

Do Judges Make Law?

Imagine that you are a judge and you have the choice of:

(a) following the law which would result in an unfair outcome, or

(b) deciding the case in a way that you think is fair but not in accordance with the law.

Which would you choose?

Judges have traditionally been very careful to emphasise that their role is not to make the law, merely to apply it.

But it is apparent that judges play a significant role in the development of law through the interpretation of both common law principles and legislative provisions.

When legislation is ambiguous or has gaps, judges must necessarily come to a decision as to how the law should be interpreted.

Precedent

When a higher court makes a decision, it is generally binding upon subsequent cases.

This is called “precedent”.

It also means that members of the judiciary in the [District or Local courts](#) must follow the decisions of higher courts such as the Supreme and High courts.

Those who support “literal” approaches to the law say that judges should use pure and rational logic to arrive at the ‘right’ conclusion; they should never ‘make the law’ but strictly uncover and apply it.

Those who support “purposive” approaches argue that a judge’s

task is to consider the purpose behind the provision or legal principle – which acknowledges that judges have an active role in developing the law.

Legal Rights

We certainly have a lot to be thankful for our common law, which is often a primary source for the protection of our rights.

Our Constitution contains few rights, but courts have consistently found and applied protections, particularly in criminal trials.

This includes the right to be considered innocent until proven guilty; and the fact that it is the job of the prosecution to prove your guilt – not your responsibility to prove your innocent etc.

But what should happen if judges take it too far?

Judicial Activism

Judicial activism is a term that is used disparagingly when judges are accused of taking things too far.

Judges have to decide according to the law, not what they would like the law to be.

A judgement should therefore read like a judgement on the law as applied to the facts of the case, not an opinion piece.

Judges who are accused of making decisions based on their own political or personal beliefs face the risk of being labelled as judicial activists.

[According to one former High Court Justice Dyson Heydon](#), judges who don't like the constraints of the judiciary should get out and join a political party.

If judges were not bound by legislation, or earlier cases,

they would have far too much arbitrary power.

As we have a judiciary that is not elected, and difficult to fire, it makes sense that their power should not be unlimited.

This ensures that any judicial developments should be incremental and gradual.

However, having a judiciary that is too fettered can also be problematic.

Courts don't normally have to take great account of the financial and political consequences of their judgments.

And while judges can declare laws invalid, they cannot suggest new laws to replace them.

The current situation means that judges are often reactive – not proactive.

Community Values

One criticism often levelled at judges is that they are “out of touch” with the community and do not decide cases in line with community values.

It might surprise many people that the job of a judge is not to be ‘in touch’ with the community – or community standards or values.

Laws are supposed to be judged according to the law, not what radio commentators think should happen.

The criterion for defining cases is what the law says, not by reference to opinions about community values and standards.

There are multiple reasons for this.

Firstly, how would we decide ‘community values’?

And who would decide them?

There are often conflicting opinions among members of the community, and divergent views should be seen as healthy in a democracy.

Secondly, deciding cases according to legislation means that they are decided according to the decisions of an elected government.

While it becomes apparent that judges often apply subjective interpretations to the law, they must do so cautiously.

And judges are certainly not free to deviate from the clear meaning of legislation simply because they do not agree with the result it may produce.