

Read between the lines to get a grasp of French

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Features

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THE announcement that Federal Court judge Robert French will become Australia's new chief justice of the High Court has received resounding praise from across the nation. By any measure it has been a veritable love-in. A black-letter lawyer with a heart, some say. A fine jurist who has sailed under the radar, say others. He is, we are assured, not an activist in the genre of High Court judge Michael Kirby or former High Court judge William Deane.

He will not have any immediate impact on the direction of our most senior court, we are told. He is apparently a judge who cannot be pigeonholed. These observations are meant to make us feel easy that French is a traditionalist, a judge who will eschew the activism of some of his predecessors on the High Court.

Not so fast. Watch and wait, I say.

Consider the Mason precedent. When Anthony Mason became chief justice in 1987, having been on the High Court since 1972, The Sydney Morning Herald rushed to judgment, claiming that he would steer the court into calmer waters. It was assumed that Mason's legal stripes as a traditional, conservative-minded judge were fixed. They were not.

Mason took the High Court on the most activist jaunt in its history, implying rights to free speech into the Constitution in a way only an activist judge can do and allowing an unprecedented leap in the common law in *Mabo*. Whether you agree with those decisions or not is irrelevant. The point is that the Herald later concluded that Mason was the "most radical chief justice we have ever seen".

Few could have predicted Mason's transformation. He succumbed to the great judicial temptation of using the bench to mould what he regarded as a better world. He grew bored with being a black-letter lawyer. He preferred the role of philosopher king. As one judge remarked, Mason was seduced by the "siren song of left-wing intellectuals" into becoming a judicial innovator.

Is history repeating itself? Will the lamb become a lion? It is entirely possible that the descriptions offered in effusive praise of French give us more than a few hints that, as chief justice of the High Court, he may be unable to resist the temptation to do a Mason.

For starters, any judge breathlessly embraced by left-wing legal academics and commentators immediately deserves a question mark over their so-called safe, black-letter lawyer credentials.

George Williams, a left-wing academic and the leading proponent of a charter of rights for Australia, is excited about French because "he's very difficult to predict because of the approach he takes to the law". Williams is no lover of black-letter lawyers. He has built a career by pushing for a more activist judiciary armed with a charter of rights that enables courts to decide important social questions.

Here's another clue that French may succumb to the Mason temptation. Gillian Triggs, dean of the law faculty at the University of Sydney, told ABC radio that French had a wide view of the role that

law played in society, from local matters of indigenous rights to the influence of international law. Excuse the scepticism, but that is generally code for a judge who is not your traditional, black-letter lawyer.

Indeed, now that Richard Ackland, the Herald's dour legal commentator, who has little time for conservative judges, also has enthusiastically embraced French, it's time to look a little closer at whether the West Australian judge is in fact a safe, conservative choice for the High Court.

The most important clue to what the 61-year-old French will do as chief justice is to be found in his published views on judicial activism. I shared a podium with French at the Constitutional Law Conference earlier this year on the topic. French said statutes were invariably vague, calling on judges to make decisions about what words mean. The common law was a moving creature, developed for centuries by judges, he said. No quibbles there.

Of course, judges make law when they are called on to decipher vague words and develop the common law. But that is a different thing from an activist judge who, with a healthy dose of arrogance, ignores parliament's clear intent and regards the common law as a judicial playground for pushing their preferred agenda.

We know from interviews with our most senior judges conducted by American academic Jason Pierce that the Australian judiciary has plenty of judges who regard parliament as a bunch of generally slow, incompetent populists whose legislation (or lack of it) needs to be corrected by a more intelligent class of being. Few dispute that Mason was an activist. The only question is whether you like it.

And it's here that French may have revealed his true colours. He peddled the line favoured by supporters of an activist judiciary. He said judicial activism defied definition. And if you couldn't define it, he said, it didn't really exist except in the imagination of misguided conservatives. The judicial activist was, French concluded, "so hard to pin down and define that it will turn out to be a mythical monster". This is akin to saying that because people can't agree on a definition of happiness, happiness doesn't exist.

Indeed, the death-by-definition trick is a standard tactic of those judges, and their boosters in academic circles, who hanker for a more activist judiciary. The aim is to present judicial activism as a concoction to sideline the debate so they can get on with pursuing a more activist role.

Whether French will tire of being a black-letter lawyer and instead follow the activist role that seduced Mason remains to be seen. But it is a safe bet that those judges likeliest to succumb to judicial activism are the same ones who, like French, treat the topic with disdain. To be sure, as one of seven judges, French cannot change the direction of the High Court overnight. But if future vacancies on the High Court are filled with judges who share French's enthusiasm for a wider view of the law and his desire to treat judicial activism as a fantasy, there is every chance that French may prove to be a more radical chief justice than the unquestioning media have led us to believe. That, of course, may be the aim of the Rudd Government in choosing a judge who, to date, has chosen to play below the radar. Judgment, as they say, is reserved.