanistan. They have not been heard of since.

VI. CONCLUSIONS: A LIMITED AND ESSENTIAL ACTIVISM

What are the inferences to be drawn from the three cases I have mentioned, and others? What are their consequences in countries such as India and Australia for our concept of permissible judicial activism and creativity?

1. In the first place, it must be remembered that the common law system, which both our countries share, is one that is inherently creative. It never stands still. The judges have an inescapably creative obligation. They interpret the Constitution. They construe the legislation. They declare the common law by reference to the cases and arguments presented to them by the Bar on behalf of the people. No two cases are ever exactly alike. New times and circumstances give rise to new perceptions. New values affect the way in which judges view the problems that are presented to them. Even slight changes of language in legislation can make large differences to judicial outcomes. The books in lawyers' offices, and now the cases on the internet, bring decisions to our attention that record the activism of the common law. It is this very activism that is the reason for the survival of the common law today, in circumstances often quite different from those in which the earlier constitutional and statutory interpretations and common law decisions were made. It is the element of creativity that ensures that the common law lives. Judges are the guardians of that creativity. To them is entrusted the creative decision-making power. They know that this involves an element of restraint. But it also involves an element of creativity.
2. Where very great injustices are shown to occur, it is natural that a judge, who takes an oath or affirmation to do right to all people, without fear or favour, will seek, so far as the law permits, to reach conclusions that strike the judge as just and fair in all the circumstances. Here again may be found the elements of flexibility and adjustment that are a reason for the success of our legal system. Justice will often give rise to

a healing balm that softens the edges of old cases, that requires re-examination of previous precedents and that demands extension of previous doctrine. To the judges is entrusted the role of seeking, so far as possible, to secure justice and not simply to be an instrument of formalistic injustice in the name of the law. Postponing further any review of the law of land rights in the *Mabo* case, on the proposition that such reform could be left to Parliament, was a completely unsatisfactory stance. This was so given that the Parliaments had failed to act in Australia over the past 150 years.

3. The greater the injustice and the more widespread its operation, the more closely will the judges look to see if they can properly and lawfully, provide a better and fairer exposition of the law in the particular case. This, I believe, was a reason why the High Court of Australia, in *Mabo*, did not simply apply the old imperial and colonial law mechanically in that instance. New times had given new judges greater insight and perception of the special injustice to the indigenous people of the continent. New times and international human rights law had expressed fundamental principles common and universal to all legal systems in the world today. One of those principles was that a law that denied peoples' basic rights because of their race was intolerable. Because the law in question had been made by the judges, it could be unmade and made again without such a deep offensive flaw within it. The greater the injustice, the more vigilant will the judges be to doing what they can to correct the injustice, while staying within the limits of their subordinate role in law-making.
4. Another consideration is hierarchy. Judges in subordinate and intermediate courts are obliged to observe the precedents that have been established by courts higher in the judicial hierarchy, and especially those established by the apex court. This does not mean that judges of intermediate courts have no creative function. On the contrary, in my view, they have a significant creative function, given the pressure of the case load and the

relatively few cases that can come before a final court.⁴³ Views differ and change over time on this score. But there is no doubt that the final court, at the apex of the court system of any country, has an added obligation to look afresh at old doctrine, to re-examine constitutional texts, to re-scrutinise any legislation that has been enacted and to re-examine the common law as declared in the past. An apex court is not simply another intermediate court of appeal. It has special duties and functions to supervise the entire judicial system and to fulfil obligations imposed upon it as the ultimate constitutional guardian of the nation. I became aware of this difference in function when I was elevated from the New South Wales Court of Appeal to the High Court of Australia. In the final court, a judge is still a servant of the law. But the law includes the operation of the entire system which the highest court must maintain in its safekeeping.

5. Judges are necessarily restrained by the words of the law; the text of the Constitution; the provisions of statutes; the decisions of the courts in times past. All of these impose restrictions, boundaries and limitations on the judge. The obligation of the judge to give reasons for decisions and to explain and justify those decisions is a formidable restraint on excessive judicial creativity and on straying impermissibly into the errors of legislation or non-judicial functions. The judge's reasons are published, nowadays virtually instantly and on the internet, to the whole world. Judges are subject to criticism, some of it severe, as I have indicated. Judges are also subject to the scrutiny and assessment by their colleagues in the judicial branch, at the Bar, in Parliament and amongst the citizenry. In free societies, criticism can be voiced and often is. Some of the criticism will be justified. As I have shown, some of it will not. The notion that the law stands entirely

⁴³ *Nguyen v Nguyen*, (1990) 169 C.L.R. 245 at 268 – 270; *Garcia v National Australia Bank*, (1998) 194 C.L.R. 395 at 418-419 [58]-60; *see Farah Constructions v Say Dee Pty Ltd.*, (2007) 230 C.L.R. 89 at 149 [131].

still must be firmly rejected. However, the notion that the law has no boundaries must otherwise be rejected, with the same firmness and resolve. In between these two extreme positions, there is an intermediate place where the constitutionalism of a common law country, such as India and Australia, lies. That place is where the judges live, think and work. It is not a completely uncontrolled place of palm tree justice. But neither is it a place of rigid formalism and inert indifference to justice and to the legitimate creativity of the judicial role.⁴⁴

It is because there is this area, described by my great teacher, Julius Stone, as a place where judges have “leeways for choice”,⁴⁵ that the common law still flourishes today in a third of humanity and serves the people with the principles of the law moderated by the demands of justice, so far as they can properly be given voice. It is so in Australia. It is so in India. It is so also in the United Kingdom. It is so in all countries of the common law: a law for nearly 2 billion people. Almost a third of humanity.

This was the intellectual environment in which M.K. Nambyar worked and thrived and served the law. As now does his son Senior Advocate K.K. Venugopal.

Here, today in Kolkata I honour them both. They are exemplars of a career that can inspire the students, scholars and lawyers of today. Without such advocates, the judges cannot effectively perform their duties. Those are duties of fidelity to the law and paper creativity. This is so for the thirst of our legal systems for equal justice under law for all.

⁴⁴ M.D. KIRBY, JUDICIAL ACTIVISM: AUTHORITY, PRINCIPLE AND POLICY IN THE JUDICIAL METHOD 90-91 (2004).

⁴⁵ J. STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 649 (1966); following Karl Llewellyn.