REVIEW ARTICLE*

JUDGE(S) AND CO

Courts of Final Jurisdiction: The Mason Court in Australia edited by CHERYL SAUNDERS (Australia: Federation Press, 1996), pp xviii + 273. Softcover recommended price: $60.00 (ISBN 1 86287 206 6).

I. INTRODUCTION

It has been said that "judges were the traditional lawmakers" before "they were overtaken by the onslaught of democratic theory and supplanted by parliament". The onslaught followed in the wake of Jeremy Bentham's withering criticism of their role in the development of the law.[1] The greater reluctance to acknowledge this kind of role in modern times occurred with the movement which saw the extension of the parliamentary franchise in the United Kingdom and the establishment of democratically elected parliaments in British colonies including those in Australia. Notwithstanding that movement, it is of course now widely accepted, even amongst the judiciary, that judges still make law but in a special and more limited sense than the political branches of the government. Justice Michael Kirby has often reminded us of Lord Reid's

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1 G Sturgess and P Chubb, *Judging The World: Law and Politics in the World's Leading Courts*, Butterworths (1988) pp 2-3 who referred to J Bentham, "The Elements of the Art of Packing" in *The Works of Jeremy Bentham*, Vol V, Russell and Russell (1962) pp 75 ff quoted Anthony Blackshield, "The Legitimacy and Authority of Judges", Meredith Memorial Lecture, 1985. Jeremy Bentham coined the term "Judge and Co" referred to in the title to this article.

famous remarks about the declaratory theory of the common law being based on a "fairy tale" which is no longer believed.[2]

For the robust Lord Denning, the real difference was between the judges who could be described as the "bold spirits" and those who could be described as the "timorous souls" in the shaping of the common law.[3] So the issue then, has become in Australia, as in other parts of the world which apply Anglo-American common law principles, not so much whether they make law, but in what sense and in what circumstances.

The decisions of the Australian High Court during the period when Sir Anthony Mason presided as Chief Justice saw dramatic changes to judge-made law. It was almost inevitable that decisions like the *Mabo* case[4] would excite controversy about the legitimacy of the role of judges in making law. The publication of the book which is the subject of this review makes it a timely occasion to revisit this somewhat familiar debate, especially as the debate has begun to attract the attention of the general public, some of which has been critical of certain leading decisions of the High Court during the period in question.

II. THE CONTENTS OF THE BOOK

As is explained in the concise and informative Prologue to the book written by its editor, Professor Cheryl Saunders, the book consists of series of essays which were originally delivered by distinguished jurists and lawyers from Australia and overseas at a highly successful conference to mark this important period in the life of the High Court.[5] The book is structured in two parts. The first part consists of essays which will serve as an extremely useful record of the achievements of the Court during this period. The second concentrates, for the most part, on essays which deal with the role of appellate courts in other parts of the world, as well as the growing significance of international law for domestic courts in Australia and elsewhere. The book contains a helpful index and is free of proof reading errors.

A. Part 1: The Chief Justice and the High Court and Interlude

Given the outstanding contribution made to the law by Sir Anthony throughout his long legal and judicial career it could hardly be found surprising that most contributors paid justifiably glowing tributes to the former Chief Justice. One contributor went as far to suggest that Sir Anthony was in his view the best Chief Justice Australia has ever had, not excluding Sir Owen Dixon.[6]

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2 Justice M Kirby, *The Judges*, Boyer Lecture Series (1983) at 59 quoting from Lord Reid "The Judge as Lawmaker" (1972) 12 *Journal of Public Teachers of Law* 22 at 22.

3 *Candler v Crane Christmas & Co* [1951] 2 KB 164 at 178.

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

5 Prologue: "The Mason Court in Context" in Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia*, Federation Press (1996) pp 2-8.

6 Lord Cooke of Thorndon, "Dream of an International Common Law" in Saunders *ibid* 138 at 138.

Another described him as a "very considerable Australian" who was the right person to lead the High Court in its new role.[7]

Be that as it may, the leading tribute was delivered by the present Chief Justice, Sir Gerard Brennan, who described the more significant achievements of the Court under the guidance of Sir Anthony's leadership.[8] In particular he described the effect of the main decisions in the fields of public and private law, Sir Anthony's attitude to precedent and policy, the use of precedent from other countries, and also his willingness to explain the role of the Court to the public through the media. In the words of the present Chief Justice, Sir Anthony had "a vision of the future which allowed for the moulding of old principles to suit new conditions".[9] Sir Anthony was seen as opening the way to a more policy oriented interpretation once it was acknowledged that Sir Owen Dixon's attachment to "strict and complete legalism" could no longer be accepted as an adequate explanation of the judicial method. The new approach was seen as running the risk of confusing the distinction between political and judicial policy. However, the running of this risk was seen as necessary in order to guarantee the integrity of the judicial process and also to bring to bear upon the modern exposition of legal principle the influence of contemporary community values. Reference was also made to the way in which the former Chief Justice fostered the collegiate spirit as was apparently illustrated by the writing of the landmark judgment in *Cole v Whitfield*[10] on s 92 of the Constitution and also the judicial management of the judgment when differences of expression, or even of a concept, were negotiated to a united conclusion.[11]

One quality which the present writer would emphasise is the clarity and conciseness of Sir Anthony's style of expression in an age when judicial writing is increasingly called upon to be accessible to members of the public not versed in the law.

The contributions made by both the present Chief Justice and Sir Maurice Byers contain an incisive and accurate description of the personal qualities of the former Chief Justice. The present writer was particularly attracted by the remark made by the present Chief Justice that the changes achieved by his predecessor were all "carried out with a mischievous twinkle in the eye and a mordant wit which was never designed to offend".[12] Sir Maurice, like Sir Anthony Mason, was a former Commonwealth Solicitor-General, and he was during the period under discussion, and continues to be, a most influential advocate before the High Court. He referred in the course of his humorous and graceful "Vote of Thanks" to the former Chief Justice, to the:

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7 D Jackson QC, "The Role of the Chief Justice: A View from the Bar" in Saunders *ibid* 21 at 27.
8 G Brennan, "A Tribute to Sir Anthony Mason" in Saunders *ibid*, pp 10-14.
9 *Ibid* at 14.
10 (1988) 165 CLR 360.
11 Note 8 *supra* at 13.
12 *Ibid* at 14.

> great peace that descended on the Bench with Sir Harry Gibbs's elevation [having] continued undisturbed after Sir Anthony's. This peace has from time to time been relieved by the occasional acerbic remark, but courtesy and sweetness of temper were and remained the rule.[13]

The contribution by the Federal Attorney-General in the Labor Government praises the achievements of the Mason Court and draws attention to the significant shift to a more robust and purposive interpretation of Australia's Constitution.[14] This shift is illustrated by the abandonment of "narrow, formalistic rules of interpretation which ignore the underlying purpose of a constitutional provision and the social consequences of the Court's decision". Predictably, the prime illustration of this tendency cited was the Court's unanimous judgment in *Cole v Whitfield* - a case which is seen by most contributors as one of the finest achievements of the Mason Court given the confusing and, some would assert, irrational state in which the law had fallen by the time it was decided. Somewhat more surprising was the praise expressed on behalf of the then Government for the Court's decisions on "implied rights" and the rights of individuals such as, for example, the equally notable case on freedom of political communications: the *ACTV* case.[15] The other major development praised was the Court's decision in the *Mabo* case and its significance for the rights of indigenous peoples of Australia. The former Attorney-General acknowledged that the activism of the Court had given rise to disagreement on the proper roles of the Court and Parliament but he thought these tensions were healthy and creative.

The "View from the Bar" presented by one of Australia's leading constitutional silks, Mr David Jackson QC, is equally praiseworthy.[16] Mr Jackson reminds us of the background to the role exercised by the present High Court in the interpretation and application of the Constitution and also as a national court of appeal on all matters. By the time Sir Anthony Mason became Chief Justice the process of ending appeals to the Privy Council was completed as a result of the Australia Acts 1986, as was the establishment of the mechanism which ensures that all appeals heard by the High Court now lie in the discretion of the Court, namely, by the grant of the special leave of the Court. The latter mechanism gives the Court control over the volume and kind of judicial work it will perform in the exercise of its appellate jurisdiction.

Mr Jackson points to three important constitutional areas in addition to the developments in relation to s 92 (guarantee of freedom accorded to interstate trade) and s 117 (prohibition of discrimination on grounds of residence in other States) for which the Mason Court will be remembered. These were the *Mabo* case, the decisions which established a constitutional guarantee of free speech and also cases which concerned the separation of Commonwealth judicial power from legislative and executive power. These three areas are repeatedly referred to by other contributors to the book. The first of these cases was recognised as

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13 M Byers, "Vote of Thanks" in Saunders, note 5 *supra* 108 at 110.

14 M Lavarch, "The Court, the Parliament and the Executive" in Saunders *ibid*, pp 15-20.

15 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

16 Note 7 *supra*, pp 21-7.

controversial given the nature of its subject matter and the fact that its reasoning did not follow earlier perceptions of the effect of European settlement. Mr Jackson acknowledges that it was "no doubt a case very close to the boundary between the appropriate roles of the legislature and the judiciary".[17]

The non-constitutional areas chosen to typify significant change were said to illustrate the concepts of fairness or fair dealing or reasonableness as governing the relationships of citizen to government and citizen to citizen. Those areas included the criminal law as regards the rights of defendants (eg to legal representation in serious criminal trials), doctrines of estoppel, and unjust enrichment and restitution. As Mr Jackson indicated, "an underlying view of reasonableness has shown itself in the trend towards making all cases in tort depend on intention or negligence".[18] This involved the reversal of a number of long standing cases including a case which had stood for 126 years in favour of strict liability for the escape of dangerous things.[19]

Mr Waterford, the editor of a national daily newspaper and an experienced journalist with legal qualifications, provides an informative insight into the perceptions of the media regarding the workings of the High Court, as well as reaffirming the picture painted by other contributors of the main achievements of the Mason Court. In his view, there appears to be greater modern reporting of the working and operations of the Court since the transfer of the Court to Canberra.[20] He also believed that, on the whole, judgments were becoming easier to read.

The theme of citizenship (and the difficulties which attend that concept) were ably portrayed by Mr Justice Keith Mason, now the President of the New South Wales Court of Appeal, but who was then the Solicitor-General for that State.[21] This was one of the principal themes which characterised the contribution of the Mason Court to the evolution of Australian law. This essay elaborates the decisions which dealt with implied constitutional 'rights' and also the concept of popular sovereignty which underlies the judgments of some members of the Court in those decisions, principally Chief Justice Mason and Justice Deane. His Honour forecast the future significance of the separation of judicial power in Chapter III of the Constitution as a potent vehicle for the implication of citizens' rights. This essay contains a neat summary of the kind of judicial reasoning which can be expected to be used more frequently in the implication of those rights. He believed the rights would enure "as the result of two converging dead-ends", namely, "(1) Neither Parliament nor the Executive can perform certain tasks. And (2) judges cannot be directed by Parliament to perform those tasks otherwise than as *they* determine, according to traditional common law

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17 *Ibid* at 24-5.

18 *Ibid* at 24.

19 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 overruling *Rylands v Fletcher* (1868) LR 3 HL 330 which was said to by Mr Jackson to have fallen under the "steamroller of negligence", *ibid.*

20 J Waterford, "The Role of the Chief Justice: A Media View" in Saunders, note 5 *supra*, pp 28-34.

21 K Mason, "Citizenship" in Saunders, note 5 *supra*, pp 35-46.

principles".[22] The first of these steps is the result s 71 of the Constitution vesting the judicial power of the Commonwealth in the courts. The second is the result of implying from Chapter III the principle that federal courts cannot be vested with non-judicial powers.[23] In *Lim v Minister for Immigration, Local Government and Ethnic Affairs*[24] at least three judges were able to use this kind of reasoning to affirm a right of individuals to be protected against arbitrary imprisonment authorised by the executive branches of the government. It is not surprising that his Honour adverted to the potential for the separation of judicial powers to be used as a springboard for the creation of a judicial Bill of Rights. At the time he wrote about this kind of reasoning he spoke of the "dead-ends" being confined, at the moment at least, to the federal sphere. Subsequently, and after the departure of Sir Anthony Mason and Sir William Deane from the Court, a majority of its members have extended the reaches of some aspects of the separation of judicial powers to the State sphere.[25]

The former Solicitor-General fittingly ended his essay by pointing out that if anything characterised the era of the Mason Court it was the implicit rejection of an aspect of the landmark decision in the *Engineers* case[26] which strongly affirmed that the ballot box was the only answer to potential abuse of power exercised by the majority in Parliament. This is consistent with the view expressed by Sir Anthony Mason in the Wilfred Fullagar Memorial Lecture in which he indicated that "our evolving concept of the democratic process" was "moving beyond an exclusive emphasis on parliamentary supremacy and majority will" and embracing "a notion of responsible government which respect[ed] the fundamental rights and dignity of the individual".[27]

The theme of procedural fairness was taken up in the essay written by Mr RA Finkelstein QC and provides a comprehensive account of the steady and decisive expansion of the rules of procedural fairness (formerly known as natural justice).[28] The essay traces the history of those rules and their growth as a result of their judicial development in Australia in the second half of this century. These rules require persons who are adversely affected by the taking of administrative decisions to be provided with an opportunity to make representations and also that the decision maker act in good faith and without bias. The position has now been reached where the requirements of procedural fairness are recognised as applying to every decision maker whose decisions affect the rights, interests and legitimate expectations of individuals. Only a clear expression of a parliamentary intention can be effective to exclude those requirements. As Mr Finkelstein indicated, the past 20 years has seen the High Court respond to an increase in governmental powers which have increased the

22 *Ibid* at 41 [emphasisin original].

23 Due to the principle established in the *Boilermakers Case* (1957) 95 CLR 529.

24 (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ and cf at 55 per Gaudron J.

25 *Kable v Director of Public Prosecutions (NSW)* (1996) 70 ALJR 814 per Toohey, Gaudron, McHugh and Gummow JJ; Brennan CJ and Dawson J dissenting.

26 (1920) 28 CLR 129 at 151-2.

27 "Future Directions in Australian Law" (1987) 13 *Monash Law Review* 149 at 163 and also quoted at note 8 *supra* at 11.

28 RA Finkelstein QC, "Procedural Fairness" in Saunders, note 5 *supra*, pp 47-62.

range of powers and discretions vested in administrative agencies. The result of that response has been to lead to the establishment of a "unifying principle that decision makers whose decisions could cause loss of any kind should adopt fair procedures" and this is thought to be "justified and appropriate as a proper check against oppressive government power".[29]

A third principal theme that characterised the contribution of the Mason Court to the evolution of Australian law relates to fair dealing (and good faith) in the area of private law or, in other words, dealings between citizens as amongst themselves. The treatment of this theme by Mr Ian Renard, a leading Melbourne legal practitioner, is both extremely comprehensive and illuminating. As with the developments in the field of public law, the origins of the work of the Mason Court can be traced back to the earlier period when Sir Harry Gibbs became the Chief Justice of the Court.[30] Three main conclusions emerged from the panoramic survey of the main cases decided by the Court during the period under discussion. Firstly, that the Mason Court contributed significantly to the expansion of the use of equitable doctrine in commercial law. Secondly, that Australian legislatures and courts have together provided more appropriate remedies against unfair dealing. Thirdly, that despite the clamour from some quarters, the Court has yet to adopt, and should not adopt, the American concept of good faith as an essential element of the law of contract. As more than one contributor pointed out, the courts have historically enjoyed the jurisdiction possessed by the English Court of Chancery to set aside contracts on the grounds of fraud, misrepresentation, breach of fiduciary duty, undue influence and unconscionable conduct. However, what made the application noteworthy during the period under discussion was the greater willingness of the courts led by the High Court to exercise the jurisdiction and continue to develop the doctrines which regulate its exercise. This had a very significant impact on the law of contract. The High Court's approach to unconscionable conduct has been to prevent the enforcement of contractual bargains where this would lead to an unfair or unconscionable result. At the same time, it has also enabled the courts to enforce the promises or reasonable expectations of parties to a commercial transaction, notwithstanding any technical difficulties which might otherwise have prevented this taking place. A leading illustration of the latter development was the relaxation of the rules relating to consideration and privity of contract as essential requirements for the enforcement of a contract.[31]

The position has now been reached where it is possible to perceive good faith and fair dealing as a unifying theme. As is indicated by Mr Renard, few would dispute that contract law is undergoing an ideological shift away from the rugged individualism and self reliance of an earlier time towards more contemporary standards of conscience and fairness.[32] It is also clear that the Australian High Court is now much more prepared to extend the reach of equitable doctrines in

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29 *Ibid* at 62.

30 I Renard, "Fair Dealing and Good Faith" in Saunders, note 5 *supra*, pp 63-83.

31 See eg *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988)165 CLR 107.

32 Note 30 *supra* at 70.

commercial transactions which do not involve consumers or parties who are not in an unequal bargaining position.[33] Mr Renard's analysis is not unmindful of the dangers which beset these developments. Inevitably there will be tension with the equally competing values of the need to foster a reasonable degree of certainty and predictability in contractual business arrangements. Not everyone will feel at ease with the intrusion of equity in the field of commercial transactions. Reference is made to the comment by the former Chief Justice of New South Wales, Gleeson CJ, that broad notions of unconscionability provide greater scope for the exercise of individual discretion and the application of subjective value judgments of the judges.[34]

Related to the same theme of fair dealing is the essay contributed by Priestley AJ, a member of the New South Wales Court of Appeal.[35] This essay contains a defence of the Mason Court against the vigorous criticisms made by a legal academic. The person in question, Mr John Gava, has objected to the changes made to the law of contract.[36] He accused the Court in Sir Anthony's time of refashioning, without a mandate, Australian contract law in a most fundamental way which was both revolutionary and damaging. The essential ground of objection was that the Court undermined freedom of contract by interfering with the terms of the bargains struck by the parties to a contract and also allowing persons who were not parties to a contract to claim benefits under them. In addition, Mr Gava recognised but repudiated the view that judge-made law reflects community values. The essential defence mounted against these criticisms was that the courts always had the capacity to interpose between the parties through the exercise of their equitable jurisdiction even if that jurisdiction had not been used to its full potential in the past. The latter tendency was to result in the enactment of legislation both in England and Australia in the field of consumer contracts where one of the parties had considerably less bargaining power than the other even though in legal theory the contract was freely made. A typical example of such legislation was the *Trade Practices Act* 1974 (Cth). In other words, and as was also stressed by Mr Renard, the courts could be seen to respond to legislative developments which encouraged them to intervene. The fact that throughout this century courts have become more and more accustomed in wider and wider areas of contract to giving relief and reformulating contractual terms in situations where pure freedom of contract theory would deny any interference was thought to underlie a good deal of the High Court activity in the areas of unconscionability, restitution, unjust enrichment, equity and contract. Mr Justice Priestley responded to the criticism regarding community values by referring to what he treated as an "empirically

33 A leading exponent of this approach has been Mr Justice Paul Finn, a judge of the Federal Court: see p 80, n 92 in Saunders, note 5 *supra* and in "Commerce, the Common Law and Morality" (1989) 17 *Melbourne University Law Review* 87. Apparently the same tendency has not been in evidence in English cases.

34 Referred to at 77 in the book under review which cites in n 74, The Hon AM Gleeson, "Individualised Justice - The Holy Grail" (1995) 69 *ALJ* 421 at 431. A further reference is made to the views of Gleeson CJ at 74 in the same book.

35 LJ Priestly, "Influences on Judicial Law-making" in Saunders, note 5 *supra*, pp 99-106.

36 This was presumably a reference to the article entitled, "Assault on contract law a threat to freedom", *The Australian*, 19 April 1995, p 11.

observable fact" embodied in the remark once made about colonial law: "[a]lways the law follows the facts, at a respectful distance".[37]

The same essay also contains a discussion of other areas where change had occurred as a result of significant High Court decisions during the period under discussion, most notably the law of torts. Without wishing to suggest that the idea was new, his Honour drew attention to the background influence and prevalence of insurance as one of the factors which might help to explain areas of the law where liability for civil wrongs has been broadened especially under the law of negligence.

There remains in Part I of the book the important essay by John Doyle, the present Chief Justice of the South Australian Supreme Court. He addresses the key issue foreshadowed at the beginning of this review, namely, the implications of judicial law-making. However, since this theme will be addressed more fully in the latter part of this review, a discussion of that essay is postponed until then.

B. Part 2: The Global Context and Epilogue

The theme of fairness and fair dealing is continued in the essay contributed by Canadian Supreme Court Justice Beverly McLachlin.[38] The essay is especially concerned with the effect of equitable intervention in contractual and business relations under Canadian law. The issues faced by Canadian courts are broadly similar to those which are faced by Australian courts and were discussed by Mr Renard and Justice Priestley. Valuable comparisons are drawn between the same areas of law in both countries. Justice McLaghlin points to the insistence of modern courts to ensure that the decisions they render are not only legal but fair as compared with the previous tendency to ensure that the law was predictable even if the cost of doing so was to lead to rigidity, for example the way in which contract law met the plea of a hard bargain with the well known maxim of "let the buyer beware". Given that modern insistence, she poses the question: how is the creative discretion of judges to be limited to avoid uncertainty and unpredictability? The reader will need to be aware that the approach of the Canadian courts in this area has apparently been bolder and more expansive than their Australian counterparts but even in Canada Justice McLaghlin warns against the danger of exaggeration and indicates that while Canadian courts "remain open to applying equity in new situations, the initial burst of creativity may be yielding to a period of consolidation".[39]

The movement towards fairness is not confined to the area of private law or of course to Australia, as is illustrated by the essay contributed by Professor TR Allen, a Reader in Legal and Constitutional Theory at Cambridge University.[40] The same author suggests that public law is developing apace in

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37 Note 35 *supra* at 102, quoting from RTE Latham, *The Law and the Commonwealth*, Greenwood Press (1970) p 515.

38 B McLachlin, "Fairness and the Common Law: Using Equity to Achieve Justice" in Saunders, note 5 *supra*, pp 118-37.

39 *Ibid* at 137.

40 TR Allen, "The Common Law as Constitution: Fundamental Rights and First Principles" in Saunders, note 5 *supra*, pp 146-66.

both Australia and, although at a necessarily slower pace, the United Kingdom as well, despite the absence of a written constitution in that country. He obviously supports these developments and the attendant growth in the judicial review of governmental action. In the United Kingdom, the common law (using that term to refer to the 'unwritten' law developed by the judges) is seen as the only defence against the excesses of legislative and executive power. Mr Allen argues that there are fundamental similarities in the constitutional law of both countries despite some important differences. Both countries of course share a common law tradition and it is argued that recent decisions in both countries offer encouraging illustrations of the development of the common law in defence of individual rights.

The author stresses equality as a fundamental principle and right: indeed he goes so far as to submit that "the principle of equal citizenship is almost certainly the most fundamental principle of constitutional theory and modern public law".[41] It is, however, one thing for writers to assert the importance of fundamental and enduring values in a society and quite another for the law to recognise that those values are judicially protected, particularly in the face of traditional understandings to the contrary. This difficulty is particularly acute in a country which has historically been seen as the home of parliamentary supremacy, even though that supremacy is increasingly seen to be out of touch with the reality of Britain's membership of the European Common Market and its participation in the European Convention on Human Rights. Leaving aside any possible legal restrictions on the legislative powers of the British Parliament, Mr Allen does, however, point to the quite legitimate use which the principle of equality (as with other important values such as freedom of expression) has and should have in the field of administrative law; for example, in relation to decisions which can be impugned on the ground of unreasonableness and also the need to observe the principle of proportionality in the exercise of powers vested in administrative bodies and officials. There is no threat here to the legal ability of the Parliament to overturn such outcomes if the Parliament feels politically able and inclined to do so. At the time this essay was written, the correctness of the controversial dicta of certain judges in *Leeth v The Commonwealth*[42] remained open for determination in the future. For those judges, equality was necessarily implied from the Commonwealth Constitution as a restriction on Australian legislative power because of its fundamental

41 *Ibid* at 152, where reference is made to an article by a leading exponent of the kind of law which is suggested by its title: MC Detmold, "The New Constitutional law" (1994) 16 *Sydney Law Review* 228.

42 (1992) 174 CLR 455. The judges were Brennan CJ, Deane, Toohey and Gaudron JJ. The three remaining judges rejected such a view. The case has not been taken as having established the correctness of the dicta referred to in the text. A similar uncertainty surrounded the correctness of dicta which asserts the inability of the Commonwealth Parliament to enact criminal laws which operate to impose retrospective criminal liability: *Polyukhovich v The Commonwealth* (1991) 172 CLR 501. Both that case and the *Leeth* case are discussed in L Zines, *The High Court and the Constitution*, Butterworths (4th ed, 1996) pp 418-20 and pp 210-12 respectively, and G Lindell, "Recent Developments in the Judicial Interpretation of the Australian Constitution" in G Lindell (ed), *Future Directions in Australian Constitutional Law*, Federation Press (1994) 1 at 33-7. Subsequent judicial developments regarding the constitutional concept of equality are mentioned briefly in the text which accompanies note 89 *infra*.

character and, according to one view, its alleged recognition in the common law subject to certain aberrations.

Mr Allen also seeks to show how the principle of parliamentary supremacy can be reconciled with the rule of law. The reconciliation attempted here goes beyond the adoption by the courts of principles of statutory interpretation which would protect fundamental rights against their abrogation unless there was a clear and unambiguous expression of a parliamentary intention to override those rights. For the author, even the expression of such an intention should not be given effect because the limits on the power of a democratic majority will ultimately be found in the common law which is "too subtle to tolerate the absurdity - even constitutional contradiction - of wholly unlimited legislative power".[43] The distinction between legal and political sovereignty is said to leave the former bereft of any rational justification.

The essay in question testifies to the growing intellectual unrest and dissatisfaction with the notion of parliamentary sovereignty. Whether this intellectual restlessness heralds an inevitable transformation of judicial doctrine remains to be seen. In Australia, the question has been left open whether the exercise of "legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law".[44] This remark was in part prompted by remarks of another contributor to the book under review, Lord Cooke of Thorndon, made when he was judge of the New Zealand Supreme Court and Court of Appeal. Ultimately, however, the objections traditionally advanced against the judicial implication of a legally enforceable Bill of Rights remain: the lack of a democratic mandate for unelected judges to embark upon this kind of restriction on the legislative powers possessed by the elected legislature and the dangers of judges giving effect to their own subjective views regarding the nature of fundamental principles and rights of individuals. The dangers were present in the past in the field of economic and property rights when judges were accused of giving effect to laissez faire philosophy. The same problem can arise in the field of political and social rights. The appeal to the common law as a justification for the process of implication of this kind fares little better. By definition, the common law is inherently subject to alteration by parliament - a feature of Australian constitutional law which was emphatically driven home by the enactment of British legislation in order to curb the idiosyncrasies of a colonial judge who was in the habit of striking down laws as invalid for being repugnant to fundamental rules of English law including the common law.[45]

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43 Note 40 *supra* at 156.

44 *Union Steamship Co Pty Ltd v King* (1988) 166 CLR 1 at 10.

45 The judge was Boothby J who was appointed to the Supreme Court of South Australia last century and the legislative provision in question was s 3 of the *Colonial Laws Validity Act* 1865 (Imp); see AC Castles "Reception and Status of English Law in Australia" (1963) 2 *Adelaide Law Review* 1 at 22-7: J Goldsworthy, "Implications in Language, Law and the Constitution" in G Lindell (ed), note 42 *supra* 150 at 175 and generally, at 174-8. See also the discussion of common law principles as a restriction on legislative power in L Zines, note 42 *supra*, pp 418-20.

In his essay, Lord Slynn of Hadley, a member of the English House of Lords who has also served as a judge of the Court of Justice of the European Court of Justice, analyses the significance of the Treaty of Rome for British domestic law.[46] The legal significance of that treaty is the result of British statutory provisions (the *European Communities Act* 1973 (UK)) which give effect to the terms of the treaty as part of the domestic law of that country. Attention is drawn to the historic *Factortame* decision under which an English court issued an order staying the operation of a British statute which was inconsistent with the terms of the treaty.[47] The failure to cite the case and the absence of reasoning in the case itself to explain this remarkable development for an English court, may be both symbolic and ironic. The absence of greater discussion of the implications of this decision for the operation of British parliamentary supremacy both analytically and as a practical matter is surprising. Perhaps the analytical explanation for what the court did on that occasion is that the British Parliament has been prepared to cede to its own courts the authority and power to prevent the application of Acts which breach the Treaty of Rome - a power which it is always theoretically capable of revoking in the event that Britain was to leave the Common Market. The implicit assumption must be that the enactment of the *European Communities Act* in 1973 constitutes a standing expression of the intention of the British Parliament not to allow any legislation, whether passed before or after 1973, to operate if the legislation conflicts with the Treaty of Rome. The essay, nevertheless, contains a valuable insight into the growing importance of international law for domestic courts in the face of British international obligations, and as Lord Slynn simply explained, this was an area of law where certain established English rules had to go.

The theme of internationalisation which permeates the second part of the book under review is also present in the contribution by Lord Cooke of Thorndon.[48] The essay draws attention to the emergence of an international mercantile law or as it is called the *lex mercatoria*. Apparently this emergence has been largely due to arbitration clauses or decisions of arbitrators relating to disputes between 'foreign' contractors or investors on the one hand and states or state agencies on the other arising out of resource exploitation or development contracts. It also draws attention to the interaction or reciprocal influence between separate common law jurisdictions to show how in a practical sense an international common law may already be evolving. In the view of the present writer, the influence of the increasing contact that occurs between members of appellate courts in international conference is a further factor which may explain this

46 Lord Slynn of Hadley, "The European Union and English Law" in Saunders, note 5 *supra*, pp 174-85.

47 *R v Secretary of State for Transport; Ex parte Factortame (No 2)* [1991] AC 603. The case involved Spanish fishermen whose right to use vessels flying the British flag and to fish against the British quota allocated by the European Community was curtailed by the *British Merchant Shipping Act* 1988 (UK). The Act was stayed because it violated several principles of Community law relating to the free movement of workers and of goods. For a further discussion of this case and the associated litigation and literature on the subject see S De Smith and R Brazier, *Constitutional and Administrative Law*, Penguin (7th ed, 1994), pp 84-9.

48 Lord Cooke of Thorndon, "The Dream of an International Common Law" in Saunders, note 5 *supra*, pp 138-45.

development and one which merits further attention. The third aspect of the internationalisation theme is the approach of the courts to treaties concerning human rights which have been ratified but not yet incorporated into domestic law. Reference is particularly made to judicial developments in New Zealand which parallel those which have taken place in Australia.

The reception and status of international law as part of Australian domestic law is the subject of an impressive and rewarding analysis by my colleague, Ms Kristen Walker, a Lecturer in Law at Melbourne University.[49] Unlike most of the essays in the second part of the book, the primary focus is on the jurisprudence of the Australian High Court. The problems identified by Ms Walker are likely to become increasingly relevant in the future. One of those problems concerns the accepted rule that international agreements to which Australia is a party are not part of the domestic law unless they are implemented or incorporated by the parliament or parliaments in Australia. The essential reason for this rule goes to the heart of an important democratic principle, namely, that the executive branch of government should not, and does not, have the power to usurp the power of the elected representatives of the people to legislate. The executive power of the Commonwealth nevertheless does clearly encompass the power to enter into international agreements as part of the conduct of the nation's foreign affairs. As Ms Walker convincingly demonstrates, the democratic principle has not prevented the courts from looking to treaties in order to interpret the common law and legislation - areas which attracted increasing judicial attention during the life of the Mason Court.[50]

What has proved more controversial has been the use of international agreements which have not been incorporated into domestic law by legislation as a means of enlivening administrative law remedies such as the rules of procedural fairness. Here a subtle distinction has been drawn between, on the one hand, recognising that an international convention on human rights can give rise to a legitimate expectation that a person adversely affected by a decision will be given an opportunity *to make representations* if the decision maker proposes to act inconsistently with the terms of the convention and, on the other, that the decision maker *must act consistently with those terms*. The former does not require the decision maker to accept or act on the representations made. This was achieved under the framework of the doctrine of 'legitimate expectations', an important test which evolved to attract the operation of the rules of procedural fairness. In a clear and accurate analysis, Ms Walker defends the approach taken by the majority against the criticisms of the one dissenting member of the Court and the then Minister for Foreign Affairs who elaborates his support for the

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49 K Walker, "Treaties and the Internationalisation of Australian Law" in Saunders, note 5 *supra*, pp 204-35. See also the accompanying essay: G Evans, "The Impact of Internationalisation on Australian Law: A Commentary" in Saunders, note 5 *supra*, pp 236-41.

50 See note 2 *supra* at 42 where Brennan J made his much publicised remarks to the effect that while the common law did not necessarily conform with international law, the latter law is a legitimate and important influence on the development of the common law especially when international law declares the existence of universal human rights; *Deitrich v R* (1992) 177 CLR 292; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (the *Teoh* case).

dissenting view in his commentary on her essay. Ms Walker criticised the legislation proposed by the former Government for the purpose of overriding the majority judgment in the *Teoh* case.[51] As important as the above development was, Ms Walker indicates that the position has yet to be reached where decision makers may be required to have regard to, and to take into account as relevant considerations, Australia's international obligations - a suggestion made apparently in New Zealand where similar developments have taken place. The danger remains that the indirect significance of international agreements will constitute 'incorporation by the back door' and will grow to such lengths as to erode the democratic principle mentioned earlier by eliminating the need for parliamentary implementation of international agreements.

The other enlightening part of Ms Walker's analysis relates to the failure to articulate a clear theory on the operation of the customary rules of international law as part of the domestic law of Australia. A careful examination of existing authority shows that the formulations of existing principle give the courts a very substantial measure of judicial discretion as to which aspects of those rules should form part of our domestic laws. The increasing process of internationalisation will put pressure on the courts to remedy the defect identified by her. Ms Walker also makes a substantial contribution to knowledge by seeking the clarification of the unhelpful terminology in this area which would replace such confusing concepts as 'incorporation' and 'transformation'. (The latter terms bear upon the need, for example, for legislation or judicial action to give effect to the general rules of international law, apart from treaties and other international agreements). In effect, Ms Walker seeks a greater degree of harmonisation between international and domestic law than exists at present. Such an approach deserves support but at the same time care needs to be taken to ensure that the institutional limitations on the role which domestic courts are capable of playing are observed. This is particularly important in relation to disputes between foreign governments including those in which our own national government is involved. Furthermore, in this area more attention will need to be paid to the potentially limiting effect of the 'Act of State' doctrine as a means of depriving domestic courts of the jurisdiction to determine whether the exercise of executive power by the Australian Government under s 61 of the Constitution complies with the rules of international law.

Also concerned with the theme of international law, was the essay contributed by Professor Fried van Hoof which provides a useful illustration of the roles that domestic courts can play in legal systems where international law automatically forms part of the domestic law.[52] The essay deals with the position of those courts in the Netherlands which, according to the author, adopted such an approach for geographical and historical reasons associated with its failed policy of neutrality and the invasion of that country during World War II.

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51 The majority comprised Mason CJ, Deane, Toohey and Gaudron JJ; McHugh J dissented.

52 F van Hoof, "The Impact of International Law in the Legal Order of the Netherlands: The Role of the Judiciary" in Saunders, note 5 *supra*, pp 186-203. At the time the essay was provided the author was a Professor of Law at the University of Utrecht and also Chairman of the Netherlands Institute of Human Rights.

The remaining essays deal with the considerable challenges faced by courts in dealing with constitutional issues in other countries. The essay on Germany particularly draws attention to the fascinating process by which Germany was re-united after the fall of communism in East Germany and also the consequential constitutional problems which followed that development.[53] Two other essays deal with the challenges faced by courts in the less developed part of the world, notably South Africa following the overthrow of apartheid and Papua New Guinea.[54] Those challenges turn on the tension between the rule of law and the importance of stability and development. The last three essays described above also provide interesting insights into the role of domestic courts in giving effect to economic and social rights such as the right to housing and education. The emphasis in the developed Western countries has been directed at civil and political rights.

III. EVALUATION OF THE MASON COURT ERA AND THE STATE OF JUDICIAL LAW-MAKING

The book will serve as an extremely useful record of the Mason Court era. It remains to offer some concluding observations about that era and its significance for judicial law-making. The latter issue is the subject of a very significant contribution in the book by the present Chief Justice of the South Australian Supreme Court.[55]

A. Achievements

As a number of the contributors were to emphasise, it is important not to exaggerate the influence of any one member of the High Court even if that member happens to be the Chief Justice of the Court. Yet the fact remains that many of the developments which occurred bear the hallmarks of Sir Anthony Mason's judicial philosophy even if that philosophy itself underwent considerable change during his long period in office as a judge.[56] Sir Anthony rarely found himself in dissent.

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53 J Kühling, "The Constitutional Court in United Germany: New Areas of Conflict and New Perspectives" in Saunders, note 5 *supra*, pp 242-51. At the time the essay was contributed the author was a member of the First Senate (Division) of the German Federal Constitutional Court.

54 I Mahomed, "Constitutional Court of South Africa" in Saunders, note 5 *supra*, pp 167-73; and Sir A Amet, "Issues and Challenges Facing the Supreme Court of Papua New Guinea" in Saunders, note 5 *supra*, pp 252-62. At the time these essays were contributed the first of the authors was a Deputy President of the Constitutional Court of South Africa, Chief Justice of Namibia and President of the Lesotho Court of Appeal. The second was the Chief Justice of the Supreme Court of Papua New Guinea.

55 J Doyle, "Implications of Judicial Law-Making" in Saunders, note 5 *supra*, pp 84-98.

56 Witness for example the less activist approach which he formerly supported as is illustrated by the cases decided in the early 1980s discussed by Doyle CJ *ibid* at 90-1. This has been noticed by others: see Justice Michael Kirby, "Sir Anthony Mason Lecture: AF Mason - From *Trigwell* to *Teoh*" (1996) 20 *Melbourne University Law Review* 1087. The change may perhaps be attributed to a heightened disillusionment with the effectiveness of the legislative process as a means of effecting necessary changes in the law.

The record of the Court's achievements under his leadership is impressive. The Court was progressive at a time of great and accelerating social and economic change. The willingness of the Court to keep the law up to date in response to technological change is illustrated by its decision in *McKinney v The Queen* when the majority changed the rules relating to the admissibility in criminal trials of confessions obtained from persons under interrogations while in police custody by treating them as unsafe if they were not recorded on videotape.[57] The same willingness to respond to changes in community perceptions is illustrated by *R v L* when it was boldly asserted that if it ever was part of the common law that marriage constituted continuing consent to sexual intercourse it was no longer part of that law in modern times.[58] This is not to say, however, that the Court's record is uniformly progressive as was demonstrated by its disappointing failure to embrace the new approaches to the rules of private international law recommended by Law Reform Commissions and academic writers. Significantly, this was one the few areas where Mason CJ lacked the necessary support of the rest of the Court for departing from the traditionally accepted rules.[59]

Although it is beyond the scope of this article to attempt a comprehensive sketch of the different trends that have emerged since Sir Anthony Mason departed from the Court, it will be tempting to contrast the record of the Court's achievements during the period under review with those of the Court after he retired from the Court. Perhaps his successor anticipated as much when he expressed surprise as to how much was achieved during the former period and seemed to foreshadow that the role of the Court might become one of consolidation - a prediction which has, I think, proved, if not self-fulfilling, at least largely correct.[60]

This can be seen from the striking reaffirmation, for the most part, of the implied freedom of political communication and its impact on defamation law in the *Lange* case. On the other hand, the failure of the Court in the *McGinty* case to uphold challenges based on the unequal size of electoral divisions certainly shows a disinclination to expand the content of the implied freedoms derived

57 (1991) 171 CLR 468.

58 (1991) 174 CLR 379. A more recent, if not even more striking, illustration of the dynamic view taken of the nature of the common law resulted from the need to bring the law of defamation into conformity with the Constitution (and in particular the implied freedom of political communication). This was achieved by the reformulation of the common law defence of qualified privilege in *Lange v Australian Broadcasting Corporation* (1997) 71 ALJR 818 (*Lange* case).

59 Although it was unnecessary for the decision, Brennan, Dawson, Toohey and McHugh JJ reaffirmed the need to establish liability for interstate torts according to both the law of the place where the alleged wrongful act took place and the law of forum in *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1. This was so despite the Court's decision in the earlier case of *Breavington v Godleman* (1988) 169 CLR 41 where his Honour elaborated his support for the preferable and less mechanistic "proper law" approach.

60 Epilogue in Saunders, note 5 *supra* at 265.

from the recognition of certain aspects of representative government under the Commonwealth and, in that case, the Western Australian Constitutions.[61]

As was mentioned before, the period under review saw the abandonment of a style of judicial reasoning which was described as 'formalistic' and 'legalistic', to use words which have assumed a highly pejorative connotation. In its place, the Mason Court can be seen to have adopted, on the whole, a more open style of reasoning which will be more accessible to the public, even if this runs the risk of exposing the Court to greater criticism when it relies on policy considerations which are no longer hidden by the veil of legalism. This development seems to indicate that the Court might now have accepted a point which was made long ago by one of the contributors to the book acting in the quite different capacity of a legal academic commenting on the work of the High Court. The suggestion was that "the ground rules for principled [judicial] decision-making are exactly the same as those for the *intelligent* discussion of any issue".[62]

A further feature of the period under review is the belief that the Court was helping to develop a distinctly Australian approach to its development of the law. An earlier collection of essays had already explored the development of an Australian law.[63] The heavy if not substantially exclusive reliance on English sources of law has now given way to a more varied willingness to consider sources of law in other countries for non-binding guidance and assistance. The development began before the elevation of Sir Anthony as Chief Justice and represents the attainment of a kind of national maturity which is the delayed but inevitable result of the formal attainment of Australian political and judicial independence. This may perhaps supply a further illustration of the remark quoted above to the effect that "[a]lways the law follow[s] the facts [but] at a respectful distance." Also associated with these developments was the expansion of the Court's library research capacity and its greater willingness to consider and cite academic writing in its judgments.

For this writer, at least, perhaps the most important aspect of the Court's work during this period has been its concern for protecting the individual against the abuse of private and public power.[64] Sir Anthony Mason and the Court as a whole obviously feel that the Court has a very significant and appropriate role to play in dealing with the rights of individuals - a role that does not necessarily presuppose the existence of a judicially enforceable Bill of Rights. His Honour had suggested that the degree to which a decision was "determinative of the

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61 *McGinty v Western Australia* (1996) 186 CLR 140. The case involved an unsuccessful challenge to the electoral redistribution laws for the election of members of both Houses of the Western Australian Parliament which produced a heavy malapportionment between urban and rural electorates.

62 G Evans, "The Most Dangerous Branch? The High Court and the Constitution in a Changing Society" in D Hambly and J Goldring (eds) *Australian Lawyers and Social Change* (1974) 13 at 68 [emphasis in original].

63 MP Ellinghouse, AD Bradbrook and AJ Duggan (eds), *The Emergence of Australian Law*, Butterworths (1989).

64 For a further discussion of this theme generally see P Finn, "Controlling the Exercise of Power" (1996) 7 *Public Law Review* 86.

rights or interests of an individual" was a leading criterion for determining whether a decision should be the subject of judicial review.[65]

So far as private law is concerned, there will be some like the present writer, who will question the appropriateness of the courts extending the reach of equitable rules in relation to commercial transactions where the parties can be expected to have access to legal advice and enjoy equal bargaining power, leaving aside the transactions which involve small business and consumers. They will also question the ability, as well as the need, for judges to fix standards in the marketplace for such parties. They will ask why the same parties should as a rule, be able to use a valuable public resource - the court system - to arbitrate their commercial disputes.

In the field of public law, the period under discussion saw the Court become increasingly occupied with restrictions on legislative power which are not concerned with the federal nature of the Constitution. The *Mabo* case raises interesting parallels with the landmark decision of the US Supreme Court in *Brown v Board of Education* regarding the desegregation of public schools.[66] One rationale that is sometimes advanced for the developments which began with that decision and culminated in the activism of the Warren Court in the 1960s is that the court should intervene to protect individuals and groups who are denied real access to the political process. Something like this rationale and its attendant dangers is mentioned in the essay contributed by Chief Justice Doyle.[67] It is tempting to speculate on whether a similar explanation can be advanced in relation to the High Court's solution to the native title question. The pursuit of this approach does achieve very valuable results at least in the short term and the decision of the Court in *Mabo* certainly did have the effect of breaking a difficult political and legislative logjam on the Aboriginal land rights question. However, to adopt, in the words of Mr Jackson QC, "reasoning" which "did not follow earlier perceptions of the effect of European settlement",[68] comes at a considerable cost; as is illustrated by the torrent of virulent criticism unleashed against its decision in that case and also the even more virulent (but with far less justification) criticism unleashed against the succeeding case in *Wik*.[69] The fact that, as Sir Anthony Mason observed, the Australian High Court only did for the indigenous inhabitants of this country what the courts in the United States, New Zealand and Canada did for their indigenous peoples is unlikely to calm the voice of the critics in Australia.[70] The adoption of the

65 Sir A Mason, "Administrative Review - The Experience of the First Twelve Years" (1989) 18 *Federal Law Review* 122 at 124.

66 (1954) 347 US 483. Although the *Mabo* case may not strictly speaking be a constitutional decision, the protection accorded to native title gives that case a constitutional dimension. The protection in question consists of the inability of the Commonwealth to legislate for the acquisition of native title without the provision of "just terms" (ie compensation); and also the inability of the States to legislate in respect of native title otherwise than in accordance with the terms of the *Racial Discrimination Act* 1975 (Cth) and *Native Title Act* 1993 (Cth) by reason of s 109 of the Constitution.

67 Note 55 *supra* at 88-9.

68 Note 7 *supra* at 25.

69 *Wik Peoples v Queensland* (1996) 187 CLR 1.

70 Sir A Mason, "A Reply" in Saunders, note 5 *supra* 113 at 114.

rationale adverted to above also has the potential to make the courts a potential dumping ground for issues which are too hot for politicians to handle.[71] In my view, it is extremely doubtful whether courts should act to upset traditional understandings of the law in advance of public opinion or where significant sections of the community are divided on the need for a change in the law.

The praise accorded to the decision in *Cole v Whitfield*[72] is well deserved.[73] The case adopts an interpretation which probably and more closely reflects the intentions of the framers when they resolved to provide that "trade, commerce, and intercourse among the states ... shall be absolutely free" in s 92 of the Constitution. This was done in a unanimous judgment, "the most important parts" of which were said, by the present Chief Justice, to have been written by Sir Anthony Mason. In that judgment the Court adopted a federal free trade approach to the interpretation of that section (aimed at the elimination of protectionism in a common market). This had the effect of abandoning the misplaced individual right (laissez faire) view of the section which had prevailed since the *Bank Nationalisation* case was decided in 1949 when legislation to nationalise banking was held to violate s 92 despite the absence of any suggestion that the legislation discriminated against interstate banking.[74] The Court was able to clarify the interpretation of one of the most litigated sections of the Constitution even if the unanimity of the Court was disturbed shortly afterwards in the application of the new test in relation to the taxation of interstate trade and commerce.[75] As Emeritus Professor Zines correctly points out, the effect of the new test will be to increase the scope of both Commonwealth and State power to regulate and control trade and commerce.[76] Doubtless this will come as little comfort to the governments of the past whose legislation has suffered at the hands of the Court as a result of the past interpretations of s 92. If so, it will not be the first time that the Court has interpreted the Constitution in a way that expands governmental power at a time when the governments then in office show the least signs of exercising that power. This occurred, for example, with the effect of the *Engineers* case[77] on the scope of the Commonwealth's legislative powers. The conservative Bruce Government showed little interest in realising the full potential of those powers during the 1920s.[78] The same can obviously be said about the ability of governments to nationalise banks and other forms of trade and commerce at the

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71 Adapted from the language used in G Sturgess and P Chubb, *Judging the World: Law and Politics in the World's Leading Courts* (1988), p 123 who, however, refer to the tendency of modern legislatures to leave certain issues to be determined by the courts as a reason for justifying judicial creativity.

72 (1988) 165 CLR 360.

73 L Zines, "The Most Significant case of the Mason High Court" (1995) 30 *Australian Lawyer* 18 which also contains a most concise overview of the achievements of the Mason Court in the field of constitutional law.

74 *The Commonwealth v Bank of New South Wales* (1949) 79 CLR 497.

75 *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411.

76 Note 73 *supra* at 18.

77 (1920) 28 CLR 129.

78 G Sawer, *Australian Federal Politics and Law 1901-1929*, Melbourne University Press (1956) p 329. See also L Zines, "The Commonwealth" in G Craven (ed), *Australian Federation Towards the Second Century*, Melbourne University Press (1992) 71 at 75-6.

present time. But the Court's new approach will at least have the effect restricting the destructive potential of s 92 to invalidate legislation which deals with the control and taxation of trade and commerce including such matters as the marketing of primary products and transportation of goods and persons.

Professor Zines has rightly praised the Court's tendency to prefer substance over form in its newfound willingness to give greater effect to constitutional restrictions on legislative power (such as s 117 of the Constitution). The earlier tendency to give restrictions on power a narrow and formal operation was probably symptomatic of the lingering influence of the British doctrine of parliamentary supremacy.

It may be noted in passing that the Court's willingness to depart from the previous interpretations of s 92 was not matched by its reluctance to disturb the wide view taken of the meaning of excise in s 90 under which the States are excluded from imposing a wide range of taxes on the production, manufacture and distribution of goods. Perhaps this may be due to the policy predilections of the majority who viewed the purpose of s 90 as helping to "create a Commonwealth economic union and not an association of States each with its own separate economy".[79] A majority of the present Court subsequently adhered to the wide view of excise but in a way that destroyed the practical significance of certain kinds of franchise fees on tobacco and liquor which the States had previously been able to levy under an anomalous exception to the wide view.[80]

It will be recalled that one of the commonly acknowledged areas of achievements of the Mason Court in the field of public law related to 'implied rights', and, in particular, the Court's decision in the *ACTV* case. The case has rightly attracted much public and largely popular interest, at least for the result it achieved in recognising the existence of some kind of constitutional guarantee of free speech. The guarantee is presently more accurately expressed as a guarantee of the freedom of political communication which restricts legislative power and is implied as an indispensable element of the representative democracy that is recognised in the Australian Constitution. Perhaps one of the reasons for its general popularity was its attractiveness to the media for the effect it had, as a result of subsequent decisions, in 'reforming', on a uniform basis throughout Australia, the law on defamation so as to facilitate the discussion of political matters.[81] Attempts to achieve reform in this area by means of cooperation between Australian government and Parliaments have proved to be singularly unsuccessful.

More recently in the *Lange* case, the Mason Court decisions on defamation were accepted as authority for deciding that the law on defamation as previously interpreted failed to conform with the freedom in question. However, the way in which the law was brought into conformity with the Constitution differed from

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79 *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 585 per Mason CJ, Brennan, Deane and McHugh JJ; Dawson, Toohey and Gaudron JJ dissenting.

80 *Ha v New South Wales* (1997) 71 ALJR 1080 per Brennan CJ, McHugh, Gummow and Kirby JJ; Dawson, Toohey and Gaudron JJ dissenting.

81 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

the way suggested by the earlier decisions, although this seems to have produced substantially similar results to those achieved in the earlier defamation cases even if those results are not the direct result of the operation of the constitutional freedom.[82]

What has concerned some legal commentators has not been the utility of the results described above but rather the judicial vehicle used to bring them about. Judicial implications from structure of the Constitution, for example, in relation to federalism and the separation of judicial from legislative and executive powers, are not new. What was new about the process of implying restrictions on legislative power from the representative nature of the governmental institutions created by the Constitution was the use of implications which had the potential to defeat the acknowledged intentions of the framers of the Australian Constitution not to adopt a Bill of Rights. The orthodox understanding was that in that respect Australia remained more closely aligned with British notions of constitutional law, under which as Dawson J was to point out "the guarantee of fundamental freedoms" did not lie in "any constitutional mandate but in the capacity of a democratic society to preserve for itself its own shared values."[83] This gives rise to serious doubts concerning whether the judges enjoy a democratic mandate to give effect to an implied Bill of Rights. It also gives rise to the usual concerns about the use of implications as a vehicle for judges giving expression to their own subjective values.

Some of these concerns may perhaps be alleviated by the acknowledgment by Sir Anthony Mason that in view of the decision of the framers to eschew the American model of a Bill of Rights "it is difficult if not impossible to establish a foundation for the implication of general guarantees of fundamental rights and freedoms".[84] The implication he supported was confined to strengthening the workings of representative democracy. This would help to perfect the integrity of the process by which decisions are made, rather than determine the outcomes which emerge from that process.[85]

Not all judges were or would be content to limit the process of implication in this way. Quite apart from the inherent potential of a freedom of political communication to embrace other important freedoms such as freedom of movement, association and assembly,[86] on one view of democracy, the concept of representative democracy might be seen for some to extend to other basic rights which are not restricted to ensuring the genuine and effective nature of the

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82 *Lange* case, note 58 *supra*. But the present Court failed to confirm the application of the *constitutional* freedom to discuss political matters which are not relevant to the federal level of government.

83 Note 15 *supra* at 183.

84 *Ibid* at 136.

85 This is similar to the philosophy espoused in J Ely, *Democracy and Distrust: A Theory of Judicial Review*, Harvard University Press (1980).

86 As Professor Zines has indicated, "provisions concerned with the establishment and maintenance of democratic processes appear, to some degree, to shade into those which are thought desirable by people who emphasise, not merely democratic structures, but liberty of the individual and the protection of the individual": L Zines, *Constitutional Change in the Commonwealth*, Cambridge University Press (1991), pp 34-5.

election process.[87] There are also suggestions made in the past by some judges that equality is necessarily implied from the Constitution despite the fact that this was the same right which the framers explicitly refused to include in the Constitution. Similar arguments apply with respect to the implied constitutional inability of the Commonwealth Parliament to create retrospective criminal offences.[88]

Admittedly, the chances of a majority accepting the implication of equality seem greatly diminished given its rejection in the recent case which involved the removal of Aboriginal children from their families.[89] Moreover, a majority of the Bench as presently composed seem to be generally opposed to the use of general concepts such as representative democracy as free standing principles which operate independently of express provisions in the Constitution, when those concepts are only *partially* recognised in those provisions; that is, as a reason for invalidating legislation which does not otherwise breach the express provisions of the Constitution.[90] Reference has already been made to the decisions of the present Court which may be taken to have consolidated rather than extended previous developments although generalisations can be hazardous given the surprising case of *Kable v Director of Public Prosecutions (NSW)*[91] where a majority of the Court has begun to extend some aspects of the separation of judicial powers case into the State judicial sphere.

B. Judicial Law-making: Concluding Remarks

It has been said that the end of the Mason Court era coincided with a vigorous debate about the limits of judicial creativity in Australia. Reference was made, in particular, to the cases on the implied freedom of communication, including those which curtailed the operation of State defamation laws, as prompting much scholarly discussion of whether the Court had departed from its legitimate role and strayed too far into law-making. It was also said that the debate clearly reflected the reputation earned by the Mason Court, especially during the latter part of the former Chief Justice's tenure, as a court of final jurisdiction which gave effect to a conscious philosophy of judicial activism.[92]

As only a brief journey into the past will show, there have been various times when courts have oscillated between periods of activism and relative quiescence.

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87 See the definition of 'democracy' in A Bullock, O Stallybrass and S Trombley, *The Fontana Dictionary of Modern Thought* (1988), pp 211-12.

88 Note 42 *supra* and accompanying text.

89 *Kruger v The Commonwealth* (1997) 71 ALJR 991 per Brennan CJ, Dawson, McHugh and Gummow JJ; Toohey and Gaudron JJ dissenting (although Gaudron J supported only a limited a guarantee of equality based on Ch III of the Constitution). Three of the majority judges rejected the implication without qualification but Chief Justice Brennan's remarks can be confined to laws for the Territories enacted under s 122.

90 *Lange* case, note 58 *supra* at 830.

91 Note 25 *supra*, where a majority of the Court held invalid State laws which provided for the judicial authorisation of the preventative detention of persons who were thought to pose a threat to the lives of others (Toohey, Gaudron, McHugh and Gummow JJ; Brennan CJ and Dawson J dissenting).

92 Justice Ronald Sackville, "Continuity and Judicial Creativity - Some Observations" (1997) 20 *University of New South Wales Law Journal* 145 at 145-6.

Thus there have been in English legal history judges with a reputation for judicial dynamism as was illustrated by Lord Mansfield who, it was said, cared little for procedural rules but much more for good faith and honest dealing in the development of commercial law. He may be contrasted with the role played by Lord Eldon who is said to have completed the process of stabilising and systemising the principles of equity.[93] It is perhaps not surprising that, as Professor Saunders has pointed out, the years of the Mason Court coincided with a period of dramatic and general (non-legal) change in Australia.[94]

There is now no shortage of leading members of the Australian judiciary who have acknowledged that judges make law as a result of the inevitable choices which confront them in the decision making process.[95] Thus the retiring Chief Justice of the High Court said:

> In modern times the function of the courts in developing the common law has been freely acknowledged. The reluctance of the courts in earlier times to acknowledge that function was due in part to the theory that it was the exclusive function of the legislature to keep the law in a serviceable state. But legislatures have disappointed the theorists and the courts have been left with a substantial part of the responsibility for keeping the law in a serviceable state, a function which calls for consideration of the contemporary values of the community.[96]

The notion of ensuring that the law is kept in a "serviceable state" is particularly applicable to what might be termed 'lawyers' law' in the areas of law such as torts and contracts. Parliaments may well assume that the courts will develop in an orderly manner the law in those areas safe in the knowledge that any unwanted results of that development can if necessary be reversed by overriding legislation. The assumption here is also that courts do not change the law on matters which divide the community. Even in the area of 'lawyers' law', however, it is important for the courts to develop techniques to ensure that the expectations of persons who plan their affairs in reliance on previous case law, are not defeated.

The difficulty with the judicial acknowledgment of law-making by judges, however, is that, as Professor Galligan has correctly pointed out, the judiciary may have failed to prepare the public for that acknowledgment.[97] The public would not be assisted in understanding this development by the acceptance of a literal and oversimplified version of the doctrine of the separation of powers.

Sir Gerard Brennan has attempted to confine the acknowledgment of judicial law-making to the development of the common law (as distinct from the interpretation of the Constitution)[98] and also to stress, as others have, that judges

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93 Sir V Windeyer, *Lectures on Legal History*, Law Book Co Ltd (2nd ed, 1957) p 239, in relation to Lord Mansfield and p 266, in relation to Lord Eldon. See also B Cardozo, *The Nature of the Judicial Process*, Yale University Press (1978) p 116.

94 Note 5 *supra* at 2.

95 For example, in the important essay contributed by the present Chief Justice of the South Australian Supreme Court, John Doyle, note 55 *supra*; and Sackville, note 92 *supra*. An earlier acknowledgment made to the general public was made by Kirby J in the 1983 ABC Boyer Lectures when he spoke of the demise of the declaratory theory of law, note 2 *supra*.

96 *Dietrich v The Queen* (1992) 177 CLR 292 at 319 per Brennan J as he then was.

97 Quoted by Doyle, note 55 *supra* at 85. If so, Kirby J should be seen as an exception.

98 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 143.

make law in a very different way than the political branches of the government. Thus he emphasised that "the development of the substantive principles of law by the High Court must be the outcome of the application of the *judicial method* to the cases that come before it".[99]

The attempt to confine the acknowledgment of judicial law-making to the development of the common law and so deny its application to the interpretation of the Constitution is curious. While undoubtedly deriving some theoretical support from democratic considerations, the point remains that as a purely practical matter it will be difficult for a court not to 'make law' and thus have regard to policy considerations, in any area of the law, including constitutional law, at least when those considerations are used in the same special and confined sense that will be explained below. This is because of the necessary brevity and open nature of constitutional provisions which call for interpretation.[100]

The attempt by Sir Gerard Brennan to emphasise the use of the 'judicial method' is more persuasive. The differences between judicial and other law-making are worth reiterating, even though they have been well rehearsed by others. For Sir Gerard Brennan the scope of judicial policy, as distinct from political policy, is informed by precedent and disciplined by analogy and these factors operate to confine the scope for discretionary judgement.[101] Sir Anthony Mason stressed the place of the strong traditions of consistency, coherence and continuity in the orderly development of the law. Judicial decision making was seen as principled and reasoned in contrast to the ad hoc nature of political decision making which involves compromise and expediency. Moreover the need to resolve disputes between the parties before the court necessitates closer attention being paid to the interests of individuals since it is concerned with the particular, whereas political decision making is much more concerned with the general. The differences also go to procedure and method in that judges are bound to hear the interested parties and give public reasons for their decisions. They are also required to deal with problems raised by litigants while politicians are free to decline to deal with problem raised for their decision.[102]

A final factor which is frequently emphasised is that courts can only decide the cases that come before them and cannot on their own initiative decide issues in the absence of litigation which involves their determination. In Australia there is also the restriction on the ability of federal courts to render advisory opinions. The significance of these factors should not be exaggerated since, as a final court of appeal, the High Court has a high degree of control over the cases which it chooses to hear under the special leave process. In addition, judges can signal their interest in certain issues in a way that may encourage legal advisers to recommend the initiation of litigation which will raise those issues. Some

99 Note 60 *supra* at 264 [emphasis added].

100 For a typical example see L Zines, "Characterisation of Commonwealth Laws" in H Phun Lee and G Winterton (eds), *Australian Constitutional Perspectives*, Law Book Co Ltd (1992) Ch 2 on how it is almost impossible for judges not to have regard to functional considerations in determining the characterisation of laws in the distribution of powers between the Commonwealth and the States.

101 Note 8 *supra* at 13.

102 See the interview recorded in Sturgess and Chubb, note 1 *supra*, pp 346-7.

constitutional cases also have a suspicious similarity with advisory opinions given the willingness of the High Court to entertain challenges in some cases to the validity of legislation before it comes into force.

If judicial law-making is now accepted by judges of Australian courts, or at least those at the appellate level, some difficult issues still remain regarding the way this role is to be performed in the future as was clearly demonstrated by Doyle CJ of the South Australian Supreme Court.[103] His Honour believed that the work of the Mason Court would come to be regarded as marking a significant development in Australian legal thinking and in Australian judicial techniques. It has prepared Australian courts for a new approach to their law-making function. However, awaiting its successors are the tasks of:

- defining more clearly the limits between the law-making role of the Courts and that of Parliament;
- clarifying and expounding the judicial techniques which support the law-making function; and
- refining the procedures of the Court to enable the function to be carried out in the best possible way.

The warnings are timely and he is not the only judge to have issued them.[104]

In relation to the function of courts to keep "the law in a serviceable state", Doyle CJ has pointed to the significant distinction between the need for changes generally and the need for those changes to be brought about by judicial action.[105] Searching questions are raised as to whether the reasons given by the High Court in such cases as *Mabo* sufficiently addressed that distinction. This was so in *Mabo* despite the fact that the case is seen by some as coming very close to "the boundary between the appropriate roles of the legislature and the judiciary";[106] and also that the practical impact of the decision was such that an urgent legislative response was required since it was widely agreed that the impact of the decision could not be left to be sorted out in accordance with common law principles on a case by case basis. The legislation in question was to have very significant political, social and economic consequences.[107]

The procedures adopted by the Court to carry out its law-making function will need to address the tendency of judges in the modern era to resort to community values and perceptions as a reason for changing the law. They will also need to address the associated need for more systematic materials to be placed before the courts in relation to such matters. Changed social, political and economic conditions are legitimate factors which call for changing judge-made law. At the same time, however, the use made of such values is obviously not free from danger, especially for the potential which exists for some judges to smuggle their own subjective values under the guise of perceived community standards and also the understandable difficulty in arriving at the commonality of such values

103 Note 55 *supra*.
104 See eg Sackville, note 92 *supra*.
105 Note 55 *supra* at 93-4. See also Sackville, note 92 *supra* at 161.
106 Note 7 *supra* at 25.
107 Note 55 *supra* at 93.

in an increasingly multicultural society. Sir Anthony Mason is probably right to reject any calls for the introduction of surveys to gauge contemporary values[108] but Doyle CJ is surely right to insist on more systematic materials being placed before the Court for this purpose.

It is interesting to note that in a recent case the Court may arguably have failed to keep the law up to date when it refused to accept the right of patients to obtain a copy of their medical records despite Canadian judicial developments which accepted the existence of such a right despite previous authority to the contrary.[109] This was so also despite the acknowledgment by two members of the Court that a majority of the community would support such a right.[110]

A more liberal approach may also need to be adopted in relation to the exercise of the existing power to allow for the intervention of third parties.[111] Another technique which deserves greater attention is the possibility of a court engaging in prospective overruling so as to ensure that when previous cases are overruled the effects of the establishment of any new rules are confined to the future and the immediate parties in the litigation which gave rise to the new rules. Its full acceptance probably calls for the demise of the lingering remnants of the declaratory theory of law. The technique, however, seemed to receive short shrift in the recent *Ha* case on s 90 where it was rejected by both the majority and the minority on the ground that prospective overruling was inconsistent with the exercise of judicial power.[112] This was so despite the absence of any discussion of the tentative steps that may have been taken in that direction before the decision of the Court in the *Ha* case.[113]

Earlier in the 20th century a famous American judge, Benjamin Cardozo, lucidly analysed the question of judicial law-making in a way that fully and freely accepted its existence. At the same time he accepted that for practical reasons, if nothing else, adherence to precedent should be the rule and not the exception. Cardozo summarised the process of judicial law-making as requiring courts to have regard to four factors:

- logical progression (mainly inductive rather than deductive as involving law-making by analogy);
- historical development and evolution;
- the customs, morals and traditions (including the accepted standards of "right" conduct) of a society; and
- social utility or welfare.[114]

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108 Note 70 *supra* at 114.

109 *Breen v Williams* (1996) 186 CLR 71. See also Sackville, note 92 *supra* at 159.

110 Gaudron and McHugh JJ in (1996) 70 ALJR at 794-5.

111 The existing law on the matter was discussed by both Brennan CJ and Kirby J in *Levy v Victoria* (1997) 71 ALJR 837 at 843-6, 873-4 respectively.

112 Note 80 *supra* at 1093, 1099-100.

113 *Bropho v Western Australia* (1990) 171 CLR 1 (but cf in that case the refusal to adopt the technique by Brennan J as he was then); *McKinney v The Queen* (1991) 171 CLR 468. See also Sackville note 92 *supra* at 159; K Mason, "Prospective Overruling" (1989) 63 ALJ 526; *Constitutional Commission: Final Report* (1988) Vol 1 at 424-5.

114 B Cardozo, *The Nature of the Judicial Process*, Yale University Press (1978) pp 112-13.

The difficulty today is that courts and the rest of the legal community has yet to improve on this test in elaborating the limits of judicial law-making.

The challenge for the modern judge remains, in the words of Justice Michael Kirby, to "find where the line lies in a particular case, at a particular time and place".[115] As indicated by Professor Saunders, the most significant issue for the judiciary here and around the world "is the difficult and delicate task of finding an appropriate balance between the functions of the courts and the other arms of government" particularly in an age "in which the assumptions of majoritarian representative democracy have been eroded from both inside and out without the full ramifications of the change being, as yet, fully explored or understood". That said, "[t]he legacy of the Mason Court is a useful base from which to start" to resolve such issues.[116]

115 Justice M Kirby, "Judicial Activism" Bar Association of India Lecture delivered in New Delhi on 6 January 1997 at 11 <http://www.hcourt.gov.au/indialt.htm>.

116 Note 5 *supra* at 8.