Book Review

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DYNAMIC AND PRINCIPLED: THE INFLUENCE OF SIR ANTHONY MASON

Dynamic and Principled: The Influence of Sir Anthony Mason, edited by Barbara McDonald, Ben Chen and Jeffrey Gordon, Federation Press, 2022, 464 pages: ISBN 9781760023454. Hardback $180.00.

A casual glance at the contents of *DYNAMIC AND PRINCIPLED: The Influence of Sir Anthony Mason* may well give the impression that it is another learned festschrift, this time containing impressive discussions by the cream of Australian jurists and legal writers about the prolific judicial output of Sir Anthony Mason in the course of his legal career in the Court of Appeal of New South Wales and the High Court of Australia. It is certainly that and for those keen on knowing more about the diversity and depth of Sir Anthony's work in the courts, there is no better introduction that this collection. There is even a short Foreword from Sir Anthony himself. The book is divided into three parts, simply headed General, Public Law and Private Law. The topics that are covered include statutory construction, constitutional law and diverse private law topics such as mental distress, the law of fiduciaries and equitable estoppel.

However, this superficial description of the book far from conveys its real significance. For me, it represents, as I hope it does for others as well, one of the most durable works about the common law itself, with understandable emphasis on Australia, though not exclusively so. This being the intention, the editors (Professor Barbara McDonald, Ben Chen and Jeffrey Gordon, all from the University of Sydney Law School) and the contributors are to be congratulated because they could not have chosen a more suitable person than Sir Anthony Mason, arguably the giant among giants in the common law. He is certainly a "good lawyer", the highest accolade that I have ever heard him give to any lawyer, be they judges, legal practitioners or academics. Always modest about how he sees his legacy in the law ("I would prefer not to express an opinion about that. It is better left to others to determine whether there was a legacy worthwhile that was left") (Introduction, p 1), I shall say something on his behalf: his legacy is enormous. When I was a law student close to 50 years ago, the stars in the legal firmament included Lord Reid, Lord Wilberforce, Lord Diplock and Sir Owen Dixon. Their legacies were massive (they still are) but Sir Anthony Mason's contribution to Australia specifically and the common law in general will, if anything, be larger: the impact he has made will remain for many, many generations to come. This book confirms this. In Sir Anthony Mason: Hong Kong and the Court of Final Appeal (p 44), William Gummow quotes from a part of the speech I gave on my retirement in 2021. Rethinking this after reading the book, and with due apologies and blushes aside, I would now say, "Sir Anthony Mason remains for me **the** wisest, ablest and best lawyer I have ever had the fortune to meet and work with".

The common law has of course as its foundation the concept of justice and fair procedure, but its existence is crucially dependent on the recognition that it can only have relevance when it serves the community in which it exists. Looked at in this way, we can more easily see that the development of the common law in any given jurisdiction is a reflection of that place's history and actually forms a part of that history. If history means essentially the political, social and economic facets of a society, then the law – and the rule of law as lawyers understand that concept – are good reflections of that society and the challenges faced by it, and, more important, of how just and fair, indeed humane, it deals with those challenges. In this respect, therefore, the operation of the legal system, in other words the work of the courts and their judges, must come under close scrutiny. The basic questions are always the same but they are worth repeating: what are the characteristics of the legal system, what is the approach of the courts, how are the rights and freedoms of *everyone* in the community protected and is there a discernible method in the way judges work (in other words, do the courts function in a principled way)? The book aims to provide the answers to these questions from the point of view of the common law, seen through the work of Sir Anthony Mason. It is by studying his judgments and approach that one can see not just the content of the law and its development, but also the principled way in which the process of judging must, and can

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only, be approached. Justice and integrity of course characterise the work of the courts but only by the application of transparent legal principles. I emphasise the word 'principles' for it is no part of a court's function to reach conclusions and to decide cases on some sort of random – or worse, arbitrary – basis. A principled approach is always and indeed the only method.[1]

A convenient starting point in this discussion is Sir Anthony's speech on his being sworn in as Chief Justice of the High Court on 6 February 1987.[2] An important part of his speech is reproduced in the Introduction (p 2). Particularly noteworthy in this quote is the obligation placed on courts to "shape principles of law that are suited to the conditions and circumstances of Australian society". In that part of his speech immediately following this quote, Sir Anthony uses the term "the common law for Australia"[3] and this encapsulates precisely how Sir Anthony regards the ethos and spirit of, as well as the duty placed on, Australian courts: the articulation and development of legal principles that would are, in the final analysis, relevant to Australia. The abolition of appeals from Australia to the Judicial Committee of the Privy Council in London by The *Australia Act 1986* (Cth) no doubt facilitated this development, allowing the High Court to have (as Sir Anthony said in his speech) "the exclusive final responsibility for declaring what is the law for Australia".

In this context, The Coming of Age of Australian Law by Stephen Gageler is essential reading. It is essential for anyone wishing to understand the spirit of the law as developed by Sir Anthony in Australia and how this came about. Justice Gageler refers to the creation of "a body of common law and equitable principle that was distinctively Australian" (p 9). This was of course neither controversial nor in any sense revolutionary. After all, we are reminded of the Dixonian ideal that the "common law system is one of incremental judicial development of principle to meet changing societal needs" (p 8). But it was principally during the years when Mason CJ led the High Court that this ideal translated, at times it can be said courageously, into a distinct body of legal principles in many different areas of the law that uniquely catered to the needs, requirements and obligations of Australian society. "Not very long before, and even during, the Mason era, it was common to see reference to the common law **in** Australia, just as it is common to see reference to the common law **of** an individual Australian state. Within a decade after the Mason era, it was being said confidently, repeatedly and meaningfully that there existed a unified common law **of** Australia." (p 9) Justice Gageler refers to *Mabo*[4] as epitomising the spirit of the High Court under Mason CJ.[5] It is little wonder that this is widely acknowledged to be the case. If the common law of Australia was to reflect society, it had to reflect its history. Respecting indigenous rights and indigenous customary law was a part of Australian culture and the common law of Australia recognised this.[6] It is important to understand that the High Court's reasoning in *Mabo* was not an exposition or interpretation of the *Australian Constitution*; it was the articulation of the common law of Australia, employing the tools of fairness, justice and legal principle. As Brennan J, who gave the leading judgment, said,[7] "The law which governs Australia is Australian law". Mason CJ gave a short concurring judgment,[8] simply saying "the common law of this country recognises a form of native title".[9] This is a short statement but one which profoundly acknowledged that a people's culture was the foundation of

[1] Lawyers will readily recollect from their law study days that cases were never to be decided according to the length of the "Chancellor's foot". This is a reference to the criticism made of the courts of equity in the 17th century when it was perceived that the Lord Chancellor was arbitrary in the way cases were decided. John Selden, the 17th century jurist and philosopher, referred to the Chancellor's foot being "long, short or indifferent" depending on who occupied the office (Selden's *Table Talk Writings*, 1689).

[2] *Dao v Australian Postal Commission* (1987) 162 CLR 317.

[3] Following the said quote.

[4] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

[5] Together with another case which Sir Anthony has described as "the most important constitutional decision in my time" (pp 29–30): *Cole v Whitfield* (1988) 165 CLR 360.

[6] See a detailed discussion of this in First Nations Heritage: Land Rights, Cultural Integrity and Succession Law by Prue Vines.

[7] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 29.

[8] Together with McHugh J.

[9] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 15.

rights that the common law would enforce. The societal, not to mention historical, significance cannot be over-emphasised. Nor can its legal significance be underestimated: indigenous customary law was recognised "in a way that the common law had refused to do before".[10]

The need to develop the common law to dovetail with the needs of the particular community in which it is to be found, applies in all areas of the law. The book identifies instances of this. In tort, in the troublesome area of negligent misstatements, Mason J stated, "This court must now decide for itself what is the common law for Australia upon the topic".[11] As Barbara McDonald remarks in Mason on Tort Law: What Is Negligence?,[12] "It could truly be said that, during Sir Anthony's tenure [in the High Court] tort law in Australia became distinctly Australian" and that these "distinctly Australian principles of tort law… will continue to influence the development of the law for generations to come". This approach permeated other areas. In the law of contract, the interesting (and unusual) case of *Codelfa Construction Proprietary Ltd v State Rail Authority of New South Wales*,[13] in its treatment of implied terms and the law of frustration marked "a significant touchstone in the Australian law of contract".[14] The leading judgment in *Codelfa* was that of Mason J. There is a tribute paid to him by the authors of the chapter: "There are, indeed, few judges who could be said to have had as great an influence as Sir Anthony in shaping the development of Australian law." (p 266) The authors remind us that any evaluation of Sir Anthony's contribution to the Australian law of contract must "inevitably" begin with Volume 149 of the Commonwealth Law Reports: this volume was "for many years regarded as close a thing as existed to a genuinely Australian textbook on the law of contract" (p 266).

Chief Justice Andrew Bell's incisive Chapter on the conflict of laws (Sir Anthony Mason and the Conflict of Laws: A Critical Appraisal) also places emphasis on Sir Anthony's insistence on a common law for Australia. An analysis is made of Mason CJ's judgment in *Breavington v Godleman*,[15] case dealing with the much-vexed and difficult question of the double actionability rule, but in a federal context. There is then quoted a passage, said to be "founded at once in practical common sense but also a clear and modern vision of the Australian polity" (p 220). That passage begins, "Australia is one country and one nation".[16] *Breavington* was followed by *McKain v RW Miller & Co (South Australia) Pty Ltd*,[17] said by Professor Michael Pryles to be "the best analysis I have read on substance and procedure in the conflict of laws, judicial or extra-judicial" (p 221).

So far, I have been at pains to highlight the imperative that the common law must be relevant to the community in which it operates, meaning of course for the majority of Sir Anthony's legal career, Australia. However, it would be a mistake to think that this imperative somehow became an end in itself and might justify a relaxation of the discipline of the law. As the book (with respect) is rightly at pains to point out, Sir Anthony above all adhered to the common law approach of deciding cases on a principled basis. There is nothing random about his approach: due deference is paid to the value of judicial precedent, to the value of comparative law and close judicial reasoning. Perhaps this was why Sir Anthony (and many other eminent judges) have always railed against labels such as "judicial activism", as though cases were decided in some unprincipled or random way. At his swearing in, he reiterated the Dixonian ideal: "And even in those cases where the rules in question are common law or judge-made rules, judicial freedom of choice is restrained by our efforts to ensure that judicial development of the law, though responding dynamically to the needs of society, is principled, orderly and evolutionary in character." Brennan J's judgment in *Mabo* further reflects this approach: "In discharging its duty to

[10] *Cole v Whitfield* (1988) 165 CLR 360, 392.

[11] *L Shaddock & Associates Pty Ltd v Parramatta City Council (No 1)* (1981) 150 CLR 225, 248.

[12] *Cole v Whitfield* (1988) 165 CLR 360, 364, 375.

[13] *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337.

[14] A Doctrinal Landmark: Codelfa Construction Pty Ltd v State Rail Authority of NSW by Professor JW Carter, John Eldridge and Justice Elisabeth Peden.

[15] *Breavington v Godleman* (1988) 169 CLR 41.

[16] *Breavington v Godleman* (1988) 169 CLR 41, 78.

[17] *McKain v RW Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1.

declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency."[18] I mentioned the case of *Breavington* earlier. Andrew Bell says this about the judicial method in Mason CJ's judgment: "contrary to charges that are sometimes made as to the radicalism of the Mason Court, the Chief Justice's reasoning was orthodox and transparent." (p 218) In one of the most important constitutional cases heard by the High Court, *Australian Capital Television Pty Ltd v Commonwealth*,[19] Mason CJ insisted that the implication of rights had to be "securely based".[20]

Sir Anthony's methodology in constitutional reasoning is further explored in depth in Sir Anthony Mason and The Australian Constitution: Method and Vision by Sean Brennan. It is a fascinating analysis, not least because it is made in the context of that area of the law in which many regard Sir Anthony as having made the most significant impact: constitutional law, where there exists that perennial tussle between the rights of the individual and the public interest (as seen through the eyes of the authorities), both being legitimate considerations in public law, but which often pull in diametrically opposite directions. In order to arrive at a workable, not to mention convincing, approach to what are often extremely difficult – and extremely significant – decisions for the courts, a principled and disciplined approach is mandatory. Add to this, in Sir Anthony's case, the responsibility of dealing with major issues that defined "the implications of Australian nationhood",[21] one appreciates the need even more and, in Sean Brennan's words, "helped make Mason the most significant Australian judge of his era" (p 102). One of the characteristics of this judicial method was the recognition that in explaining the reasons behind a decision, there had to be openness in disclosing (not just to the reader but to the public as a whole) the "actual considerations at work in the mind of the judge" (p 104). I have already in the preceding paragraph made reference to transparency. Not just that, Sir Anthony recognised the importance of a court speaking with one voice (in contradistinction to a court in which each judge must have their individual say even where the result is exactly the same), a lesson that is not to be underestimated. The collegiality of a court is not just a concept involving a sense of camaraderie: it translates into comprehensible and clear judgments which are essential particularly when matters of great public interest are involved. This gives rise to certainty in the law and greater transparency, essential components of the rule of law itself. Sir Anthony brought this collegiality to the High Court (indeed every court in which he has sat). This aspect is admirably brought out by Stephen Gageler (pp 27–30). It is perhaps no coincidence that the first judgment of the High Court under Mason CJ (as reported in the CLR) is a judgment of the court as a whole.[22]

In writing this review, I do so from the perspective of a lawyer from another common law jurisdiction, in my case Hong Kong. Most the book understandably looks at Sir Anthony's work in the Australian courts, but as I mentioned earlier, not exclusively so. After he retired as Chief Justice of the High Court of Australia in 1995, he became the first of the overseas judges invited to sit in Hong Kong's Court of Final Appeal.[23] In Sir Anthony Mason: Hong Kong and The Court of Final Appeal, William Gummow documents a part of the immense contribution made by Sir Anthony to Hong Kong. After 1 July 1997, when the Court of Final Appeal replaced the Judicial Committee of the Privy Council as the apex court for Hong Kong, there was brought about by the resumption of the exercise of sovereignty by the People's Republic of China over Hong Kong and by the Basic Law,[24] a new constitutional order that, while allowing Hong Kong to remain as it is today a common law jurisdiction, also had an inevitable interface with the rest of the People's Republic of China. This new constitutional order brought about many

[18] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 29.

[19] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

[20] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 134. See here Sir Anthony and the Implied Freedom of Political Communication by Kristen Walker and Shawn Rajanayagam (p 197).

[21] This is the phrase used by Sean Brennan (p 102).

[22] *Dao v Australian Postal Commission* (1987) 162 CLR 317.

[23] The judges are known as NPJs (Non-Permanent Judges).

[24] This is the constitutional document for the Hong Kong Special Administrative Region.

difficult legal questions that the Court of Final Appeal had to determine and quite simply, needed to get right at that early stage of the new Hong Kong. It is no exaggeration to say that Sir Anthony Mason played an utterly crucial role in putting Hong Kong on a sure legal footing in this initial period of the new constitutional order. This continued to the day he retired from the Court of Final Appeal in 2015, one of the saddest days in my own legal career.

Time does not permit me to refer to the other excellent Chapters in "*DYNAMIC AND PRINCIPLED: The Influence of Sir Anthony Mason*". It is a fitting tribute to a great jurist and a great man. But perhaps Sir Anthony would, in his modest way, prefer the book to be a fitting tribute to the common law itself, for this is in truth the theme that percolates through it.

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