

Quality of justice is not strained by 'activism'

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JUDICIAL activism vs judicial restraint is a topic of vibrant debate in Australia. It is an important debate, yet touches one dimension only of the effect that judicial method has on Australian law and government.

A recent published extract from a Quadrant speech by Australia's next High Court justice Dyson Heydon gives prominence - in our view, too much prominence - to that theme in evaluating the contribution of Anthony Mason to Australian law (Opinion, December 18).

High Court judges can write upward of 40 judgments a year, many having little bearing on the debate about legalism, progressivism, activism or whatever the label. The High Court deals with all legal issues arising in Australia, such as the interpretation of tax law, jury instructions in a criminal trial, calculation of damages or the meaning of conflicting statutory provisions. Even when social policy issues are more prominent, a label such as conservative or liberal can add little in analysing a legal problem or a judge's response. Recently, for example, in the Gutnick case, the High Court decided unanimously that it is for parliament, not the judiciary, to decide whether to change the law on defamation to accommodate the internet age. That conclusion, like many others, can be viewed differently - as striking a balance between law and technology, the courts and parliament or protection of individual reputation as against press freedom. Legal rulings often have to be disentangled, too, from their later effect and significance. In Aala in 2000, all seven judges held that a breach of natural justice by the Refugee Review Tribunal could be rectified by the High Court in proceedings begun in the court under the Constitution. That ruling caused an upswing in immigration applications to the court and complicated the administration of Australian immigration policy. Yet it would be simplistic to connect those larger trends directly to the judicial philosophy of any individual justice of the court.

Mason served on the High Court for 23 years, including seven as chief justice. He sat alongside many other powerful and respected judges who were equally influential in that period - William Deane and Gerard Brennan, to name just two. Among the great diversity of issues dealt with by the court, some were contentious and now loom large in appraisal of the court's record - such as Mabo on native title, ACTV on implied constitutional rights and Teoh on international conventions. WE have been among the critics of at least some aspects of the reasoning in those decisions, but have never questioned the complexity of the issues or the quality of the legal scholarship brought to bear upon them. Courts choose neither the legal problems nor submissions on which they have to rule. A feature of the court over which Mason presided is that it was more open in addressing the social and policy choices it had to confront. As many commentators have pointed out, an attachment to "strict and complete legalism" - a hallmark of the Dixon court - can appear

to downplay but never remove the underlying need for choice, whether described as a legal, social or political choice.

It is, in any case, misleading to describe the development of Australian law as captured by different styles of reasoning, from the Dixon, Mason or other era. Owen Dixon, as Heydon notes, accepted that courts change the law, but preferably by a process of gradual development. Mason equally stressed the strong tradition of consistency, coherence and continuity in the orderly development of the law. The difference revolves around the extent of permissible change and the process by which it occurs. Legal trends are never static and oscillate between periods of activism and relative quiescence. One explanation of that trend, famously offered by US Supreme Court justice Oliver Wendell Holmes, is that the law must deal with "the felt necessities of the time". Mabo, not surprisingly, is applauded at least as much as it is criticised. Society is not homogenous, and neither is judicial reasoning nor the solutions to legal problems. The open dialogue on legal issues that was a strength of the court over which Mason presided continues to be displayed in other ways. Since his retirement, Mason has prepared an almost countless number of papers and addresses for conferences, journals and university classes in Australia and abroad. This can be viewed only as a mark of his esteem within and beyond the legal community. The value of his contribution to Australian law is not to be measured by whether one agrees or disagrees with his views on a particular issue.

Geoffrey Lindell is a professorial fellow in law at the University of Melbourne.

John McMillan is alumni professor of administrative law at the Australian National University.

Both have worked with or alongside Anthony Mason at different times.