*Sir Anthony Mason**

CONSTITUTIONAL INTERPRETATION: SOME THOUGHTS

THOUGH cast as a commentator on the two papers, I shall speak directly to the topic. Various theories of constitutional interpretation compete for acceptance. I have previously reviewed them in the article "The Interpretation of a Constitution in a Modern Liberal Democracy" published last year[1] and I won't repeat what I then said. I do not believe that any particular theory is capable of resolving all questions of interpretation or that any theory is to be adopted to the exclusion of others. Much depends upon the particular question to be resolved and the concatenation of factors which may be relevant to it.

High Court judgments contain little discussion of theories of interpretation. The same comment can be made about the opinions of justices of the Supreme Court of the United States, Scalia J being a notable exception with his emphatic support of originalism. It is only in very recent times that worthwhile discussion of theories of interpretation has got under way in Australia. Jeffrey Goldsworthy's paper on originalism presented to an Australian National University Research School of Social Sciences Seminar last year was an example,[2] though I would have classified it as an exploration of intentionalism. Jeffrey Goldsworthy's paper had the virtue of discussing intentionalism in a specifically Australian context, *McGinty's Case*.[3] The United States debate centres on guarantees of individual rights, whereas our problems relate to the interpretation of powers and are therefore different.

It is not surprising that judges are diffident about embracing a particular interpretive theory. For one thing, there is an apprehension about being locked in. For another thing, no theory has yet proved to be flawless or to offer comprehensive guidance. Intentionalism and originalism provide no assistance when neither the text nor the framers specifically address the particular question which arises for decision, and that is the case all too often. Nor does intentionalism help when the framers had conflicting intentions.

In Canada there has been repeated reference to the proposition that the Constitution is to be interpreted as a "living tree",[4] a proposition which can be guaranteed to bring a Cheshire

---

* The Hon Sir Anthony Mason AC KBE, Chancellor, University of New South Wales, National Fellow, Research School of Social Sciences, Australian National University.

1 In Sampford & Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, Sydney 1996) p13.

2 Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 *Fed L Rev* 1.

3 *McGinty v Western Australia* (1996)186 CLR 140.

4 *Edwards v Attorney-General of Canada* (1930) AC 124 at 136 per Lord Sankey.

cat-like grin to the face of any Canadian lawyer or law student whenever it is mentioned. The judgments do not elucidate its meaning with clarity; it tends to be a ritual incantation, or a code word for progressive interpretation, but just what form of progressive interpretation it supports is not altogether clear.

So far as the High Court is concerned, it adopted a literalist legalistic approach for a long time, an approach which was endorsed in the *Engineers' Case*.[5] Once it is recognised, as it must be, that there are many cases where the text is not directed to the question for decision, the shortcomings of the literalist approach begin to emerge and they multiply when you appreciate that words do not possess fixed, exclusive meanings. In more recent times, the Court has moved towards what has been described as a more "progressive" approach. The word "progressive" is not particularly informative, as Scalia J is at pains to point out. Its main object is to announce a non-literalist and non-legalistic approach, without telling you what the approach actually stands for. One form - a specific form - of progressive interpretation is "evolutionary" interpretation. It surfaced in *McGinty* and I shall come back to it.

One of the few occasions in which the High Court became involved in a debate about theory was in *Theophanous v Herald and Weekly Times Ltd*[6] where Deane J espoused the "living force" approach to interpretation, inveighing against the dead hands of the past,[7] while McHugh J appeared to join issue. But when the relevant passage in McHugh J's judgment is read closely, the precise area of disagreement is not quite so easy to identify. His Honour denied that the actual intentions of the framers control the meaning of the Constitution. His Honour went on to say that the meaning for the present generation is not necessarily the meaning it had for earlier generations or for the framers. But then he made the statement that the Constitution is not to be interpreted by using theories of federalism, politics or political economy to "control, modify or organize the meaning of the Constitution"[8] unless those theories can be deduced from the terms or the structure of the Constitution itself. So a constitutional doctrine is unacceptable unless it is based on something that is contained in the Constitution itself.

Yet, at the same time, his Honour acknowledged that such theories and the principles of the common law may be used to interpret the particular provisions of the Constitution but only if there are grounds for concluding that the meaning of the provision was intended to be understood by reference to such a theory or principle. Such grounds may appear from the Convention debates, from the history of the nation and its institutions and even, it seems, in some circumstances from common law rules and principles.[9] So theories and

5 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
6 (1994) 182 CLR 104.
7 At 172-173.
8 At 198.
9 At 198-199.

common law principles, external to the Constitution itself, may, subject to meeting that qualification, be used to interpret particular provisions in the Constitution.

Add to all that McHugh J's approach to interpretation as applied in *Kable v Director of Public Prosecutions*.[10] It does not seem to be all that different from the approach of Deane J. Justice Deane, it will be recalled, was saying that implications could be drawn from fundamental doctrines on which the Constitution is structured, representative government being such a doctrine. So, despite the clash of cymbals, the real point of difference in *Theophanous* was whether that doctrine formed part of the structure of the Constitution. For practical purposes that point of difference has largely disappeared as a result of *Lange v Australian Broadcasting Corporation*.[11]

Nonetheless the underlying question of principle remains: in what circumstances is it legitimate to interpret the Constitution by reference to doctrines and principles prevailing in 1900? The question may be subdivided into two separate exercises, as McHugh J suggests: (1) when is it permissible to incorporate the doctrine or principle into the Constitution, and (2) when is it permissible to interpret a particular provision by reference to such a doctrine or principle?

Plainly the first is the more formidable undertaking. *Leeth v Commonwealth*[12] is an example. There an attempt was made to establish the principle of substantive equality as an integral part of the Constitution. That attempt was based on what was said to be a fundamental common law principle of equality and the proposition that "specific provisions of the Constitution which reflect or implement some [particular aspect of an] underlying doctrine or principle are properly to be seen as a manifestation of it and not as a basis for denying its existence".[13] The majority did not accept that approach in *Leeth*. The attempt was again rejected in *Kruger v Commonwealth*,[14] individual justices asserting either that the doctrine of substantive equality had no common law foundation or that provisions of the Constitution were inconsistent with it or both. In *Kruger* little was said about the circumstances in which it is legitimate to import into the Constitution an underlying doctrine. But it seems clear enough that, since *McGinty*, some clear manifestation of a doctrine is necessary either by text or structure. Responsible government, representative government and separation of powers are instances of such doctrines. How and to what extent they are incorporated depends upon an examination of particular provisions. The discussion in *McGinty* is now shadowed by the decision in *Lange* but I doubt that affects what I have just said.

---

10 (1996) 138 ALR 577 at 622 (where McHugh J referred to "the principles that underlie Ch III" of the Constitution as a basis for the implication unearthed in that case).

11 (1997) 145 ALR 96.

12 (1992) 174 CLR 455.

13 At 484-485 per Deane and Toohey JJ.

14 (1997) 146 ALR 126.

When it comes to interpretation of a particular provision, there is less need for it to manifest an underlying doctrine or principle. Convention debates or history may demonstrate its relevance and its influence upon the particular provision. One only has to recall Sir Garfield Barwick's laissez-faire inspirations on s92 and, more recently, Gummow J drinking deeply from the fountain of John Stuart Mill on s24.

EVOLUTIONARY INTERPRETATION

Support now exists for an evolutionary interpretation of some terms and concepts in the Constitution according to contemporary understandings. The best example is the reference to the word "jury" in s80. In 1900, the term signified a body of males satisfying a property qualification. *Cheatle v The Queen*[15] decided that it now signifies a body of persons, including women, who are not required to satisfy a property qualification. The result is that, though a law enacted in 1903 providing for an all male jury would satisfy s80, such a law if enacted to-day would not do so. I do not need to remind you that *Cheatle v The Queen* was a unanimous decision of the Court.

The rationalisation for this ostensible affront to originalism is that the essential feature of the institution of the jury is that it consists of persons representative of the wider community. Our perception of who are the persons who are representative of the wider community has changed in the meantime. A similar result can be achieved by the connotation/denotation distinction.

Another instance of evolutionary interpretation is that given to the words "directly chosen by the people" in s24 of the Constitution. In 1900 the franchise did not include all adult males and females yet that was not fatal to the validity of the franchise. To-day it would be, at least in the view of Toohey, Gaudron and Gummow JJ in *McGinty v Western Australia*[16] and of McHugh J in *Langer v Commonwealth.*[17] So the requirements of what is involved in a direct choice by the people will be determined by reference to the particular stage which has been reached in the evolution of representative government.

There is a tension between the evolutionary approach and the notion that the Constitution left matters, such as the vote, to be regulated by the parliament. As Jeffrey Goldsworthy has pointed out in his article on originalism, that tension is exhibited in Gummow J's judgment in *McGinty.*[18]

Cheatle and *McGinty* recognise that some constitutional terms or concepts at least are capable of dynamic or evolutionary development, which will entail new requirements and, as a consequence, the invalidity of measures which would have been valid at an earlier

15 (1993) 177 CLR 541.
16 (1996) 186 CLR 140 at 201, 218-219, 286-287.
17 (1996) 186 CLR 302 at 342.
18 Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 *Fed L Rev* 1.

time. The evolutionary development on which the Court has relied in both cases has been recognised by statute so that the meaning adopted by the Court is based on legislative practice. It is not a case of the Court basing an evolutionary constitutional requirement on a contemporary understanding which is without legislative backing.

Geoffrey Lindell in the paper in this collection refers to Jeffrey Goldsworthy's criticism on originalism grounds of the evolutionary approach to s24. The main criticism is that the justices did not identify the fixed concept or essential core of the vote or choice which enabled the concept to evolve over time. However, it seems clear enough that the justices considered that the Constitution contemplated that the choice was to be made by a class of voters sufficiently representing the community. Once again our perception of what the class must entail has changed over the years. That is because the concept of representative government is evolving.

In passing, I do not deny the force of Jeffrey Goldsworthy's originalist premise that the Constitution left these matters to the judgment of parliament. There is a tension between the evolutionary approach and the idea that the Constitution and the framers left everything to the judgment of parliament. The evolutionary approach is itself based on the notion that the framers considered that the Constitution would evolve along the lines enunciated by Alfred Deakin, at least in relation to representation reinforcement, as with s24, and communication, as to government and political discussion.

Yet another example is the concept of judicial power. As understood in 1900 its scope or content was much more limited than it is today. Many instances can be given of functions now regarded as involving the exercise of judicial power which were not recognised as involving such an exercise and were therefore not in 1900 traditional judicial functions. The re-opening of money-lending and hire-purchase agreements are sufficient instances. Here, again, the constitutional concept has evolved or our perception of its scope and content has.[19] But in this instance it has expanded without displacing the earlier content of the concept. What is more, the evolutionary advance has been based on legislative practice. In other words, the Court can look to statute as demonstrating the new scope and content of the power; the Court is not driven to give effect to community values established otherwise than by statute.

There is no reason in logic why the Court could not also apply the evolutionary approach to some terms and concepts in the Constitution in cases where the evolution is not supported by legislative endorsement. Naturally, the Court would be circumspect in applying the evolutionary approach in the absence of legislative recognition of the extension or expansion.

Generally speaking, the instances in which the High Court has adopted an evolutionary approach to constitutional interpretation, including *McGinty*, are instances which would be

19 Zines, *The High Court and the Constitution* (Butterworths, Sydney, 4th ed 1997) p198.

explicable and justifiable by reference to Professor Ronald Dworkin's distinction between concepts and conceptions. A concept, which is an expression of an idea at a high level of abstraction, admits of subsequent development by the inclusion of later exemplifications. A conception, on the other hand, which is spelled out with a degree of specificity, does not admit of that form of evolutionary development.

INTENTIONALISM

My main concern with intentionalism and originalism is that they have little to offer: we don't know what the framers' intentions or dominant intentions were with respect to so many questions of interpretation. In addition, there is the difficulty of transporting the framers' historical intentions to a contemporary setting. That is why counterfactual intention could be of importance.

I am particularly interested in Natalie Stoljar's discussion of the *Tasmanian Dam Case*[20] counterfactuals as an answer to the shortcomings of intentionalism. As Natalie suggests, in the passage quoted from *Tasmanian Dam*, I was not donning the mantle of intentionalism. Rather I was seizing upon the general abstract intention and giving effect to that notwithstanding that the 1900 denotation probably did not extend so far. The textual reference to "external affairs" expressed the abstract intention or concept and so a later expansion in the applications of the intention or concept did not prevent them from falling within the abstraction. Whether you treat it as a change in facts or circumstances, a change in our perceptions or as a change in denotation does not matter that much.

Natalie's exploration of counterfactuals in two areas of great interest to contemporary constitutional lawyers reinforces on analytical grounds my intuitive beliefs that intentionalism and originalism offer limited assistance in the resolution of constitutional questions.

THE UNSPEAKABLE AND THE INVISIBLE

What Penny Pether says is reminiscent of the commentator who claimed that the values of the justices of the Supreme Court of the United States were derived from reading the *New York Review of Books*. When you take account of the class of persons from whom the justices are selected under the Constitution, that it is a constitution that the High Court is interpreting and that constitutional interpretation calls for continuity in development - what Professor Cass Sunstein calls the idea of a usable past - there is an air of inevitability about what has happened.

True it is that some critical points have been made. High Court judgments have been described as "dense" when compared with the judgments of other courts. The Court is speaking to the legal community, rather than to the community at large. But how realistic

20 *Commonwealth v Tasmania* (1983) 158 CLR 1.

is it for us to think of the Court communicating directly with the public? If I could persuade Chief Justice Brennan to employ a post-modernist judgment ghostwriter, would the judgments be more readable? I can't see the sans-culottes and the lumpen-proletariat massing at the doors of the Court Registry demanding judgments rather than bread. As Chief Justice Brennan said, we must rely on the commentators and the media to inform the public. At the same time, the judgments could be expressed in a form which is more attractive to an intelligent readership of non-lawyers. That, however, has not been our tradition.

There is some force in the view that in some areas the Court has given effect to the values of the law and the legal community and less so to other values. The Court has, for example, distilled more out of Chapter III dealing with the judicial power than out of any other part of the Constitution. Chapter III has been a source of curial "rights", "immunities" or "privileges", in contrast to other parts of the Constitution. In one sense this is understandable as the justices are familiar with the curial process and what is needed in order to ensure due process in the courts. On the other hand, the judgments may sometimes betray a concern with public apprehensions about the administration of justice which may or may not be founded in fact. And, in the view of some critics, the judgments tend to reflect an exalted view of the judicial process.

What, if anything, should or can be done about this is another matter. The papers in this collection dealing with interveners consider how the High Court can be better informed through interventions using the device of the amicus curiae or the office of Advocate-General. The problem is, of course, that to better inform the Court involves presenting even more materials to it when it is already inundated with work. And according greater accessibility to the "unspeakable" and the "invisible" inevitably means the prospect of exposing the Court to groups and individuals many of whom will not make a significant contribution to the Court's understanding for the simple reason that they will not address themselves to the relevant legal question.