

## The essence of good judgment

JANET ALBRECHTSEN THE AUSTRALIAN JUNE 18, 2014 12:00AM

**ACTRESS Kate Fitzpatrick famously labelled him the sexiest man she had ever met. Hopefully that caught your attention because writing about a judge can be a dry endeavour. That's especially the case when you're writing about a judge who doesn't fall into that fashionable genre of hero judge, one of those colourful celebrity judges who court media attention and, brimming with self-regard, prefer the brilliance of their own mind to construct an outcome rather than applying the rule of law.**

If a judge's name is well-known outside the law, it's safe to assume they have probably stepped outside their proper judicial function into the adrenalin pumping political arena. Many in the media love nothing more than a self-appointed hero judge.

Hence, many people outside law and politics won't have heard of Murray Gleeson. On the one hand, that's a shame because Gleeson is one of this country's most eminent jurists. On the other hand, Gleeson's low profile outside the law is the finest tribute to a judge who was never seduced by judicial power to succumb to his own whims about fairness over the rule of law.

The Smiler, a recently published biography of Gleeson written by journalist Michael Pelly, is a scintillating read not because Gleeson, now retired, pours out his thoughts and wisdom to Pelly. On the contrary, it's a book made more fascinating by Gleeson's natural reticence to talk about his role at the forefront of the political, legal and social convulsions in Australia during his 50 years in the law. Here is a book that breathes the true nature of Gleeson and his unwavering belief in the proper role of a judge.

There are no rhetorical flourishes about appearing before the High Court as a barrister, no purple prose when Gleeson defended a doctor in a game-changing abortion case in 1970 when police broke into an operating theatre in Bondi where a 37-year-old woman lay, having travelled 100km for a safe abortion. No waxing lyrical about his role in drafting advice to the Liberal opposition in 1975 about the powers of the governor-general, or his successful defence of Country Party MP Ian Sinclair or his defence of Labor stalwart Mick Young, or the Fine Cotton racehorse ring-in scandal, or the Raw Prawn defamation case when he acted for Fitzpatrick, or acting for the Tasmanian government in the Tasmanian Dam case in 1983.

Pelly tracks Gleeson's almost half century career in the law through the prism of a man who became renowned for his dry style, his disciplined and analytic approach to argument, a lawyer never afraid to give away a bad argument ("it detracts from the strength of your good points"), who eschewed the flowery prose used by so many lawyers to buttress weak arguments, a judge committed to the rule of law, with a withering glare that would, inevitably, lead him to be dubbed The Smiler.

Gleeson's career, first as chief justice of the NSW Supreme Court and later as chief justice of the High Court of Australia, covered everything from the trial of Ivan Milat, to raising questions about the powers of the NSW Independent Commission Against Corruption, to reining in the "blame and claim" culture of negligence cases, to judgments about the extent of commonwealth power, drawing a line about infringing basic rights at the indefinite detention of asylum-seekers and a prisoner's right to vote.

Gleeson gave speeches to educate the public — and lawyers — about the need for judges to remain true to their judicial role in upholding the rule of law, rather than deciding cases according to personal

approval or disapproval.

Gleeson warned that judges who succumb to conscience-driven decision-making forfeit their legitimacy as judges. He reminded us that restraint and discipline are sources of strength, not weakness, for the judiciary because “public confidence demands that the rule of law be respected, above all, by the judiciary”. Labelling elected judges a “constitutional monstrosity” Gleeson reminded us that judges should stay outside politics.

Gleeson’s warnings are timeless. When Anthony Mason became chief justice of the High Court in 1987, the former traditional judge succumbed to that great judicial temptation of using judicial power to engineer a better world according to his own notions. Bored with the tiresome job of upholding the law, Mason assumed the role of philosopher king with one of his judicial brethren remarking that he was seduced by the “siren-song of left wing intellectuals” into becoming a judicial innovator.

As Pelly’s book traces, Gleeson and fellow justice Michael Kirby often clashed over the judicial role. Like Mason, Kirby was frequently seduced by the hero judge role, making conscience-driven decisions, using his own values as a measuring stick for “community values”, ignoring the rule of law, and searching for some international pronouncement to bolster his decision. The man who once won a judicial Oscar for most media mentions while on the court, in 2004, Kirby gave what became known in legal circles as his “I Dream” speech where he dreamt of being on the Mason court, a “period of the court’s history alert to serious injustices and awake to the traditional recuperative capacities of our law to right significant wrongs”. It was, said Kirby, a “happy dream”.

No doubt it was happy. Getting a handful of judges to implement social agendas is far easier than getting millions of voters to agree with you. Unhappily, democracy must bear the price of that conceited paternalism.

And using the bench to socially engineer a world according to personal whim makes it harder to say, as Alexander Hamilton — one of the founding fathers of the US Constitution — said more than 200 years ago, that the judiciary is the least dangerous arm of government.

A month after Kirby’s “I Dream” speech, Gleeson politely slapped down the judicial activists on the courts and in our law schools: “Although some judges speak confidently of community values as though they know what they are, they may be attributing their personal values to the public for rhetorical purposes.”

“The judiciary”, he said, “is a passive institution and judges should not set out to influence wider community values.”

People will always agree or disagree with some of Gleeson’s individual decisions. However, his long career — 600 judgments on the High Court — is a tribute to the proper role of the judge at a time when many acquiesce to the more fashionable and inherently undemocratic genre of judicial imperialism.

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