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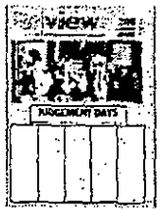
DECISIVE INSIGHT



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JUDGEMENT DAYS

Andrew Clark on the battle for the soul of Australia's highest court

The High Court will soon confront the issue of whether Australia should become a unitary state or retain a diffuse power structure. Australia's highest legal tribunal will be responding to Prime Minister John Howard's legislative twin peaks: new laws that grant police and intelligence agencies sweeping powers to combat terrorism; and those that abolish long-standing workplace regulation and remove state authority in industrial relations.

An appeal against the federal government's WorkChoices laws will be heard next Thursday. The High Court has not yet listed any appeal against the new anti-terrorism laws. But according to Cameron Murphy, secretary of the Australian Council of Civil Liberties and son of former High Court judge Lionel Murphy, an appeal is inevitable.

The court's decisions in these matters will not only be about whether Australia has a single industrial relations system, or discards its traditional faith in third-party involvement in workplace disputes, or confirms laws that undermine 800-year-old common-law safeguards such as habeas corpus.

They will also demonstrate how much the High Court has pulled back from a heady decade of liberal engagement — moving from an era of recognising native title and the freedom of political speech to one in which it upholds the government's decision to indefinitely incarcerate effectively stateless refugees.

George Williams, a professor of law at the University of NSW, says: "We're dealing with an era when the federal government and the federal parliament are really stretching the limits of what might be acceptable under the constitution."

These matters come at a time when, according to the clerk of the Senate, Harry Evans, parliament has deteriorated into a form of elective monarchy. The prime minister "rules all he surveys", Evans said last year.

The refusal of Howard, deputy prime minister Mark Vaile and foreign minister Alexander Downer to accept any blame for the government-backed Australian Wheat Board paying $290 million in bribes to Saddam Hussein's regime when Australian troops were poised to join a US-led invasion of Iraq raises questions about the relevance of traditional notions of ministerial responsibility.

"There's a very strong need for a High Court that recognises its role of holding the government and the parliament to account, in accord with the constitution," Williams says. "It's not an era where you want the judges to go into their shell."

A former chief justice of the High Court, Gerard Brennan, says he has "some concern . . . that there will be an increasing movement to extract from judicial control freedom of movement, freedom of speech, freedom of thought, even in the interests, so it is said, of protecting the community".

"I cannot as yet accept that it is necessary to truncate the freedom of Australia in order to preserve it. After all, legislative restrictions can be as oppressive as the risk of terrorism itself," Brennan says.

Former NSW premier Bob Carr says the states are being reduced to "implementation agencies". Greg Craven, a constitutional lawyer and executive director of the John Curtin Institute of Public Policy at Curtin University, says future High Court decisions may even sanction the federal government extending its control over university research, curricula content and standards, appointments and fees.

Craven, a former Victorian solicitor-general, says the appeals to the High Court over the new industrial relations laws form a "piquant" test of the federal corporations power, which the Howard government has used to air-brush the states out of the industrial relations picture. The question, he says, is "how inclined the High Court is to expand the corporations power and the Commonwealth's power generally".

The High Court's approach in the IR case will depend on whether judges decide they are political conservatives or constitutional conservatives, Craven says. In a court where Howard appointees are entrenched 5-2 after the November retirement of Michael McHugh, and his replacement by Susan Crennan, this poses an exquisite dilemma.

For the most part, political and constitutional conservatives reside in the same camp, but the IR appeal could reveal a form of politico-legal schism within that comfort zone.

A conservative lawyer might retort that the IR appeal will be decided on the law. Fair enough, but the precise reach of the IR legislation is unclear, and there is division within the judiciary about how to interpret constitutional law. In other words, there are not just differences about what the law means, but also about the correct approach to deciding what the law means.

When considering any future anti-terrorism appeal, senior legal figures hark back to the 1951 High Court repudiation of the Menzies government's attempt to outlaw the Communist Party. In particular, they refer to the reasons for judgement given by Owen Dixon, soon to become chief justice. He said: "History . . . shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power."

Not surprisingly the precise reach of the relevant constitutional provisions is contested. More

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significant is what these decisions will mean for the High Court.

The appeals will bring into focus a generation of tumult in Australia's highest legal tribunal. This includes campaigns to remove two Labor appointees — Lionel Murphy and Michael Kirby, the latter targeted by Howard political enforcer senator Bill Heffernan.

There have been tensions between judges and open hostility between retired chief justice Harry Gibbs and his successor, Anthony Mason, centred on the Mabo decision which recognised native title. And there have been virulent attacks on High Court decisions from without.

The court itself, and its various judges, have been labelled "bogus", "pusillanimous and evasive", guilty of "plunging Australia into the abyss", a 'pathetic... self-appointed [group of] kings and queens", guilty of "undermining democracy", and a body packed with "feral judges". After the 1992 Mabo decision, Hugh Morgan, a former president of the Business Council of Australia, said the judgement "gave comfort to Bolsheviks".

These attacks gathered force as the High Court moved from exclusive reliance on British precedents to embrace a more internationalist path.

Judge Michael Kirby, who serves as a judicial voodoo doll for the Howard government, said in a minority judgement (al-Kateb,

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DAYS OF JUDGEMENT

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2004) that the principles expressed in international law, like universal human rights, could influence legal understanding.

Despite the impact of this High Court-led change on Australian society, much of its significance is lost on the 99.8 per cent of Australians who aren't lawyers — and on some of those who are. One contributing factor is that, unlike in the US, there is no widespread veneration of the Australian constitution, and therefore less interest in judgements affecting the constitution.

Further, in a legal world where the precise meaning of words is argued over endlessly by barristers enjoying fabulous fees, much of the lawyers' language in this argument has, ironically, been debased.

Instead of addressing questions such as the role of international law in constitutional interpretation, or the relevance of decisions by courts in other nations, many legal players, politicians, media commentators and academics prefer emotive terms like "judicial activism" and "black letter" law.

Former chief justice Mason describes judicial activism and black letter law as "terms of abuse, terms of denigration, rather than terms that have any precise meaning at all. I do not regard them as contributing to useful discussion".

Bret Walker, a former head of the NSW Bar Association and a regular advocate before the High Court, says: "I find debates between people who use those terms like parrots talking to each other. If you don't know what you are identifying when you use the labels conservative and activist then we're not having an intelligent discussion."

The current chief justice, Murray Gleeson, said in a 2003 interview with *The Australian Financial Review*:

"I do have a problem with people just sticking those labels on somebody, not explaining what they mean, and not seeking to justify why they stick the labels on them. They just become slogans. You might as well say 'boo' and 'hooray' to describe the outcome of a particular case."

Shorn of legal argy-bargy, both judicial tendencies base their decisions on precedent. In its stereotypical extreme, the black-letter tendency is likely to confine its search for precedent to well-thumbed volumes of English and Australian law records. The "active" tendency could settle a perceived conflict between existing Australian and British judgements by referring to UN covenants signed by Australian governments or, say, to a decision of the US Supreme Court.

The history of so-called judicial activism goes back a long way. In 1772 a British judge ordered the freeing of an African slave being held on a ship that had entered the Thames estuary. He said slavery was "so odious that nothing can be suffered to support it but positive law". As Gleeson noted in one speech: "This is an example ... of what would now be described as judicial activism."

More confusing for the non-practitioner is the misleading nature of the argument. One side, including the prime minister, a one-time conveyancing solicitor, insists that judges shouldn't make law. Soon after entering office, Howard declared that "the laws governing Australians ought to be determined by the Australian parliament and by nobody else".

This argument casts a cloud of illegitimacy over Australia's judicial independence and over nearly a millennium of organic growth in the common-law system. Judge-made law has been the normal practice in common-law countries such as England, the US and Australia, particularly in appellate courts such as our High Court.

According to Mason, the view that judges simply declare law and do not make it is "an old myth". He points out that the British House of Lords "expressly repudiated the declaratory theory of law in 1999".

Obfuscation by lawyers, even by prime ministers who purport to know the law, makes it more important to explain the struggle in the High Court, because it reflects the wider struggle for Australia. Lifting the fog from the court's activities, inside and outside the court, will resonate with those seeking some understanding of how much the nation has changed in the past 30 years and — a more contested point — how much of that change is permanent.

One starting date in examining this struggle is 1975. In that year Gough Whitlam's Labor government appointed its attorney-general, Lionel Murphy, to the High Court. Later that same year, then governor-general John Kerr dismissed the government after he had consulted with then chief justice Garfield Barwick.

Both events proved profoundly unsettling. One introduced a heterodox approach to constitutional interpretation, and the other inserted the court into the vortex of Australia's greatest constitutional crisis.

But the court's foundations were also being shaken by other events. Two years before Barwick's involvement in Whitlam's dismissal, Britain joined the European Common Market (now the European Union) and English law became increasingly influenced by decisions made elsewhere in Europe, including adherence to the European Convention on Human Rights.

Over the next 15 years the High Court was transformed. In part, the change was internal, with the appointment of new judges like William Deane, Brennan, Michael McHugh, John Toohey and Mary Gaudron, and the replacement of Barwick as chief justice by Gibbs in 1981, and, in 1987, Gibbs's replacement by Mason.

Of these judges, five — Deane, Brennan, Mason, Gibbs and Barwick — were appointed by Liberal governments. But Mason, Deane

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and Brennan, in particular, became aware of the need for change. Like Alfred Deakin, Australia's second prime minister, who steered the original High Court legislation through parliament, they came to view the court as "one of the organs... which enables the constitution to grow and to be adapted to the changeful necessities".

And many changes were necessary. In part, this followed legislation in 1968 and 1975 that narrowed the ambit of cases that could be taken to the Privy Council in London. This was "the spark that set alight the opportunities for a new and distinctive Australian jurisprudence", former High Court judge McHugh said in a 2004 speech.

Also, this new era emerged not long after the formal abandonment of the "White Australia" policy and a wider acceptance of a more independent approach to Australian history. By the 1980s Australia was also embarking on a more distinctive foreign policy, promoting a comprehensive peace settlement in Cambodia, much to the annoyance of the American government.

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The industrial relations appeal could show up the difference between political and constitutional conservatives. Picture: ROB HOMER

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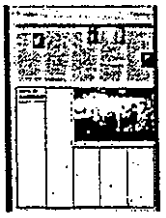

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DAYS OF JUDGEMENT

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The Hawke government formally established an independent legal system when it passed the Australia Acts, which cut off all remaining appeals to the Privy Council.

It was also in the 1980s that Australia floated the dollar, reduced tariff protection, and invited in foreign banks, opening up the economy to more competition. As McHugh noted in his Sir Anthony Mason lecture in 2004, "whatever else competition does for a society, it forces it to change".

"Globalisation did more than open up the Australian economy; it opened up Australian society to new ideas, to a new way of seeing the world. And by the commencement of the period of the Mason court, human rights had become part of the political and social agenda, and international law and agreements were becoming a source of common law and domestic statute law.

"In addition, throughout the years of the Mason court, the Hawke-Keating governments saw the future of Australia as involved with Asia, not the United Kingdom or Europe. They floated the idea of a republic. The thinking and many of the beliefs and values that permeated the age of Menzies largely disappeared.

"It would be surprising if the judiciary had missed this message."

This shift first became apparent in the High Court in the early 1980s under chief justice Gibbs, who died late last year. Gibbs, who hailed from Queensland, was a traditionalist, especially in matters of states' rights. But judges like Mason and Murphy moved the court away from the Barwick era.

Writing in *The Oxford Companion to the High Court*, Anne Twomey said the Gibbs court "bridged the transition from the more conservative Barwick court to the more liberal Mason court". In his carefully worded speech marking Gibbs's passing, chief justice Gleeson said Gibbs's tenure had coincided with governments testing "the outer limits of federal power". However, Gibbs's inclination, as a federalist, was "unsympathetic towards some of that exploration".

This federalist sentiment became apparent in the Franklin River dam case in 1983, the first major High Court case after the election of the Hawke government. The majority, led by Mason, upheld the government's right to intervene and stop the dam. Significantly, the majority held that this right was based on the government's world-heritage listing of land around the proposed dam, an action in turn based on Australia's signing of a UN convention. The minority, led by Gibbs, argued that Tasmania had a legal right to go ahead.

It was not just reference to international treaties that marked the Mason era. In his lecture, McHugh said that what distinguished the Mason court from its predecessors was a "particular attitude of mind". It was this attitude, "rather than the adoption of any particular method of judging", that brought about the results of cases on issues ranging from Mabo to freedom of speech, and that "established its reputation as a radical court".

"The attitude of mind was the belief that Australia was now an independent nation whose political, legal and economic underpinnings had recently and essentially changed."

According to McHugh, Mason was a "a party to more judgments making more dramatic changes in the common law than any other judge in the history of Australia". This was because he "regarded Australia's evolving status as an independent nation as inevitably requiring a change in the approach of High Court justices to judging".

A lawyer with an impeccable establishment background, educated at Sydney Grammar and solicitor-general during the Menzies government, Mason showed little sign that he would be such a radical and forceful influence. In 1979, seven years after he was elevated to the High Court, he said in a judgement that the court was "neither a legislature nor a law reform agency" and that its role was to "decide cases by applying the law to the facts as found".

But Mason says that while constitutional interpretation must "start with the text and any interpretation must be faithful to the text", he is "in favour of policy-oriented interpretations of all legislative instruments". He acknowledges that "from an historical perspective the independence of the Australian judiciary from the elimination of the appeals to the Privy Council has been the important factor that has occurred".

"A consequence of that has been that Australia looked to decisions of other jurisdictions to a greater extent than it did while the appeals to the Privy Council [continued]."

More reference to international treaties and decisions by courts in other common-law countries acted like new blood coursing through the veins of Australia's judicial arteries.

The Mason court set out specific protection for those charged in criminal cases, widened the ambit of negligence cases, and, of course, handed down Mabo. According to Mason, the court has had a "very significant impact on the country" and the "outstanding example of this is Mabo".

Announced in 1992, five years after Mason became chief justice, the majority Mabo decision held that Australian common law, like the law in other lands colonised by the British, recognised the pre-existing land rights of native peoples.

The case involved a decade of hearings in the Queensland Supreme Court and the High Court. It was brought by the late Eddie Mabo,

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a Torres Strait islander, and was followed by a ham-fisted attempt by the Bjelke-Petersen government to retrospectively, and without compensation, abolish any traditional rights to land that may have survived the British annexation of the Torres Straits islands in 1879.

In his judgement, Gerard Brennan, who succeeded Mason as chief justice, said the notion of *terra nullius* "depended on a discriminatory denigration of indigenous inhabitants", treating them as "barbarous or unsettled". As that claim was "false" and "unacceptable", its legal consequences needed to be examined. Critically, Brennan also noted that international law "is a legitimate and important influence on the development of this common law", especially in the era of universal human rights.

Remarkably, Brennan's conclusion was anticipated more than 150 years earlier in an 1837 report by a British parliamentary committee. It declared: "It might be presumed that the native inhabitants of any land have an incontrovertible right to their own soil; a plain and sacred right, however, which seems not to have been understood."

In their judgement, Deane and Gaudron wrote of the "conflagration of oppression and conflict which . . . spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame".

This powerful statement sent

Elevation to the High Court is 'in the gift of the prime minister of the day'. Picture: ANDREW MEARES

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a hard right group within the law, business, politics, media and academia spare. In the year after the Mabo decision, attacks on the court reached an unprecedented degree of intensity, partly because of some of the emotional language used in the Mabo judgements.

Months after the decision, the Samuel Griffith Society, with Harry Gibbs as its patron, was established. Named after the first chief justice and a former Queensland premier, the society pledged to defend the constitution "against all who would attempt to undermine it [and] to oppose the further centralisation of power in Canberra".

The society also wanted to restore the authority of parliament – now an interesting dilemma, given that remarks about an "elective" monarchy are aimed at a conservative government – and to defend the independence of the judiciary. The society became a rallying point for anti-Mabo forces.

Mabo was based on common law, buttressed by a more independent approach to Australian history, including acknowledgment of white massacres of Aboriginal people. This led to an intensification of the "history wars", with the conservative historians' counter-reformation movement receiving generous subsidies from the Howard government's Federation Fund.

Stripped of extreme rhetoric, however, the Mabo debate was often about whether the decision represented a judicial revolution or a cautious correction of the common law. In any event, Mabo became institutionalised, with parliament passing the Keating government's Native Title Act in 1993.

In a 2004 speech titled "The Promise of Law Reform", Mason addressed the issue of whether it had been correct for the High Court to change a long-held interpretation of the common law.

"Although Sir Garfield Barwick expressed the view that the High Court was not entitled to change a common law rule because it was no longer appropriate to the times, his view has not been acted upon. It has been accepted that the common law is inherently capable of judicial development as, for example, when a common law rule was based on the existence of particular social or economic conditions that have undergone radical change, or when relevant changes have taken place to the legal system itself.

"In conformity with tradition, courts are extremely reluctant to depart from well-settled principle," Mason said. In his Mabo judgement, Brennan acknowledged "this self-imposed restraint". But in this case, as Mason puts it, "the principle in question was not well settled, was based on unacceptable values and an erroneous view of historical facts".

Reflecting on the Mabo decision nearly 14 years later, Mason says that the decision "drove this question of native title to the centre of the political stage. It also, I think, altered the dimensions of the tension between the indigenous people and the settler population of Australia and the government. I think it also had an impact on the way European people and the indigenous people looked at each other".

"It had a very significant cultural influence. It brought our history to the forefront, and although of course this wasn't the motive for the decision, I think it contributed to Australia looking at its own past.

"What happened in Mabo was just as much a reflection of changes in society, changes in outlook of the country, [although] obviously not all the community, otherwise we wouldn't have the strong criticism we have of Mabo."

"Mabo would certainly be one of the most important decisions that the High Court has given and perhaps the most important decision the High Court has given outside the constitutional sphere."

Asked whether a later court would have arrived at the same outcome, Mason says, "I have no reason to believe that the decision in Mabo would have been different."

Bret Walker says one of the reasons for the virulent criticism of Mabo is the "resentment by professional historians taken up by critics of all kinds about some of the judges in Mabo giving thumbnail sketches of the history of Australia".

"Another reason is that it was correctly understood to be a reversal of beliefs as to what the common law was. People who rather liked the law as it was [were displeased] and it [pleased people] who didn't like the law as it was."

Mabo presented "an enormous political challenge with huge social consequences for the country", partly because the federal parliament "cannot take property away without compensation".

Significantly, however, Walker believes that if the Mabo issue had come on at a later date, with different judges, "the result would probably have been the same".

The Mason court also found a guarantee of political free speech in the constitution, after decades of newspapers being inhibited by costly, and at times capricious, defamation cases. In a series of decisions from 1992 to 1995 (Nationwide News v Wills, Australian Capital Television v Commonwealth, Theophanous v Herald & Weekly Times), judges threw out cases where they restricted the right of journalists and others to engage in robust analysis of issues, institutions and public figures.

Mason says, "One of the features in the thinking of that time is that the old defamation law had a chilling impact on what journalists would write. That is vitally important."

"Much as we might be disposed to criticise the media for a lot of the things the media does, at bottom one of the fundamental foundations of our democracy is the capacity and the willingness of the media to probe into what is happening in public life. It may ultimately be as important a protection as any other we have, perhaps the most important protection.

"To that extent the decision in the ACT TV and subsequent cases of defamation, and ultimately taking shape in the Lange decision, were vitally important for Australian democracy and vitally important for the freedom of the press in this country."

But this was the high point for the court's "liberal" phase. For much of the past decade it has been in retreat. This ranges from narrowing the effective legal ambit for claims under the law of negligence – much to the relief of the insurance industry – to

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upholding the Howard government's decision to incarcerate indefinitely refugees who arrive by boat without a visa and cannot be returned home.

The spark for Howard's judicial counter-reformation came in 1996, after the Wik judgement of the Brennan-led High Court. The plaintiffs claimed lands and waters on the western side of Cape York Peninsula, including areas where the Queensland government had granted pastoral and mining leases. They argued that the mining leases were invalid and that the pastoral leases did not extinguish native title.

The Brennan court determined that the granting of pastoral leases was no bar to such native title claims; in other words, native title and pastoral leases could legally co-exist. Even though the judgement was not conclusive, and substantial elements of the case were subject to a Federal Court-supervised consent determination four years later, doubts about exclusive rights to the land through pastoral leases set off an explosive reaction.

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One month later deputy prime minister and National Party leader Tim Fischer accused the four majority judges in the Wik decision of judicial activism, and called Michael Kirby's separate judgement "awful".

Chief justice Mason wrote to Fischer, whom he said was threatening social stability with his attacks on the Wik judgement. Attorney-general Daryl Williams refused to support the court, even though Mason said it was "absolutely essential" that Williams defend it from public attack.

Soon after, Kirby called on politicians to stop personal attacks on judges and the court. But Williams warned judges against making public comment on political issues, unless those issues were before the courts.

Fischer called for the appointment of "capital-C" conservative judges – and that is, by and large, what he got. His demand became a rallying cry for the government, reflected in a series of court appointments.

These included Victorian Supreme Court judge Kenneth Hayne in 1997; conservative Brisbane barrister Ian Callinan in February, 1998; the appointment of NSW chief justice Murray Gleeson as High Court chief justice of Australia three months later; the elevation of NSW Supreme Court judge Dyson Heydon in 2003, and last year's appointment of Victorian Supreme Court judge Susan Crennan.

Labelling judges may indeed be, in the words of Bret Walker, a "parlour game". And few have expressed doubts about the legal prowess and intellect of Gleeson, Hayne, Heydon or Crennan. In his 2003 interview, Gleeson said: "It is very difficult to work out patterns of judicial decision-making that conform to the labels that are put on people."

Yet the elevation of the new judges to the bench coincided with a vicious Howard government attack on what it termed a "black armband" view of Australian history. The aim of the attack was to discredit a wide range of historians who had influenced the historical perceptions of High

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Court judges in the Mabo case.

Later, Heydon launched a blistering attack on the Mason court and what he termed judicial activism. In early 2003, he was appointed to the court.

Heydon's speech took place at a dinner hosted by the right-wing magazine *Quadrant*, identified by Howard as his favourite publication. Heydon said: "Many modern judges think that they can not only right every social wrong but achieve some form of immortality in doing so."

He said judges who breached a "duty" to "say no more than what is necessary" were guilty of a "form of activism capable of causing insidious harm to the rule of law".

The Howard government's High Court bete-noire, Michael Kirby, is renowned for publishing lengthy reasons for decisions, including references to international treaties and decisions by non-British courts.

In the same speech Heydon effectively accused the Mason court of setting out to alter the law, citing as factors in this process two "crucial" appointments — Murphy at the beginning of 1975; and Mason three years earlier. "Soon after Mason succeeded Sir Harry Gibbs as Chief Justice in 1987, the majority approach radically changed. Among the greatest innovators of them all, until he retired in 1995, was the once-cautious Mason. And Murphy has had numerous imitators in lower courts as well."

Heydon told his *Quadrant* audience that it was "questionable" whether a proper role for courts was to "introduce radical changes" like Mabo, even though parliament had not (at that point) done so, "particularly in view of their tendency to cause immense strains" in the community and parliament.

The more courts "freely change the law", the more the public will view their function as political, and courts will be "rightly" exposed to public attacks, and there will be increased pressure for public hearings into judicial appointments and "greater control over judicial behaviour after appointment".

Asked about Heydon's comments on activism and the Mason court, Mason said: "You ought to direct your question to him." Heydon declined to be interviewed.

In the past few years, particularly after the Heydon and Crennan appointments, Howard government attacks on the High Court have all but disappeared, suggesting that it is now relaxed and comfortable about the court's direction.

A significant decision of the Gleeson court, one often cited as evidence of its conservative leanings, is the al-Kateb case. However, Gleeson's dissent from the majority judgement underlines the risks of, to use his word, "stereotyping" judges.

Born of Palestinian parents in Kuwait, Ali al-Kateb was a stateless refugee. At the end of 2000 he arrived by boat in Australia without a visa. He was taken into immigration detention and applied for a protection visa. His application was refused and his applications for a review of that refusal failed. In August 2002, he wrote to the then minister for immigration, Phillip Ruddock, asking to be removed from Australia as soon as reasonably practicable.

The next year al-Kateb sought a declaration in the Federal Court that his continued detention was unlawful. The application was dismissed and his case was ultimately heard, on appeal, by the High Court.

On August 6, 2004, the court decided that refugees who could not be repatriated to their country, despite their wish to leave, could be held indefinitely in Australia. It was a 4-3 decision, with Gummow, Kirby and Gleeson dissenting, and Callinan, Heydon, Hayne and McHugh in the majority.

The majority decision was highly significant. Beyond legal argument about the meaning of the law, it appeared to legitimise the government's incarceration in harsh conditions of refugees who arrive unannounced in Australia by boat, a policy that played a significant role in Howard's 2001 election victory.

Partly because of this perception, partly because the issue of how Australia has handled refugees has seared itself into the conscience of a sizeable minority, but also because the case raises basic human-rights issues, it is worth canvassing some of the arguments contained in the judgements.

In his minority judgement, Gleeson said the relevant act did not specifically provide for a person to be kept in indefinite administrative detention. Limited mandatory detention was one thing, Gleeson said, but if it ended up being indefinite "there comes into play a principle of legality, which governs

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both parliament and the courts".

Courts sought to give effect to the will of parliament by declaring the meaning of legislation parliament has passed, he said. But courts "do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms [of which personal liberty is the most basic] u less such an intention is clearly manifested by unambiguous language".

In comments that could have implications for Australia's new anti-terrorism laws, Gleeson said: "A statement concerning the improbability that parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion."

"The possibility that a person, regardless of personal circumstances, regardless of whether he or she is a danger to the community, and regardless of whether he or she might abscond, can be subjected to indefinite, and perhaps permanent, administrative detention is not one to be dealt with by implication."

However, the Labor-appointed McHugh, who has since retired, argued that under the aliens power, parliament was "entitled to protect the nation against unwanted entrants by detaining them in custody. As long as the detention is for the purpose of deportation or preventing aliens from entering Australia or the Australian community, the justice or wisdom of the course taken by the parliament is not examinable in this or any other domestic court".

"It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the parliament is within the powers conferred on it by the constitution."

Kirby disagreed. His judgement cited the forced incarceration of Japanese-Americans during World War II as a case "now viewed with embarrassment in the United States and generally regarded as incorrect". He also cited a decision by the Israeli Supreme Court regarding the security wall separating Palestinians from Israelis. Judge P Barak upheld a challenge by Palestinian villagers to the "security fence" or wall being constructed on their land. Barak said: "This is the destiny of a democracy – she does not see all means as acceptable, and the ways of her enemies are not always open before her. A democracy must sometimes fight with one arm tied behind her back. Even so, a democracy has the upper hand. The rule of law and individual liberties constitute an important aspect of her security stance. At the end of the day, they strengthen her spirit and this strength allows her to overcome her difficulties."

National constitutions must adapt to the growing role of international law, including the law relating to human rights and fundamental freedoms, according to Kirby. This is "one of the most important legal developments that is occurring".

Whether it is the result of views like these, or his publicly proclaimed homosexuality, or a mixture of the two, Kirby has been the subject of the most savage personal attack in the history of the High Court. The reasons for the attack, which has included the use of a fraudulent official document, have never been fully explained.

On March 12, 2002, senator Bill Heffernan, parliamentary secretary to the Howard cabinet, told parliament that most Australian families would view Kirby as having failed the test of public trust and judicial legitimacy and that Kirby was not a "fit and proper" person to sit in judgement of people charged with sexual offences. He claimed Kirby had used the taxpayer-funded Comcar service "on a regular basis to pick up from an address known to the police in Clapton Place – adjacent to Kings Cross – a young male and accompany him to the judge's home address". Kirby denied the "homophobic accusations" as "false and absurd".

The opposition later revealed the Comcar documentation to be fraudulent. Heffernan was forced to resign as parliamentary secretary to the cabinet and to issue an unqualified apology to Kirby.

The Heffernan-Kirby affair, Kirby's high dissent rate and his close interest in international law suggest a judicial loner. But he is not alone.

This challenging legal journey to internationalisation may be three steps forward and two steps back. But such disparate influences as UN covenants and decisions by courts in other nations continue to influence High Court decisions.

Claims that the court has retreated from the more internationalist approach of the Mason court are exaggerated. The court has moved permanently beyond the highly restrictive Barwick era and the caution that marked other decades.

Another influential change occurred in 1984, when the High Court restricted full hearings to cases in which a single judge had already granted special leave to appeal.

As Gleeson says, the requirement for special leave to appeal means that in most cases "somebody's trying to push the envelope". This involves matters "in which there is a division of opinion in the courts below or there's a new order of law that has to be explored . . . We're operating at the margin all the time".

Gleeson has also referred to international influences on the practice of Australian law. In an address to an Australian Bar Association gathering in Paris in 2002, he said: "I believe there is a growing awareness within the Australian profession of the importance of looking beyond our own statutes and precedents, and our traditional sources, in formulating answers to legal problems."

"The forces of globalisation tend to standardise the questions to which a legal system must respond. It is only to be expected that there will be an increasing standardisation of the answers."

As Gerard Brennan said in his Mabo judgement: "The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the common law, especially when international law declares the existence of human rights."

For Gleeson, the Mabo decision "provides a notable example of the High Court of Australia developing the common law in response to the

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forces of globalisation".

Some Howard-appointed judges to the High Court, like Heydon, are Mabo-averse. But Gleeson's comments suggests that in a judicial tradition where continuity is valued, some major changes in the court's direction over the past generation are now part of that continuity.

This makes the High Court's reaction to the industrial relations appeal, and any future appeal on the anti-terrorism laws, all the more interesting to follow.

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ON THE HIGHEST BENCH

Keith Aickin, judge, 1976-82 Aickin (1916-1982) was a conservative judge. But as someone who reached manhood in the Depression, and experienced the vagaries of war, Aickin had a wide experience of life, which he applied to the law.

With a brilliant academic record in Melbourne, Aickin was generally cast in a similar mould to that of his mentor, Owen Dixon. He worked as a wartime administrator and diplomat, before settling into the bar, and becoming Australia's leading tax lawyer.

Aickin was appointed to the High Court by the Fraser government. This was months after he had joined with Murray Gleeson (now chief justice of the High Court) and legal academic P H Lane to express the opinion that the governor-general could, "in appropriate circumstances", dissolve parliament when a government was unable to secure supply in the Senate.

Aickin was careful and precise in his judgements, exhibiting a close adherence to precedent. He was also, perhaps surprisingly, an early advocate of a bill of rights.

Garfield Barwick, chief justice, 1964-81 One of the most gifted and successful of legal advocates, Barwick (1903-1997) had a patchy record as a politician, and was a controversial figure as chief justice.

Barwick was educated at Sydney's Fort Street high school, which another High Court judge, HV Evatt, also attended, as well as Barwick's double cousin, and later attorney-general, Bob Ellicott.

He appeared before the High Court two years after graduating in law with honours. But it was more than 20 years later, during the bank nationalisation case in 1948, when Barwick earned his wide public reputation, as the successful advocate for the private banks.

Mixed fortunes in parliament, as attorney-general and external affairs minister in the Menzies government, followed. Barwick's political star was fading when he accepted the offer to become chief justice in 1964. His tenure was marked by an abrasive manner, buttressed by his view that the court was "the most important institution in the Australian federation".

He is best remembered for his advice to fellow Fort Street alumnus John Kerr that as governor-general Kerr had the power to dismiss the Whitlam government because the Senate had blocked supply.

Gerard Brennan, judge, 1981-95; chief justice, 1995-98 A humane man, Brennan's (1928-) career reflects a belief in using the law to protect basic rights and minorities, while sticking to legal norms.

The son of a Queensland Supreme Court judge, Brennan excelled at school and university. He also did well as a barrister and was a pioneer of Australian administrative law.

On the High Court, Brennan embraced the concept of community values, but still paid strong heed to precedent and legal history. He is best known for judgements in Mabo and Wik and in decisions recognising the freedom of political speech.

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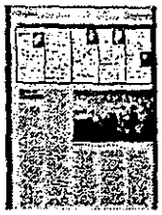

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Ian Callinan, judge, 1998- A big, burly figure, who fancies himself as a renaissance man, Callinan (1937-) was the first barrister elevated directly to the High Court in 22 years.

Raised in Brisbane, Callinan graduated in law and soon became one of Brisbane's leading advocates. He rose to national prominence in the mid-1980s when he led the prosecution against High Court judge Lionel Murphy for allegedly attempting to pervert the course of justice. In the same decade Callinan featured in the WA Inc inquiries, representing Alan Bond. He later travelled to Majorca in an unsuccessful bid to seek the extradition of Christopher Skase.

When Callinan was elevated to the High Court his views appeared to meet former National Party leader Tim Fischer's demand for "capital-C" conservatives. He is conservative in his judgements but enjoys good personal relations with other judges, including Michael Kirby.

In a fulsome profile in *The Oxford Companion to the High Court*, Nicholas Hasluck said Callinan's literary skills link him to "some equally notable lawyers" like Evatt and Deakin. More on the pace is the following lampoon of his novel-writing, titled "The Cannelloni Conspiracy", and published in a recent edition of *Justinian*, the online legal newsletter: "Sam Splayd, Culinary Detective, leaned down towards the poussin-like figure in the wheelchair and planted a luscious, full-cream kiss on Rose Du Bois' spaghettini-thin lips, imagining her plucked, trussed, lightly sauteed and dribbled all over with a delicate prune mousseline."

Susan Crennan, judge, 2005- Crennan (1945-) is the second woman to be elevated to the High Court. She had a Catholic education in Melbourne and studied arts at Melbourne University. She taught English for a while, but, as stated during her formal induction to the Federal Court in 2004, "the pull of the bard did not prove to be as strong as the pull of the bar".

She began to practise in Sydney, then moved to Melbourne, where she specialised in civil, commercial, constitutional, criminal and public law. It is premature to comment on Crennan's High Court form. It is known, however, that on St Patrick's Day, she invites colleagues for drinks and likes the men to wear green ties.

Daryl Dawson, judge, 1982-97 Educated in Canberra, Melbourne and at Yale University, Dawson (1933-) was Victoria's solicitor-general for eight years before elevation to the High Court. Respected for his legal understanding and analytical ability, Dawson was seen as a conservative. This was reflected in his dissenting position in the Mabo case.

Dawson also took a narrow view in the early free-speech cases, but, interestingly, his approach became more influential in the ultimate free speech case (Lange v ABC) in 1997.

William Deane, judge, 1982-95 Once regarded as a conservative barrister, who specialised in the lucrative tax area, Deane (1931-) became one of the most innovative and humane judges in the High Court's history.

Educated in Canberra and Sydney, where, like Gleeson, he was a boarder at St Joseph's, Deane was a keen sportsman and lost the sight in one eye after a rugby game. A highly successful barrister, he became a NSW Supreme Court judge and later president of the Trade Practices Tribunal.

Appointed to the High Court by the Fraser government, Deane became a reformer, helping to transform the law of negligence. In constitutional cases he formed a new majority with Murphy, Mason and Brennan, and he usually sided with the Commonwealth in federal disputes.

Deane stood out in the Mabo decision in 1992. He identified the dispossession of Aboriginal people as the "darkest aspect of the history of this nation". He continued to espouse concern for the needy and dispossessed when he became governor-general.

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Mary Gaudron, judge, 1987-2002 The first female judge appointed to the High Court, Gaudron (1943-) came from a humble background and achieved much by force of intellect, will and character.

Born and raised in the northern NSW town of Moree, Gaudron won scholarships to fund her remarkable academic achievements and became a successful barrister, specialising in industrial law. She was appointed a deputy president of the Arbitration Commission at 31, and was also the head of the NSW Law Reform Commission, before her elevation to the High Court at the age of 43.

Gaudron was active in major court decisions, ranging from freedom of speech to native title cases. She was a reformer in the area of criminal law, including emphasis on strict compliance by trial judges in their task of directing juries.

In a legal world that can be stuffy and patronising, Gaudron is renowned for earthy language and infectious humour.

Harry Gibbs, judge 1970-81; chief justice 1981-87 Hailing from a legal background, Gibbs (1917-2005) was a staunch conservative who appeared mild in manner but who continued legal arguments with colleagues such as Anthony Mason almost to his grave.

Educated in Queensland, he joined the army during World War II. Gibbs practised as a barrister and became a state Supreme Court judge. In 1963 the then Queensland premier, Frank Nicklin, appointed Gibbs to chair a royal commission into police corruption. Allegations centred on after-hours drinking by police and protection of prostitutes.

The commissioner's failure to find any official corruption has been criticised, particularly in light of the scandalous findings of the Fitzgerald inquiry 20 years later.

In 1971 Gibbs was appointed to the High Court, and succeeded Garfield Barwick as chief justice in 1981. He was a strong supporter of states' rights. After retirement, Gibbs remained active as the president of the conservative Samuel Griffith Society.

Murray Gleeson, chief justice, 1998- The son of a NSW north coast garage proprietor, Gleeson (1938-) boarded at St Joseph's in Sydney, along with a young Bill Hefferman, who was to feature decades later in attacks on High Court judge Michael Kirby.

A brilliant man, with an ability to present complex ideas with great force and clarity, Gleeson was the stand-out in a stellar Sydney bar.

In October 1975, he joined with Keith Aickin (later a High Court judge) and law professor P H Lane to express the opinion that that the governor-general could "in appropriate circumstances" dissolve parliament if a government was unable to secure supply.

Working mainly in commercial law, Gleeson had one celebrated victory in a criminal trial before a jury when he secured an acquittal for National Party leader Ian Sinclair. Chosen by Nick Greiner's Liberal government as NSW chief justice in 1988, Gleeson spent a decade in that position before the Howard government appointed him chief justice of Australia in 1998.

Gleeson presides over a bench that is in better odour with the Howard government, and the business community, than its predecessors, largely because it is more cautious and predictable. In personal dealings he gives the appearance of a fair, decent man, but never someone to be trifled with. Gleeson has the sort of judicial gravitas that has earned him the ironic nickname of "Smiler".

William Gummow, judge, 1995- One of the intellectual leaders of the court, Gummow (1942-) came to the bench with a strong legal academic background. Educated, like Mason, at Sydney Grammar, and later at Sydney University, Gummow taught law for 20 years until his appointment to the Federal Court in 1986. He was elevated to the High Court in 1995.

Gummow has written books on equity law with, among others, colourful Sydney judicial identity Roddy Pitt Meagher and Dyson Heydon. On the High Court he has

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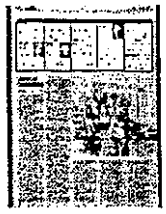

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taken a leading role in decisions affecting intellectual property law, equity law and the constitution, particularly the separation of powers. He is often part of a majority which includes Kenneth Hayne and Dyson Heydon.

Kenneth Hayne, judge, 1997- Educated in Melbourne, Hayne (1945-), like former Labor foreign minister Gareth Evans, won the Supreme Court law prize after graduating in law. After attending Oxford as a Rhodes scholar, Hayne worked as a barrister in Melbourne, building a large commercial practice. He was appointed to the Victorian Supreme Court in 1992.

As a High Court judge, Hayne is regarded as cautious. In the words of *The Oxford Companion to the High Court*, judgements which Hayne is party to "rarely develop the law beyond the extent necessary to decide the case".

Dyson Heydon, judge, 2003- Heydon (1943-) is the son of the distinguished public servant Peter Heydon, who was at one time principal private secretary to Robert Menzies when he was prime minister.

Heydon excelled at school and was also a useful cricketer. After impressing at university and the Sydney bar, however, he earned a reputation for being somewhat arch.

Along with Gummow, Heydon is the author of influential texts on equity law, and has an international reputation in the area. Regarded as conservative in the law, but a man whose brilliance is generally acknowledged, Heydon was appointed to the High Court in 2003.

After his elevation, Heydon was asked by the student newspaper *Honi Soit* what the term "Australian" meant to him. He replied: "Technically a subject of the Queen in right of Australia. That leaves out, I suppose, aliens of various types who have been resident here for a long time. In a sense they are Australians too. They are partly Australian." As the Americans say, would you run that by me again?

Michael Kirby, judge, 1996- Growing up in modest family circumstances in Sydney's west, Kirby (1939-) showed from the start the iron discipline and determination to succeed that would carry him to great official heights.

Educated at Fort Street high school – like Barwick, Evatt, John Kerr, Neville Wran and Australia's first prime minister Edmund Barton – Kirby studied law, economics and arts at Sydney University. He was nominated as the law representative on the students' representative council by Murray Gleeson.

Kirby worked at the bar for a while, but his destiny was always going to be on the bench. He became foundation head of the Law Reform Commission, followed by appointment to the Arbitration Commission. A term as head of the NSW Court of Criminal Appeal followed, where Kirby showed his preparedness to use precedents from non-British courts.

Kirby has the highest dissent rate in the Gleeson court. This could be seen as a sign that he is more amenable to non-Anglo precedents, more influenced by international treaties, an indication of the court's increasing caution under Gleeson, or all three.

Anthony Mason, judge, 1972-87, chief justice, 1987-95 Mason (1925-) is the most significant chief justice in the history of the High Court. He is responsible for bringing down historic judgements like Mabo, affirming the right to political free speech, and granting strict

procedural rights for defendants in criminal cases.

A sprightly 81, Mason still exerts considerable influence, even though the times are more cautious, through his athletic intellect, character and the quality of his academic legal work.

Educated, like Gummow, at Sydney Grammar, Mason served in the RAAF during World War II, studied law at Sydney University and was a highly successful barrister before his appointment as solicitor-general by the Menzies government in 1964.

In 1969 he was appointed to the NSW Supreme Court and three years later to the High Court. Once there, Mason's early judgments gave little indication of the liberal approach he would later employ as chief justice. While displaying due respect to precedent, Mason pioneered the development of a "new and distinctive Australian jurisprudence" – to use Michael McHugh's phrase, one free of self-conscious kow-towing to the British court system.

Michael McHugh, judge, 1989-2005

McHugh (1935-) hails from a knockabout working-class background in Newcastle and on the Queensland coalfields. He was raised with a traditional Irish Catholic emphasis on loyalty to family and mates.

The restless teenager was an itinerant for several years before completing school and studying law part-time. A brilliant barrister with a wide-ranging practice, he was appointed to the NSW Supreme Court in 1984, and five years later a Labor government appointed him to the High Court.

McHugh understood the need for change, but this was tempered, in the words of *The Oxford Companion to the High Court*, "by a conservative or cautious approach in application". This has occasionally brought him into sharp disagreement with another Labor appointee to the court, Michael Kirby.

Good looking, physically strong and a vital presence, McHugh's speeches reflect a strong understanding of the wider influences at work that is unusual for a member of his profession.

Lionel Murphy, judge, 1975-86

Murphy (1922-1986) was the most controversial judge in the court's history, one whose career ended in legal ignominy. Paradoxically, he was also one of the court's most influential figures.

Raised in inner Sydney, Murphy studied chemistry and law at Sydney University, and had a very successful industrial practice, where he often represented left-wing trade unions. He moved into politics as a Labor senator and was attorney-general in the Whitlam government, presiding over legislation that ranged from family law to trade practices.

Appointed to the High Court during the Whitlam government's last year in office, Murphy had a hostile relationship with Garfield Barwick. He believed slavish adherence to precedent was a "doctrine eminently suitable for a nation overwhelmingly populated by sheep".

Murphy insisted on the undivided authority of the High Court and slammed the Privy Council as a "relic of colonialism". His final years were dominated by his trial, conviction and ultimate acquittal on charges of attempting to pervert the course of justice.

Murphy died of cancer one hour after his last High Court decision was handed down.

Ninian Stephen, judge, 1972-82

Stephen (1923-) has an unusual background, having been educated in Europe through the generosity of

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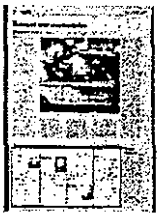

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an elderly Queensland benefactress. He studied law at Melbourne University after war service, and was a barrister in Melbourne, specialising in tax and constitutional law. Stephen's approach to judging was meticulous, once saying he saw his duty as to decide each case as appropriate, and to let the result take care of itself. His tenure spanned the Barwick and Gibbs courts.

In 1982 Malcolm Fraser appointed Stephen governor-general. According to Hilary Charlesworth in *The Oxford Companion to the High Court*, Stephen's relaxed manner and "cheerful, self-deprecating humour dissipated much of the vice-regal pomp and ceremony". Interestingly, as governor-general Stephen displayed a close interest in

indigenous issues, as did High Court judge William Deane, who became governor-general 13 years later.

John Toohey, judge, 1987-98 Like William Deane, Toohey's (1930-) time on the court was marked by a passionate concern for justice and the fate of Australia's indigenous people.

Educated at Catholic schools and the University of Western Australia, Toohey was a brilliant scholar. He later established a highly successful practice as a barrister specialising in tax and land law. In 1974 he turned his back on material success, to establish the inaugural Aboriginal legal office in Port Hedland. Three years later he was made the first Aboriginal Land Commissioner for the Northern Territory.

On the High Court Toohey's concern for justice showed up in his siding with the majority in a case concerning the common-law right to a fair trial, and later in Mabo and various free-speech decisions.

Toohey presciently argued that a court established to protect a written constitution might need to act more vigorously to protect core liberal democratic values and the rule of law. This was in an age when parliaments were "increasingly seen to be the de facto agents or facilitators of executive power, rather than bulwarks against it".

After his retirement Toohey was asked for his reaction to comments that he was an "activist" judge. "Almost none," he replied.

Ronald Wilson, judge, 1979-89 Raised in a legal family, Wilson (1922-2005) was the first Western Australian to be appointed to the High Court.

An early school-leaver, and a Spitfire pilot during World War II, Wilson finally finished his law degree in 1949. He worked for the Crown solicitor as a prosecutor, until his appointment as WA solicitor-general in 1969. Wilson remained in that position until his elevation to the High Court.

Wilson was often in a minority when issues of federal power came to the court. He was also embroiled in tensions between judges over the court's move to Canberra.

After retiring from the bench Wilson prepared the Human Rights and Equal Opportunity Commission report on the "stolen generation" of Aborigines. As former attorney-general Peter Durack wrote in *The Oxford Companion to the High Court*, preparing the *Bringing Them Home* report was a "profoundly moving experience" for Wilson. "Freed of the constraints of judicial office, Wilson has displayed a passion and commitment far removed from the conservatism of his judicial opinions," Durack wrote. Wilson died last year.

ANDREW CLARK

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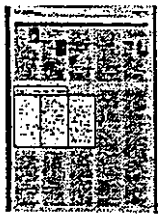

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How the few are chosen

Wide divergence in opinions among judges about the meaning of the law and methods of interpretation raises the issue of how judges are chosen.

According to University of NSW law professor George Williams, governments, not surprisingly, appoint people with judicial philosophies "they'd like to see expressed on the court".

Appointments are made behind closed doors, with no judicial commission or parliamentary hearings. There is a process, involving the sounding out of names among a select group of judges and lawyers, and an obligation to consult the states. But appointments are, as Williams says, "in the gift of the prime minister of the day".

"It's not surprising that John Howard might seek to appoint people he perceives to be less activist and more conservative than Bob Hawke or Paul Keating would have appointed," Williams says. "I think that has a major impact."

He identifies Michael Kirby as a barometer of the shift in High Court's thinking since Howard's election government in 1996. Kirby would "fit pretty much in the centre of the Mason court, whereas now he finds himself an outlier, having the highest rate of dissent ever".

"The times have changed. The reaction to the Mason court and the Brennan court had an impact. The reaction to the Wik case [in 1996] and the intense public furore that resulted from the very direct and sometimes personal criticism [of] the judges had [an effect]. You can't help, as a human being, as a judge, being influenced by those types of things."

The current chief justice, Murray Gleeson, is a courteous man with a conservative personal bent, but someone who tries to be reasonable and fair in his dealings with other members of the bench. This has not prevented tension from becoming apparent in such an intimate environment. There have even been reports of judges taking breakfast separately in the dining room of Canberra's Commonwealth Club.

But judicial tittle-tattle should not distract attention from the main game. As former chief justice Gerard Brennan says: "My main concern would be to ensure the independence of the judicial system. That is not always easy. The courts are not the playthings of politics. The courts stand as an independent branch of government and must remain so in order to maintain public confidence in them and in order to discharge their important function of preserving liberty in balance with protection."

Williams notes that while judges are independent, they live in a community and are affected by what happens in that community.

ANDREW CLARK