

## TRENDS IN CONSTITUTIONAL INTERPRETATION\*

THE HONOURABLE SIR ANTHONY MASON\*\*

### I. INTRODUCTION

In more recent times, we have abandoned the myth that the principles of the common law are up there in the sky awaiting discovery by the lynx-eyed judge. Instead, we frankly acknowledge that judges make law and that they have been doing so in the common law tradition for 800 years or more. So it may seem a little odd that we still subscribe to the view that, when a question of Australian Constitutional Law arises, the answer to that question is necessarily to be found by the lynx-eyed judge in the language of the Constitution itself. For all too often the question to be answered is not addressed in the text of the Constitution. Moreover, recourse to the Convention Debates reveals that the delegates did not deal with the question or even recognise that such a question could arise.

That is but an example of the difficulty that arises when we come to interpret a wide range of instruments, particularly statutes. Yet we continue to maintain that we are engaged in a search for an elusive intention that is somehow to be divined from the text as seen in the light of the scope and purpose of the instrument,

---

\* This is an edited version of an address given to the staff and students of the Faculty of Law, University of New South Wales on 18 May 1995.

\*\* AC, KBE. Chancellor, University of New South Wales; National Fellow, Research School of Social Sciences, Australian National University.

notwithstanding that the authors of the instrument may not have formed any relevant intention, let alone expressed it.

Of course, the Constitution itself is the critical reference point, though nowadays few would deny that it is legitimate to seek assistance from the Convention Debates and the history that led to the adoption of the Constitution by the Convention and ultimately its enactment by the United Kingdom Parliament.<sup>1</sup> They are the basic materials available to us in our search for an answer to the general run of constitutional questions that arise for determination.

## II. THE CONSTITUTION - A RIGID BLUEPRINT OR AN OUTLINE OF A FRAMEWORK FOR NATURAL GOVERNMENT?

Once that is recognised, a fundamental issue emerges. Is the Constitution a rigid blueprint - a detailed and exhaustive statement of the founders' intentions - or a set of general principles designed as a broad framework or outline for national government? In other words, what is the principle of interpretation to be applied to a Constitution which is to operate in circumstances and conditions so very different from the circumstances and conditions prevailing one hundred years ago when the delegates to the Convention reached agreement on its provisions. Curiously enough, that question has not been precisely exposed for comprehensive examination in the judgments of the High Court of Australia. By way of contrast, in the United States, there has been an on-going controversy between the original intent school of interpretation, now forcefully led by Justice Scalia, and the progressive or dynamic approach to interpretation to which, one suspects, a number of the Justices of the Supreme Court of the United States now subscribe.

According to original intent theorists, the object of constitutional interpretation is to ascertain what the text means, and that meaning corresponds with what the original understanding of the text was. The virtue claimed for this approach is that the Constitution always has a fixed unchanging meaning except in so far as the provisions are capable of applying to new exemplifications.<sup>2</sup> Original intent theorists see other approaches to constitutional interpretation as necessarily ascribing to the Constitution a changing meaning, a meaning which changes from time to time as social necessity and convenience demand. In other words, as Justice Scalia has put it, the very act which the Constitution once prohibited it now permits, and that which it once permitted it now forbids.

On the other hand, the advocates of progressive or dynamic interpretation - sometimes called the living instrument theory of interpretation - see the Constitution as the outline of a framework of government. Not that they treat the

---

1 In *Cole v Whitfield* (1988) 165 CLR 360, to which I later refer, the Court referred to both the Convention Debates and the history of the Federation movement to support the interpretation which it gave to s 92: see at 385-93.

2 Section 51(v) which confers power to legislate with respect to "postal, telegraphic, telephonic and other like services" is such a provision and, accordingly, extends to radio broadcasting (*The King v Brislan; ex parte Williams* (1935) 54 CLR 262 at esp 283, per Rich and Evatt JJ) and television (*Jones v The Commonwealth (No 2)* (1965) 112 CLR 206), even though television was unknown in 1900.

text as unimportant - on the contrary. The dynamists, if I can so describe them, concede that the delegates to the Conventions did not foresee the particular developments which have taken place in the century that has intervened. However, they make the point that the delegates were aware that they were shaping a Constitution not only for 1900, but also for the future. Hence, the principle of interpretation first enunciated by Chief Justice Marshall of the Supreme Court of the United States, later adopted in Australia and expressed by Sir Owen Dixon in these terms:

[I]t is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions, wide enough to be capable of flexible application to changing circumstances.<sup>3</sup>

That principle has been constantly applied in the last half century. A consequence of the principle is that the Court should lean to the broader construction unless there is something to indicate otherwise.<sup>4</sup> The principle quoted is consistent with the theory of progressive interpretation and may explain why the original intent-living instrument controversy has not been ventilated in High Court judgments in the past.

However, echoes of the controversy can now be seen in the judgments of McHugh and Deane JJ in the recent decision of *Theophanous v Herald & Weekly Times*.<sup>5</sup> The judgment of McHugh J contains a general exposition of what I take to be the theory of progressive interpretation, qualified by emphasis on the proposition that any constitutional doctrine or implication must be rejected unless it is deducible from the text or structure of the Constitution itself. Thus, his Honour denied that the actual intentions of the makers control the meaning of the Constitution and acknowledged that:

[t]he meaning that the Constitution has for the present generation is not necessarily the same meaning that it had for earlier generations or for those who drafted or enacted the Constitution.<sup>6</sup>

However, the qualification on which his Honour insisted, led him to the conclusion, not shared by the majority of the Court, that:

the Constitution does not adopt or guarantee the maintenance of the institution of representative government or representative democracy except to the extent that certain sections of the Constitution embody it.<sup>7</sup>

That was because, according to McHugh J, though those sections give effect to the political institution of representative government, they did not imply that, independently of them, the institution is itself part of the Constitution. The result, in his Honour's view, was that there was no implied "general right of freedom of communication in respect of the business of government of the Commonwealth".<sup>8</sup>

---

3 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29 at 81.

4 *Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309 at 367-8, per O'Connor J.

5 *Theophanous v Herald & Weekly Times Ltd* (1993) 124 ALR 1.

6 *Ibid* at 70.

7 *Ibid* at 72; the sections to which McHugh J referred were ss 1, 7, 24, 30 and 41.

8 *Ibid* at 77.

On the other hand, Deane J, who also subscribed to the progressive theory of interpretation and used the words “living force” to describe the operation of the Constitution, cited a long passage in Sir Andrew Inglis Clark’s *Studies in Australian Constitutional Law*<sup>9</sup> to make the point that the doctrine of representative government, was of central importance both to the Constitution as a whole and its construction.<sup>10</sup> For good measure, his Honour referred disapprovingly to those who “construe the Constitution on the basis that the dead hands of those who framed it reached from their graves to negate or constrict the natural implications of its express provisions or fundamental doctrines”.<sup>11</sup>

The ultimate point of departure here is whether representative government is a doctrine incorporated in the Constitution, that is, whether it is of central importance to the structure of the Constitution. For my part, it is hard to see how that question could be answered in the negative or why the fact that there are various forms of representative democracy should require such an answer, unless what the Constitution contemplated was a form of representative democracy not dependent on freedom of communication, a proposition which, in my view, has little to commend it.

The disagreement in *Theophanous* does not bring out very clearly the opposition between original intent and living instrument interpretation, and that is because no Justice invoked the original intent theory. It should be noted that Deane J said:

the court must take full account of contemporary social and political circumstances and perceptions in determining whether an unqualified application of State defamation laws to political communication and discussion is consistent with the constitutional implication of freedom.<sup>12</sup>

However, that statement is directed not so much to the interpretation of the Constitution as to the question whether certain laws violate the implication of freedom of communication otherwise reached by the process of interpretation.

The disagreement in *Theophanous* seems to me to rest more on a difference in judicial approach to, or technique of, constitutional interpretation than on any disagreement about principles or rules of interpretation. For those who reject the implication of freedom of communication, the absence of an explicit provision is of considerable significance as is the fact that representative government or democracy is not a precise concept with a fixed meaning. The absence of an express provision and insistence on precise concepts and meanings are sometimes regarded as indicia of literal or legalistic interpretation. These factors do not figure quite so prominently in the reasoning of judges who consistently adhere to purposive or progressive interpretation.

That said, I should acknowledge that there were other factors that played a part in the *Theophanous* disagreement. One was the notion that the framers of the Constitution believed that freedom, including freedom of expression, was adequately protected by the common law, one of the central elements in Professor

---

9 Charles F Maxwell (1901) p 20 sidenote.

10 Note 5 *supra*.

11 *Ibid* at 50.

12 *Ibid* at 52.

Dicey's view of the English Constitution. No doubt another and less explicit factor was Dicey's theory of parliamentary sovereignty.

### III. EARLIER APPROACHES TO CONSTITUTIONAL INTERPRETATION

Although it would be convenient to consider now the basis on which constitutional implications are to be made, it is instructive at this point to look briefly at the changes in the Court's approach to the interpretation of the Constitution. Early on, it was construed in the light of decisions of the United States Supreme Court with which the initial members of the High Court, being delegates to the Conventions, were familiar. That approach gave way to a more literal or legalistic approach whereby the Constitution was construed according to the ordinary principles of interpretation because it was a statute of the United Kingdom Parliament. A legalistic approach to the interpretation of Commonwealth legislative powers is not necessarily advantageous to the States, but when it takes the form of characterisation of a law for the purposes of power by reference to its direct legal operation, the legalistic approach did tend to limit the exercise of Commonwealth legislative power. But that is not always the case.<sup>13</sup> The Court's initial approach to interpretation gave effect to the early notion of Griffith CJ, supported by the implications of inter-governmental immunity and reserved powers of the States that the Constitution created the States as well as the Commonwealth as sovereign entities and shielded the States from the impact of expansive exercise of Commonwealth powers. It may be that this approach gave effect to the framers' intent and their belief that State governments would be stronger than the Commonwealth. And it may be that it was an approach which served the national interest well in the initial stages of the development of the Australian nation.

### IV. THE IMPACT OF THE *ENGINEERS'* CASE - THE END OF THE OLD REGIME AND THE SIGNIFICANCE OF THE SENSE OF NATIONAL UNITY

The *Engineers'* case<sup>14</sup> eliminated those implications and the notion of State sovereignty, holding that Commonwealth laws could bind the States and vice versa. The *Engineers'* case reinforced the legalist approach, but it coupled to that approach the principle of constitutional interpretation espoused by Chief Justice Marshall. The decision did, however, recognise that the Constitution was "the national compact of the Australian people", enacted by the Imperial Parliament at the request of the Australian people.<sup>15</sup> The joint judgment, which is declamatory

---

13 See *Murphyores Incorporated Pty Ltd v The Commonwealth* (1976) 136 CLR 1.

14 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

15 *Ibid* at 160.

in style and often criticised for its reasoning, fulminates against the implications which had been made earlier, implications where were said to be based neither on the terms of the Constitution, nor on any common law principle underlying the expressed terms of the Constitution, but on the supposed principle of necessity itself resting on no more than the subjective opinion of the judges as to hopes and expectations respecting external conditions.<sup>16</sup>

The references to the Constitution as a national compact of the Australian people marked the beginning of the demise of the notion that the Court was simply interpreting a statute of the United Kingdom Parliament. *Engineers* also marked the acceptance of a new idea which displaced the dual sovereignty notion of Griffith CJ, that new idea being most persuasively expressed 51 years later by Windeyer J in *Victoria v The Commonwealth* (the *Payroll Tax case*)<sup>17</sup> in these terms:<sup>18</sup>

...in 1920 the Constitution was read in a new light, a light reflected from events that had, over twenty years, led a growing realisation that Australians were now one people and Australia one country and that national laws might meet national needs.

His Honour went on to add significantly:

As I see it the *Engineers' Case*, looked at as an event in legal and constitutional history, was a consequence of developments that had occurred outside the law courts as well as a cause of further developments there.

The three Justices who constituted the High Court when it was established were very prominent delegates to the Convention. They, perhaps more than anyone else, were qualified to identify what the framers of the Constitution had in mind. And they were the Justices who drew the implications that were subsequently discredited in the *Engineers' case* and who tended to favour the now abandoned notion of dual sovereignty. The summary rejection in *Engineers* of their views contrasts with the present efforts made to divine the intent of the founders from the Convention Debates.

But that comment is a diversion from the point I was making, namely that the emergence of the sense of Australian unity and identity became an influential element in constitutional interpretation. Australia's participation in the First World War and the appearance of Mr Hughes, the then Prime Minister, at the negotiation that led to the Treaty of Versailles, played a significant part in the emergence of that unity and identity. The influence of the notion of one nation and one country is reflected in decisions of the High Court to which I shall refer in a moment. It is an external fact which has played a part in the interpretation of the Constitution. And it is a fact which has arisen since 1900. Taking account of that fact cannot be reconciled with the view that, in construing the Constitution, you do not look forward to events occurring after 1900 unless it can be said that the fact is simply the fulfilment of what the delegates to the Convention contemplated. But the delegates' vision of future Australian unity was probably somewhat limited;

---

16 *Ibid* at 141-2, 145.

17 (1971) 122 CLR 353.

18 *Ibid* at 396.

they may not have envisaged the emergence of an integrated nationwide economy and market, such as *we* are now witnessing.

The recognition that Australia was one nation and Australians were one people - the new found sense of national unity - has unquestionably played a part in those cases which have defined the scope and content of the external affairs power.<sup>19</sup> The reasoning in those cases specifically relies upon a reading of the power which will enable Australia to take its place among the community of nations and implement international obligations which it assumes by acceding to treaties and conventions. Yet an examination of the Convention Debates rather suggests that the delegates considered that because Australia was part of the British Empire, Great Britain would enter into treaties and conventions on behalf of Australia, Great Britain, not Australia, then being a member of the international community of nations. The importance of the concept of Australia as one nation is present also in *Breavington v Godleman*,<sup>20</sup> the conflict of law decision in which Wilson and Gaudron JJ and Deane J gave s 118 ("the full faith and credit" provision) of the Constitution an operation similar to Art IV s 1 of the United States Constitution.

## V. IMPLICATIONS OF FEDERAL SIGNIFICANCE

It seems to have been thought at one time that *Engineers* banished the making of implications from the Constitution, but that was not so, as subsequent cases were to demonstrate. In this respect, it is important to note that the *Engineers'* case was not directed to the issue of individual or fundamental rights, whether express or implied. It dealt with the perennial issue of Commonwealth/State powers to the extent that it discouraged implications in the Constitution, and it was speaking in the context of powers, not individual or fundamental rights. Even in the context of powers, it later became clear that there was to be implied in the Constitution a restriction against the exercise of Commonwealth legislative powers in such a way as to single out, or discriminate against a State or to destroy or curtail the existence of a State or impair its capacity to function as a government.<sup>21</sup>

This implication has been at the core of the argument presented to the Court in a number of the recent cases. The difficulty with the implication is in giving it precise content. Because it has not been given precise content, the implication has not conferred much protection on the States. So far, it has only been invoked successfully in several cases: in *Melbourne Corporation v The Commonwealth*,<sup>22</sup> to invalidate a Commonwealth singling out, or discriminating against States by prohibiting them from banking with a bank other than the Commonwealth Bank; and in *Re Ludeke; ex parte Queensland Electricity Commission*,<sup>23</sup> a

19 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *The Commonwealth v Tasmania (the Tasmanian Dams case)* (1983) 158 CLR 1; *Richardson v Forestry Commission* (1988) 164 CLR 261.

20 (1988) 169 CLR 41.

21 *The Tasmanian Dams case*, note 19 *supra* at 139-40, 213-15, 280-1.

22 (1947) 74 CLR 31.

23 (1985) 159 CLR 192.

Commonwealth law which provided for a special regime for the disposition of industrial disputes to which an electricity authority of Queensland was a party and isolated such an authority from the general statutory regime governing the resolution of such disputes, was held invalid. These cases were instances of the operation of the first limb of the implication.

Of more significance is the very recent decision *Re Australian Education Union; ex parte Victoria*,<sup>24</sup> where the second limb of the implication was held to apply. There the Court held, Dawson J alone dissenting, that the implication operated to prevent the Commonwealth Parliament from empowering the Industrial Relations Commission from making any award which restricted the capacity of a State from terminating the services of its employees for redundancy. The Court also considered that the implication would prevent the Parliament from authorising the Commission from prescribing the terms and conditions of employment of Ministers, ministerial assistants, departmental heads, and judges, assuming judges otherwise to fall within the jurisdiction of the Commission. Just how far the implication will operate to restrict the Commission from making comprehensive awards governing the terms and conditions of State public servants is not yet entirely clear. However, there is no reason to think that the Commission cannot make awards governing substantial aspects of the terms and conditions of employment of many State public servants.

Perhaps the best indication of the acknowledged reach of Commonwealth powers in their application to the States is the very recent decision in *Jacobsen v Rogers*,<sup>25</sup> where s 10 of the *Crimes Act 1914* (Cth), a general provision authorising the issue of a search warrant, was held to authorise the issue of a search warrant to search the premises of the State Crown and seize documents relevant to the investigation of Commonwealth offences, notwithstanding the existence of the presumption that a statute is not intended to bind the Crown in right of the States or the Crown in right of the Commonwealth. The Court concluded that the State could resist the seizure of documents by raising a public immunity objection, in which event that claim would be judicially determined.

## VI. REGARD TO SUBSTANCE RATHER THAN FORM

As the presumption was not given a great deal of weight, the decision in that case might be regarded as a victory of substance over form. Like *Bropho v Western Australia*,<sup>26</sup> the decision marks a weakening in the strength of presumptions affecting the non-application of statutes to the Crown. Contrast, however, the continued, perhaps enhanced strength of presumptions favouring the non-displacement by statute of rights and freedoms said to be protected by the common law.<sup>27</sup>

---

24 (1995) 128 ALR 609.

25 (1995) 127 ALR 159.

26 (1990) 171 CLR 1.

27 *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625.



In other areas of constitutional law, the Court has been at pains to give weight to considerations of substance rather than form. That approach is, of course, entirely consistent with the movement away from legalism. The movement is perhaps even more apparent in the non-constitutional decisions of the Court. Strong emphasis on substance rather than form may be seen in the majority judgments in the recent decisions on s 90 of the Constitution dealing with "duties of customs and excise"<sup>28</sup> and s 92. Indeed, in *Cole v Whitfield*,<sup>29</sup> the Court characterised the earlier approach to s 92 - Sir Owen Dixon's concepts of the criterion of operation and the circuitous device - as artificial and, in effect, as amounting to the triumph of form over substance.

Too much should not be made of the movement away from legalism towards a more purposive or policy oriented form of jurisprudence. The text of the Constitution must always remain the principal foundation of constitutional interpretation. The treatment in the *Tasmanian Dams* case<sup>30</sup> of s 100 of the Constitution and the acceptance of the authority of the earlier decision in *Morgan v The Commonwealth*<sup>31</sup> show that legalism is still alive, as did *New South Wales v The Commonwealth* (the *Incorporation* case).<sup>32</sup> That is not surprising. In the final analysis, the Constitution is our paramount law, and interpretation requires that we give effect to its language and heed what it says.

## VII. THE CONVENTION DEBATES AND HISTORY

*Cole v Whitfield* sanctioned the use of Convention Debates as an aid to constitutional interpretation. Previously, the Debates had been regarded as forbidden fruit. Why, it is hard to understand when Justices of the Court had frequently relied on references in Quick and Garran,<sup>33</sup> which were clearly based on the Convention Debates. The legitimacy of referring to the Debates was an almost inevitable consequence of the prior acceptance by the High Court of the legitimacy of referring to Hansard and legislative history in connection with the interpretation of statutes. History can provide illumination in the construction of a constitutional provision, as it did with s 92 in *Cole v Whitfield*. But the instances in which history can make an influential contribution are relatively uncommon. For example, history has not played a significant part in elucidating the mysteries of s 90 and what is meant by the expression duties of excise.

I have been inclined to treat the Convention Debates with some reserve. They rarely reveal the extent to which the expressed views of a speaker were shared by other delegates. There is, accordingly, the risk that we may be tempted to take too much from, and read too much into, what was said. There is also the risk that the discussion recorded, focusing as it did on some problem of contemporary

---

28 See, for example, *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 630, 638, 662-3.

29 Note 1 *supra* at 401-2, 405-6.

30 The *Tasmanian Dams* case, note 19 *supra* at 154, 182, 249, 251.

31 (1947) 74 CLR 421.

32 (1990) 169 CLR 482.

33 J Quick, RR Garran, *The Annotated Constitution of the Australian Commonwealth*, Legal Books (1976).

relevance, will convey the impression that the relevant provision was directed to that issue and nothing else. And reference to the history of earlier legislation in order to establish the scope of a legislative power is more likely to establish the minimum content of a power than its outside limits, as Kitto J pointed out in *Lansell v Lansell*.<sup>34</sup> Criticism has been made of the Court's use of history on the ground that it has been selective. That is the criticism that historians constantly make of fellow historians.

The Court has also been criticised on the ground that it has been inconsistent in its use of history. In *Cole v Whitfield*,<sup>35</sup> the Court said:

Reference to the history of s 92 may be made, not for the purpose of substituting for the meaning of the words used the scope and effect - if such could be established - which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.<sup>36</sup>

It has been suggested that in subsequent cases, Justices have relied, in breach of the statement quoted above, on the founders' intentions with respect to the effect and operation of a constitutional provision.<sup>37</sup> The force of this criticism depends upon the precise effect to be given to that passage and the question whether it is legitimate to consider the founders' intentions with respect to the operation and effect of a particular provision of the Constitution as well as their view of the 'mischief' to which it is directed.

Considerations of time and space preclude me from dealing with characterisation and proportionality. Proportionality is a concept which has been imported from European law. In Australia, it now has an impact in setting limits to the exercise of legislative power, particularly purposive power such as the external affairs power when it is used to implement a treaty<sup>38</sup> and some applications of the incidental aspects of a legislative power, as in *Davis v The Commonwealth*.<sup>39</sup>

I shall not deal with s 15A of the *Acts Interpretation Act* 1901 (Cth) and its successors. Reading down a statute with a view to bringing the statute within the limits of constitutional power is a topic, the importance of which is often underestimated and sometimes neglected in arguments presented to the High Court. The topic is likely to assume greater importance in the future, as the arguments presented with respect to s 7A of the *Industrial Relations Act* 1988 (Cth) in *Re Duggan; ex parte Wagner*<sup>40</sup> tended to show.

34 (1964) 110 CLR 353 at 363.

35 Note 1 *supra*.

36 *Ibid* at 385.

37 See P Schoff, "The High Court and History" (1994) 5 *Public Law Review* 253.

38 See the *Tasmanian Dams* case, note 19 *supra* at 266-7.

39 (1988) 166 CLR 79.

40 (1995) 128 ALR 81 at 91-2, 97, 112, 117.

## VIII. THE SIGNIFICANCE OF COMMON LAW AND FUNDAMENTAL RIGHTS

But I should say something of the tendency in recent times to place great weight in both statutory and constitutional interpretation on what has been described as rights and interests protected by the common law. Personal liberty, freedom of expression, and the right to possession of one's land free from unauthorised entry are notable examples. This tendency to characterise some rights and interests as something protected by the common law has been criticised on the ground that it may enable judges to give that label to rights and interests which they wish to protect. It may be better to describe the rights and interests to be treated in this way as fundamental rights.

In *Coco v The Queen*,<sup>41</sup> the Court treated the relevant right as a common law right and as a fundamental right. There, the Court required an unmistakable and unambiguous statutory intention to abrogate a fundamental freedom before a statute would have such an effect and pointed out that it would "enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights".<sup>42</sup> The rule of construction adopted by the Court will enhance the integrity of the democratic legislative process. The Court also stated that general words will rarely amount to express words for the purpose of manifesting such an intention.<sup>43</sup> The rationale for this approach is the improbability that the legislature would overthrow fundamental principles or infringe rights without expressing its intention with realistic clarity. To give such an effect to general words, simply because they have that meaning in their widest or natural sense, would be to give them a meaning which was not likely to be intended.<sup>44</sup>

In conformity with that approach, the Court's interpretation of s 117, dealing with the rights of out-of-State residents, is now different from what it was. Contrast *Street v Queensland Bar Association*<sup>45</sup> with its predecessor *Henry v Boehm*.<sup>46</sup>

## IX. IMPLICATION

That brings me back to the implication of rights or freedoms in the Constitution. The implication of freedom of communication as to political discussion or political matter which was recognised in *Nationwide News Pty Ltd v Wills*<sup>47</sup> and *Australian Capital Television Pty Ltd v The Commonwealth*,<sup>48</sup> reinforced now by

---

41 (1994) 120 ALR 415 at 418-19.

42 *Ibid* at 419.

43 *Ibid*.

44 *Ibid* at 419, citing *Bropho v Western Australia*, note 26 *supra* at 18.

45 (1989) 168 CLR 461.

46 (1973) 128 CLR 482.

47 (1992) 177 CLR 1.

48 (1992) 177 CLR 106.

*Theophanous v Herald & Weekly Times Ltd*<sup>49</sup> is, as I suggested earlier, an implication drawn from the structure and, to a lesser extent, certain specific provisions, particularly ss 7 and 24 of the Constitution. We know from *Theophanous* that the freedom does not extend to communication generally; it is limited to political discussion, and what is more, it is not a positive right; it is a negative right or, more accurately, a negative restriction.

Underlying the implication of rights in the Constitution is the fundamental issue in constitutional interpretation, the issue to which my opening remarks were directed. Sir Owen Dixon said that we should not be fearful about making implications.<sup>50</sup> Windeyer J drew a distinction between implications which involve an addition to what is expressed and those that explain or limit what is expressed, holding that the latter, not the former, have a place in constitutional interpretation,<sup>51</sup> though he preferred to describe the judicial process as “uncovering” rather than “making” implications. His Honour went on to speak as if “underlying assumptions” were interchangeable with “implications”, though clearly enough he was speaking in the context of federal structure.<sup>52</sup>

Those who advocate the implication of rights in the Constitution seek to draw in aid the comments of Sir Owen Dixon where he wrote of the common law as an ultimate constitutional foundation.<sup>53</sup> There His Honour suggested:<sup>54</sup>

the common law should be conceived of as an anterior body of jurisprudence  
and

that constitutional questions should be considered and resolved in the context of the whole law, of which the common law including in that expression the doctrines of equity, forms not the least essential part.

However, as the joint judgment in *Theophanous* pointed out,<sup>55</sup> too much cannot be taken from these comments.

Others have sought to take the matter further. Professor MJ Detmold in his work *The Australian Commonwealth* suggests that it is legitimate to derive principles from the concepts and theories on which the provisions and structures of the Constitution are based. That suggestion does not square with the view of McHugh J in *Theophanous* when his Honour said:

it is not legitimate to construe the Constitution by reference to political principles or theories that find no support in the text of the Constitution... The *Engineers' Case* made it plain that the Constitution is not to be interpreted by using such theories to control, modify or organise the meaning of the Constitution unless those theories can be deduced from the terms or structure of the Constitution itself.<sup>56</sup>

49 Note 5 *supra*.

50 *Australian National Airways Pty Ltd v The Commonwealth*, note 3 *supra* at 85; *Lamshed v Lake* (1958) 99 CLR 132 at 144.

51 *The Payroll Tax case*, note 17 *supra* at 401-2.

52 *Ibid* at 402-3.

53 Sir Owen Dixon, “The Common Law as an Ultimate Constitutional Foundation” (1957) 31 *Australian Law Journal* 240.

54 *Ibid* at 245.

55 Note 5 *supra* at 15.

56 *Ibid* at 71.

And, in *Australian Capital Television Pty Ltd v The Commonwealth*,<sup>57</sup> I said:

It is essential to keep...in mind the...difference between an implication and an unexpressed assumption upon which the framers proceeded in drafting the Constitution. The former is a term or concept which inheres in the instrument and as such operates as part of the instrument, whereas an assumption stands outside the instrument.

The question ultimately may be whether what is sought to be implied is contained within the spirit of the instrument.

However, in *Leeth v The Commonwealth*,<sup>58</sup> Deane and Toohey JJ adopted an approach closer to that proposed by Professor Detmold. They referred<sup>59</sup> to the Constitution's adoption by implication of the general principle protecting the States and their instrumentalities from discriminatory treatment as an illustration of the approach of the framers of the Constitution, to the underlying doctrines or principles upon which it is structured. Their Honours went on to say:

That approach was to incorporate underlying doctrines or principles by implication drawn both from the nature of the Federation and from any particular express provisions of the Constitution which reflect or implement those doctrines or principles. In the context of that approach, specific provisions...which reflect or implement some underlying doctrine or principle are properly to be seen as a manifestation of it.<sup>60</sup>

Their Honours pointed<sup>61</sup> to a statement of Isaacs J<sup>62</sup> that it was the duty of the Court, in interpreting the Constitution, to take judicial notice of every fundamental constitutional doctrine existing and fully recognised at the time the Constitution was passed. They then identified the doctrine of substantive legal equality as one of those doctrines. That approach to constitutional interpretation could, if adopted, yield other implications in the Constitution.

In conclusion, it may be said that the recent decisions conform to Sir Owen Dixon's injunction that we should not be fearful about making implications, though a court must be cautious in so doing and ensure that they are soundly based, either in the text or the structure of the Constitution. However, necessary implication, to use the time-honoured expression, does not exclude recourse to what is inherent in the spirit of the Constitution. The fact that Dicey's theory of legislative supremacy is not as compelling or influential as it once was may possibly have weakened the traditional reluctance to resort to implication, though that is very much a matter of speculation. And it may be that there is a need to elucidate further the relevance and significance for constitutional interpretation of the beliefs and intentions of the Delegates to the Conventions.

---

57 Note 48 *supra* at 135.

58 (1992) 174 CLR 455.

59 *Ibid* at 484.

60 *Ibid*.

61 *Ibid* at 485.

62 *The Commonwealth v Kreglinger & Fernau Ltd & Bardsley* (1926) 37 CLR 393 at 411-12.