

The Mason Papers¹

I was intrigued by the decision to launch this book at a conference with a title explicitly based on that of a talk given by Justice Dyson Heydon at a dinner associated with *Quadrant*, in which Sir Anthony Mason was mentioned from time to time. I excitedly searched through the pages of the book for views or attitudes calculated to bring about the death of the rule of law. I must say that, in that respect, the book is wanting. It may be, of course, that the editor has suppressed those views, but as I know Professor Lindell to be a bold, honest and upright academic I am sure that is not the case.

The effect reading this volume has had on me is best explained in this way: I have spent the last two years preparing a new edition of a book. That has required me to read or re-read, with some care, all constitutional cases decided in the past eleven years. To go from that task to reading *The Mason Papers* is like coming out of a stifling room and taking a breath of fresh air.

It has, I believe, been published at a very appropriate time, reminding us all that there is another approach to law and judicial method than that which the High Court has usually (though not invariably) followed for the past decade.

Some comments by judges over this period represent the antithesis of what one gleans from Sir Anthony's writings. To the author of these papers social consequences, community values and functional considerations are, together with legal doctrine and precedent, part of the fabric of the law, the mix of factors required for the rational determination of many legal issues.

This is to be contrasted, for example, with the castigation of counsel in *Re Wakim* for treating social consequences as relevant to the issue of validity, instead of (as Gummow and Hayne JJ put it) "legal analysis and the application of accepted

¹ This speech was delivered by Professor Leslie Zines at the launch of *The Mason Papers* in Melbourne, in November 2007, and is published on the Federation Press website by kind permission of Professor Zines.

constitutional doctrine”. Similarly, the remark of Callinan and Heydon JJ in *XYZ* that “questions of inconvenience, even grave inconvenience, have little weight on issues of constitutional interpretation” is quite foreign to the philosophy and outlook displayed in these essays.

The first eight chapters, while dealing with different subjects, are all concerned, one way or another, with judicial method and the role of the courts. Included in that role is the responsibility of appellate courts to develop the law, which can only be carried out, in the writer’s view, by looking at contemporary conditions. The judge should have an eye to the justice of a rule, and its practical efficacy in our present social circumstances. In interpreting a text, whether it is the Constitution, a statute or a contract, the words alone cannot resolve the question, without regard to fundamental community values, functional considerations and the purpose or policy of a provision.

All this has a direct bearing on the concept of an open society. The need for transparency and accountability is not confined to the political arms of government. Throughout the book it is emphasised that if social considerations or values have a part to play in a judge’s decision they should be disclosed. Similarly, when a decision is finely balanced that should, the author says, be acknowledged. In other words, judgments should not be, as they often are, exercises in advocacy for a point of view, with majority and dissenting judgments not answering the arguments of the other.

As Professor Lindell’s introduction indicates, the boundary between legislative and judicial law-making is an issue of great concern for Sir Anthony and is the subject of chapter four. It is of importance in current circumstances as a result of some newspaper columnists and editorial writers deploring law-making by judges even in areas of common law. The complaint, however, sometimes depends on the subject matter. The media did not, from what I recall, complain (as some others did) about the Court’s constitutional implication of a freedom of political communication, except perhaps that it did not go far enough. There has, however, been hostile comment about the suggestion made by some State judges of the development of a common law right of privacy.

It is of interest that Sir Anthony has expressed his opposition to any judicial development of such a right. He uses this example to illustrate the various factors he sets out as relevant to the issue whether the courts should embark on a new development of the common law or leave it to the Parliaments. He refers, for example, to the issue of privacy being a highly charged political question in which various vested interests would want to have a say, and that comprehensive inquiries would need to be made as a result of that and also in framing qualifications and exceptions to any general rule.

Sir Anthony, however, gives many instances of judicial law-making and points out that in areas of judge made law the Parliaments do not keep the law under continuing review and that, therefore, the absence of legislative initiatives does not mean either that the present state of the law is satisfactory or that the Parliaments consider that it is.

A chapter entitled “Rights, values and legal institutions” is interesting in that the lecture was given, as I remember, to an audience consisting largely of social scientists and philosophers rather than lawyers. It was necessary, therefore, to explain the place of doctrine, precedent and legal argument and how they connect with values and policies. He pointed out that in giving reasons for judgment the judge must relate them to the body of legal doctrine including statutes and general principles of law. He said that precedent and authority lead to certainty, consistency and predictability which are very important values in the law. The tension between those values and the insistent demand for justice in the individual case is, in his view, the dilemma that constantly confronts the judge.

Sir Anthony cuts through much of the cant about judicial activism and passivism (although he does not, I think, use these terms) and shows that the judicial process is a more complex and sophisticated exercise. The issue is often not simply one of precedent and doctrine versus policies and values, but of choices to be made within doctrine and precedent and a conflict of values and policies. All this may call for “weighing and balancing of interests and principles”. As my old Harvard constitutional law professor, Paul Freund, was fond of saying: “Values, like troubles, come not single file but in battalions.”

Chapters on specific subject-matters include the republic, an Australian bill of rights, democracy and the law, the influence of international law, the decline of national sovereignty in the face of globalisation, threatening democratic government, appellate advocacy and legal research. Particular areas of law that are discussed are constitutional law, international law, administrative law, contract and equity.

I personally found the chapters on a comparative analysis of judicial review of administrative action, and themes and tensions underlying the law of contract particularly enlightening. He has provided for lawyers not expert in those fields a clear, concise and interesting analysis.

It is not often that academics indicate — or perhaps feel — any sympathy for the position of a High Court judge. But I have often thought that, vis-à-vis academics, High Court judges have one disadvantage. Whereas an academic is usually expert in one or two areas and is ready to comment and criticise judgments in those areas, High Court judges are required to understand, apply and develop principles and policies in all fields of law. They then wait to be pounced on by the expert who may have spent most of his or her professional life in that area.

That thought occurred to me as a result of the editor's review of the range of Sir Anthony's writings, which included, in addition to the subjects dealt with in *The Mason Papers*, contributions on torts, criminal law, company law, intellectual property, maritime law, conflict of laws, property law and taxation law.

However, leaving aside matters not included in the book, I do not know of any Australian law book by a single author that has such a broad coverage. Moreover, the contributions are written in a style that is lucid, succinct and elegant, as we have come to expect from Sir Anthony Mason.

There is someone else who must be mentioned. Professor Lindell engaged in a Herculean task in determining what among the author's voluminous pieces should be included. The magnitude of this undertaking can be appreciated from the statistics given by him in the Introduction: 36 chapters etc in books, 160 contributions in legal

periodicals, 34 forewords and prefaces. And that was only the published material. The two previously unpublished papers were chosen from 89 speeches, 78 lectures, 75 presentations at academic conferences etc and 13 media interviews.

Above all, Professor Lindell is to be commended for bringing together so well in the Introduction the various themes in the book, and also for his discussion of the propriety of extra-curial speech-making and writing by judges.

Federation Press (which has done so much to support Australian legal scholarship) has produced a handsome volume with a colourful and most attractive dust jacket. They are to be congratulated.

Justice Dyson Heydon, in the paper to which I referred earlier, indicated various qualities of modern judgments that he disliked and added, disapprovingly: “There is much talk of policy and interests and values.” That can certainly be said of *The Mason Papers*, but in no disparaging sense. It is in my opinion a highly commendable work.

Professor Leslie Zines, November 2007