SIR ANTHONY MASON

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Anthony Frank Mason came to the notice of many in the legal profession early in his career. He was admitted to the New South Wales Bar in 1951 and three years later had his first significant success in a constitutional challenge to provisions of the Bankruptcy Act, arguing that provisions purporting to give power to the registrar were contrary to Chapter III of the Constitution.[1] Shortly afterwards he endeavoured to appear for Fitzpatrick in the proceedings before the House of Representatives against his client and Browne for contempt of Parliament but he was denied permission. He has said that that experience had a considerable effect on his outlook in respect of the principles of natural justice and the importance of the courts in protecting the citizen.

In 1964 he was appointed Solicitor-General of the Commonwealth. While he was the fourth person to hold that position (the others being Garran, Knowles and Bailey) he was the first Solicitor-General who was not also Secretary of the Attorney-General's Department. His main duties were, therefore, to act as counsel and adviser to the Commonwealth. This gave him insights into the institutions and organisation of government which no doubt played their part in the formation of his later judicial views on public law.

His experience as Solicitor-General may also have had an influence on the emphasis he placed on the different roles and attitudes of judges and administrators in relation to individual rights and duties. In an address at Sydney University in 1975 he said:

> One has only to compare an appeal book with its wealth of material and accumulation of detail, mostly in the form of direct evidence, related to the case in hand, with the exiguous and superficial statement of facts contained in a typical departmental file, to realise that there is a world of difference between judicial determination and administrative decision making.[2]

Nevertheless that same experience showed that the courts should have regard to the problems of government and also ensure they did not trespass upon the proper functions of the executive and the administration. For example, in holding that the Court should not interpret s 81 of the Constitution (providing for appropriations "for the purposes of the Commonwealth") so as to require it to determine whether any specific appropriation was within a federal power, he emphasised practical problems:

> It has been the practice, born of practical necessity... to give but a short description of the particular items dealt with in an Appropriation Act. No other course is feasible because,

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1 *R v Davison* (1954) 90 CLR 353.

2 A Tay and E Kamenka (eds), *Law Making in Australia* (1980) at 18.

in many respects, the items of expenditure have not been thought through and elaborated in detail.[3]

Also in *Australian Broadcasting Tribunal v Bond*[4] he saw the issue of interpreting "decision" in the Administrative Decisions (Judicial Review) Act 1977 (Cth) as involving the question whether a particular interpretation "would lead to a fragmentation of the processes of administrative decision-making and set at risk the efficiency of the administrative process".[5]

The twenty-three years that Sir Anthony Mason was on the High Court marked some evolution in his approach to a number of issues. His decisions on s 92 of the Constitution, for example, began with an attempt to accommodate the principles laid down by the Dixon Court, but with more emphasis on the public interest component of valid "regulation" of interstate trade. The absence of discrimination against interstate trade gradually became of more importance as a factor leading to upholding validity. Finally in *Cole v Whitfield*[6] a unanimous court overruled the earlier principles and formulae in favour of treating the provision as a prohibition of discrimination against interstate trade with a protectionist purpose or effect. I have elsewhere described this case as the most important of those decided by the Mason Court. Sir Gerard Brennan has said that "This judgment might rightly be considered as testimony to the multiple judicial qualities of Chief Justice Mason."[7]

Similarly, in the earlier years he took, like other members of the Court, a more cautious approach to changing long-established common law rules and principles.[8] From the time he became Chief Justice, however, a great wave of reform occurred. Many rules and principles that had hitherto been regarded as well established in the common law were either overruled or radically altered. Old favourites on which many lawyers were weaned disappeared, including *Rylands v Fletcher*,[9] *Beaudesert Shire Council v Smith*,[10] the different classes of occupier's liability, the distinction between payments made under a mistake of fact and mistake of law and the doctrine of privity of contract in respect of insurance.[11] The principles of equity, particularly those associated with the concept of unconscionability, were extended into the area of commercial transactions.[12] This protection of the vulnerable from the exercise of

3 *Victoria v Commonwealth* (1975) 134 CLR 338 at 395.
4 (1990) 170 CLR 321.
5 Ibid at 337.
6 (1988) 165 CLR 360.
7 C Saunders (ed), *Courts of Final Jurisdiction* (1996) at 13.
8 *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583; *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 633; *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 552.
9 (1868) LR 3 HL 330.
10 (1966) 120 CLR 145.
11 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; *Northern Territory v Mengel* (1995) 185 CLR 307; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107.
12 I Renard, "Fair Dealing and Good Faith" in C Saunders (ed) above n 7 at 71-80; A Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 *LQR* 238.

private power had its counterpart in constitutional law, administrative law and the common law in relation to governmental power.

In *Commonwealth v John Fairfax and Sons Ltd* [13] Mason J, sitting alone refused an application by the Commonwealth for an injunction based on disclosure of confidential information. He drew a distinction between the protection of an individual and the protection of the government from such disclosure:

> [I]t can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism.[14]

He added that restraint on the publication of such information was "unacceptable in our democratic society". This seemed to place on its head the history of the law in respect of governmental secrecy. The importance of information and public discussion and criticism of governmental affairs to democratic government was to be further developed a decade later in the field of constitutional law.

The long-established concept, reaffirmed by Sir Owen Dixon and others in the *Communist Party Case*[15] that vice-regal representatives were not subject to administrative law writs was overthrown in the face of the reality of responsible government, namely, the rule that the Governor was bound by ministerial advice.[16] Similarly Mason J was in the forefront of those who urged the overruling of the long-established common law principle that a court could not review the manner of exercise of a royal prerogative.[17] Again, however, he showed concern that the court did not intrude into functions more suited to executive officers. He pointed out that a prerogative would not be reviewable if it were not conditioned on any purpose that was discoverable or if it was not possible to formulate a sufficiently precise principle. Nor would it be reviewable if it involved a judgment of matters about which the court was not sufficiently informed or which were otherwise unsuited to judicial method and technique.

Sir Anthony followed a fairly consistent line in construing federal powers broadly, subject to some exceptions,[18] throughout his time on the High Court. That applied particularly to the corporations power, the marriage power and the external affairs power. Many of the cases concerning these powers were decided by small majorities. As the text clearly was not conclusive, policy reasons and value judgments appeared more clearly than before in judgments concerned with characterisation. For example, in *Actors and Announcers Equity Association v Fontana Films Pty Ltd*,[19] Gibbs CJ referred (as no one had done for some decades) to federalism as a factor in not giving the broadest construction to a federal power, in that case, the corporations power. He spoke of the need "to achieve the proper reconciliation between the apparent width of s 51(xx) and the maintenance of the federal balance which the Constitution requires."[20] Mason J replied that the power "was intended to confer comprehensive power with respect to

13 (1980) 147 CLR 39.
14 Ibid at 52.
15 (1951) 83 CLR 1.
16 *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170 at 220 per Mason J; *FAI Insurances Ltd v Winnecke* (1982) 151 CLR 342.
17 *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170.
18 For example, *New South Wales v Commonwealth (Incorporation Case)* (1990) 169 CLR 482.
19 (1982) 150 CLR 169.
20 Ibid at 182.

the subject matter so as to ensure that all conceivable matters of national concern would be comprehended".[21]

Direct use of policy considerations and a clear turning away from Dixonian "legalism" occurred in *Koowarta v Bjelke-Petersen*[22] and the *Franklin Dam Case*.[23] The minority judges were expressly concerned with the threat to the exclusive power of the States. By contrast Mason J, and other majority judges, referred to the need for the Commonwealth to have sufficient power to play its part in international affairs and the evolution of international law. He said that a broad interpretation of the external affairs power was essential to Australia's participation in world affairs.

In a book review Sir Anthony drew attention to the different type of reasoning required for giving overt attention to policy considerations from the "more traditional analytical method which proceeds to a conclusion from precedent and accepted concept".[24] He pointed out that the majority in the *Franklin Dam Case* did not hesitate to base their reasoning on policy considerations in interpreting the external affairs power.

During Sir Anthony's term as Chief Justice there was, generally, a more open examination of policies and application of values than ever before in those cases where more than one rational conclusion was consistent with the text of the Constitution or a statute, or with a common law principle. There was a general attack on past decisions which were "formalistic", deserted "practical reality" or ignored social consequences. In constitutional law there was greater emphasis on the purpose of a provision, as illustrated by *Cole v Whitfield* and by *Street v Queensland Bar Association*,[25] which for the first time construed s 117 (prohibiting discrimination against residents of other States) in a manner which made it a substantive constitutional guarantee.

On a broader scale, in the Mason Court the concept of human rights and freedoms pervaded many aspects of law. In *Dietrich v R*[26] it was held that a judge should grant an adjournment or stay of criminal proceedings where an indigent accused, charged with a serious offence, is unable to obtain legal representation through no fault of his own. The decision was based on a declared common law right to a fair trial. A fair trial was also the ground for decision in *McKinney v R*[27] requiring a warning to be given to a jury about uncorroborated confessions made in police custody without access to a lawyer. The rule of statutory interpretation that an Act should be construed, if possible, so as not to interfere with basic common law rights received striking affirmation in *Coco v R*,[28] where an Act authorising the use of listening devices was held not to authorise entry onto premises to install or maintain them.

Among the most controversial of the decisions of the Mason Court was *Mabo v Queensland (No 2)*[29] recognising native title to land in Australia for the first time in more than 200 years. The judgment of Brennan J, with which Mason CJ agreed, rejected the *terra nullius* doctrine on the ground that it was unjust and discriminatory and that

21 Ibid at 207-208.
22 (1982) 153 CLR 168.
23 (1983) 158 CLR 1.
24 (1983) 6 *UNSWLJ* 234 at 236.
25 (1989) 168 CLR 461.
26 (1992) 177 CLR 292.
27 (1991) 171 CLR 468.
28 (1994) 179 CLR 427. See also *Plenty v Dillon* (1991) 171 CLR 635.
29 (1992) 175 CLR 1.

its overthrow accorded with the expectations of the international community and "the contemporary values of the Australian people".[30]

Great controversy regarding the work of the Mason Court also concerned the cases that dealt with the implied freedom of communication on political and governmental matters. Mason CJ's judgment in *Australian Capital Television Pty Ltd v Commonwealth*[31] was, contrary to the view of some, careful and cautious. The implied freedom was seen as a necessary incident of representative government for which the Constitution provided. That constitutional object was discerned from provisions such as ss 7 and 24 ("chosen by the people"), s 64 (ministers must after three months be members of Parliament) and s 128 (constitutional alteration). These provisions, combined with the Australia Act led him to the conclusion that "ultimate sovereignty resided in the Australian people".[32] The implied freedom was held to require alteration of the common law of defamation.[33] Despite criticism from judicial and other sources, the implied freedom and its effect on the common law were upheld by a unanimous Court (although in a somewhat different form) after Mason CJ's departure.[34]

In summary, from Sir Anthony Mason's judgments, speeches and articles one can discern:

(a) a questioning of the reasons for rules;

(b) a conscious weighing and balancing of conflicting interests;

(c) a greater use of policy arguments and reasoning;

(d) a dislike of formal and technical distinctions that ignore the underlying purpose of legal rules;

(e) a greater questioning of precedent.

It may be that at least some of these factors are less evident in judgments since his departure from the Court. Nevertheless the major decisions of the High Court during his chief justiceship have stood up very well.

A very important innovation of Sir Anthony was to explain to the public, by means of radio, television and newspapers, the work of the High Court and, generally, the methods employed by judges in deciding cases. Having regard to the controversial nature of some of the decisions and the attacks made on the Court from time to time, this was a bold enterprise. It seems, however, to have been as successful as it was desirable.

30 Ibid at 42.
31 (1992) 177 CLR 106.
32 Ibid at 138.
33 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104.
34 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.