The End of Freedom, Method in Theophanous

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Introduction

In the final months of 1992 it was widely anticipated that the Government of Prime Minister Keating would call a general election for the Federal Parliament in December of that year. As events transpired the Government chose to delay calling an election until March of 1993. However, in the early part of October 1992 some controversy arose when a member of the government, Mr Graeme Campbell[1], chose publicly to criticise a member of his own Party, Dr Andrew Theophanous[2], for his views and conduct in relation to migration policy. The criticisms made by Campbell became a matter of public comment and, in the context of an impending election, drew more attention than they might otherwise have done.

On 8 October 1992 the *Herald and Weekly Times* ('HWT') published a letter received from Mr Bruce Ruxton[3] in which Theophanous was subject to further criticism. The publication of that letter[4] prompted

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1 Australian Labor Party, MHR for Kalgoorlie

2 Australian Labor Party, MHR for Calwell. Dr Theophanous has written widely on immigration and social justice issues and was, in October 1992, Chairperson of the Joint Parliamentary Standing Committee on Migration Regulations and Chairperson of the Australian Labor Party Federal Caucus Immigration Committee.

3 President of the Returned Services League, Victoria. Mr Ruxton is a prominent conservative commentator.

4 The material part of the letter is: "If reports coming out of Canberra are true about the alleged behaviour of Dr Andrew Theophanous, then it is high time he was thrown off Parliament's immigration committee. I have read reports that he stands for most things that Australians are against. He appears to want a bias shown towards Greeks as

Theophanous to commence proceedings in defamation before the County Court of Victoria. The plaintiff named HWT as first defendant and Ruxton as second defendant. In answer to the claim of the plaintiff HWT filed a notice of defence which, inter alia, pleaded the letter fell within the scope of a constitutionally guaranteed freedom of communication which protects publications about government and politics. If so protected, the publication might be immune from action in defamation. The matter was removed to the High Court[5] for determination as to whether any such constitutional freedom existed and, if so, whether the nature of that freedom established the defence raised. By a 4:3 majority,[6] the High Court decided that a freedom of communication of a type claimed by the defendant is found in the Constitution and that the freedom identified operates as a qualification on the laws of defamation found in all Australian jurisdictions. As authority for that conclusion, the majority gave the reasoning of the court in *Australian Capital Television v The Commonwealth* (*ACTV*) and *Nationwide News Pty Ltd v Wills* (*Nationwide*).[7]

Basic to the outcome in *Theophanous* and the two earlier cases is the employment of a particular method of reading the Constitution which I describe as 'unrestricted structuralism'. In all three cases, the Court applied a manner of interpretation which looks beyond the text of the document and draws sustenance from the system of representative government said to be established by the scheme of the text as a whole. In particular, it said that the supposed requirements of that system of government declare a vital logic to which disputes on Constitutional meaning should be referred.

It is well-known that *Theophanous* confirmed major differences of opinion within the Mason Court over the legitimacy of structural methods in interpretation of the Constitution. Perhaps less well understood are the implications of the residue of that dispute, for in addition to the many specific issues raised by the case, *Theophanous* also represents a raising of stakes in the continuing debate as to the proper role of the High Court in the Australian system of law and government. For instance, the legacy of

migrants ... It has been reported that Dr Theophanous wants the British base of Australian society diluted so that English would cease to be the major language. What is this man on about? And what language would he suggest we use to replace English? I'm grateful there's an election in the wind. I hope the people of Calwell give Dr Theophanous the heave. Poor old Arthur Calwell must be spinning in his grave at the idiotic antics of the man in the seat named after him" *The Sunday Herald Sun*, 8 November, 1992.

5 The case was removed to the High Court under the *Judiciary Act* 1903 (Cth) s 40(1) on a case stated by the Chief Justice. Whatever else may be said of the manner in which the issue came before the High Court, it is clear that Chief Justice Mason was intent on it coming forward.

6 *Theophanous v The Herald and Weekly Times Ltd and Another* ('*Theophanous*'). High Court, 12 October 1994. Majority: joint judgment of Mason CJ, Gaudron, Toohey JJ, joined in separate judgment by Deane J. Minority: Brennan, Dawson and McHugh JJ, each separate judgments. References are to (1994) 124 ALR 1–79.

7 (1992) 108 ALR 577; (1992) 108 ALR 681.

that methodological dispute I refer to has two obvious implications for the developing jurisprudence of implied rights under the Constitution.[8]

First, it can be said that inasmuch as the case affects the basis upon which further rights might be implied from the Constitution, *Theophanous* can be extended only so far as the particular method of interpretation employed by the majority of that Court continues to find a majority which is prepared to use it so boldly. That the Court will continue in the spirit of the decision in *Theophanous* is a matter of some doubt. Second, the position of the Court on the nature of rights implied from the Constitution will be greatly influenced by the method of interpretation a future Court might choose to employ.

This essay explores the issues of method and role raised by *Theophanous*. By way of further setting the particular context within which the general reasoning of the Court must be understood, part one of this Note looks briefly at the immediate affect of *Theophanous* on the law of defamation. Part two turns to a discussion of the three distinct modes of Constitutional interpretation employed in the case and the implications of each for the doctrine of implied constitutional rights. Part three speculates on the forces which influenced the reasoning of the Mason Court. Part four questions whether the style of reasoning adopted by the majority is likely to survive. The conclusion arrived at is that in *Theophanous* the reasoning of the majority pushed the Court to a decision which overstepped the bounds of its legitimate role. Further, the outcome of the case is a high water mark from which the implied rights jurisprudence of the Court is likely only to recede.

Implied Rights and Defamation

Before turning to the wider debate raised by the case, it will be useful to summarise how the Court decided the application before it. On the particular issue raised by the case stated, the majority posed two questions. First, granted there is an implied freedom of communication in respect of matters political and governmental, do the current laws of defamation infringe on that right? Second, if current law does infringe the implied right, in what form can the law continue to recognise defamation in so far as it might provide a cause of action arising out of discussions or publication on politics and government?

In searching for an answer to the first question, the majority undertook a survey of defamation laws throughout the Commonwealth. In this it was noted that the policy which shapes defamation law is the desire to find an acceptable balance between the protection of individual

[8] See M O'Neill and R Handley, *Retreat from Injustice: Human Rights in Australian Law*, Sydney: Federation Press, 1994, Ch 4.

reputation and the public interest in freedom of speech. In the result, the majority concluded that the balance struck by the existing law of defamation, both common law and as modified by statutes of the States and Territories, infringed the requirements of the Constitution.[9] On the second question, the majority proposed a new test by which to determine if, in the context of political discussion, published matter gives rise to an actionable wrong. After rejecting the possibility that the implied right might provide an absolute immunity from suit, or that the court should adopt the approach established by the US Supreme Court in *New York Times v Sullivan*,[10] the majority state as their view that:

> "... if a defendant publishes false and defamatory matter about a plaintiff, the defendant should be liable in damages unless it can establish that it was unaware of the falsity, that it did not publish recklessly (ie, not caring whether the matter was true or false), and that the publication was reasonable ..."[11]

The net effect of the implied right recognised by the Court is not wholly to immunise political discussion from civil action for injury to reputation, rather it is to reduce somewhat the obligation imposed by the law of defamation upon those who engage in this area of public speech.[12] There is now accepted to be a more generous margin for error in the course of reporting, analysing and the putting forth of opinion. The practical result is that a new defence to an action in defamation becomes available.[13]

Three Modes of Interpretation

As a first indication of the extent to which the Court in *Theophanous* was split on the question of method, it can be noted that the overwhelming theme of the three minority judgements was that of interpretive method. In the strongly worded opinions of the minority, the position taken by the majority was said to be based on an inappropriate means of interpretation. By way of example McHugh J stated:

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[9] "... once it is acknowledged, as it must be, that the existing law seriously inhibits freedom of communication on political matters, especially in relation to the views, conduct and suitability for office of an elected representative of the Australian Parliament, then, as it seems to us, that law is inconsistent with the requirements of the implied freedom of free communication" above, n 6, at 23.

[10] 376 US 254 (1964). In *Theophanous* the court rejected the *Sullivan* approach mainly on the ground that "... in our view, it gives inadequate protection to reputation" above, n 6, at 22.

[11] Above, n 6, at 23.

[12] Most notably by establishing that a defendant will no longer be required to prove the truth of the statements in question.

[13] "... we do not consider that the plaintiff should bear the onus of proving that the publication is not protected. In our view, it is for the defendant to establish that the publication falls within the constitutional protection" above, n 6, at 24.

"... nothing in the text, structure or history of the Constitution supports the proposition that the Constitution confers a general private right to defame public or political figures."[14]

As was suggested above, the impact of the decision on future cases which raise questions of constitutional rights will be determined by the outcome of the debate on method that split the Court in *Theophanous*. To appreciate what is at issue, we should look to the detail of the reasoning in the case from which, setting aside the particular approach taken by Deane J,[15] three incompatible styles can be identified. That these differences are significant is confirmed by following through the results of deciding to read the Constitution according to one or other of the views put forward.[16] Before proceeding to make comment on each approach, it will be useful to summarise the main points of distinction between the three views.

(i) The approach of the majority, which I chose to describe as 'unrestricted structuralism' for the reason that it is a method which effectively uncouples the interpretation of the Constitution from the actual text of the document. I argued this is achieved through the interposition of a *general conception of representative government* which serves as a standpoint for a reading of the Constitution.

(ii) The approach of Brennan J, which I chose to describe as 'qualified structuralism' for the reason that the notion of representative government used by Brennan J is qualified or particularised by reference to the text of the Constitution. Thus it is fair to say that His Honour structures interpretation of the Constitution through the lens

[14] Above, n 6, at 68. The tone and wording of Justice McHugh's dissent rings of dispute in another court in another place: "I dissent. I find nothing in the language or history of the Constitution to support the Court's judgement" *Roe v Wade* 410 US 113 (1973) at 122 per White J.

[15] Deane J framed his reasoning with a premise that the Commonwealth is a system of government that is founded on an "... underlying thesis of the sovereignty of the governed" above, n 6, at 51. In this respect Deane J departed from the institutionalist definition of government found in the joint majority judgement, preferring instead to use overtly sociological concepts as in his description of the "... fundamental principle of constitutional construction ... that the Constitution must be construed as 'a living force' representing the will and intentions of all contemporary Australians ..." above, n 6, at 51. On the merits and problems raised by this approach, which in other cases is shared by fellow members of the Court (by Mason CJ and Toohey J especially), see H P Lee, "The Australian High Court and Implied Fundamental Guarantees", (1993) Pub*lic Law* 606–629 and A Fraser, "False Hopes: Implied Rights and Popular Sovereignty", (1994) 16 *Sydney Law Review* 213–227. See also W Rich, "Approaches to Constitutional Interpretation in Australia: an American Perspective", (1993) 12,1 *University of Tasmania Law Review* 150–181, especially the discussion of 'Republican Theory' at 175–181.

[16] On the majority approach, implied rights operate as general negative rights and perhaps as free standing positive rights. On the approach of Brennan J implied rights are a limited form of negative rights. On the view of McHugh and Dawson JJ implied rights *per se* are not recognised.

of a *particular* conception of representative government which is assembled from specific provisions of the Constitution.

(iii) The approach of McHugh and Dawson JJ, which I have chosen to describe as 'textualism' for the reason that neither will be drawn to the proposition that the Constitution can be said to prescribe any general or particular-general notion of representative government. The proper recourse is therefore to the express provisions of the Constitution and what might be implied from those words and phrases.

(i) 'Unrestricted Structuralism'

(A) Functional rights: the method

In the joint majority judgment structuralism was presented as an entirely legitimate principle of construction,[17] the use of which was subject to no special qualifications. The circumstances in which this approach might properly be used can be summarised as:

(a) Where the issue before the Court raises a question as to rights recognised by the Constitution and;
(b) the right is neither directly mentioned nor able to be implied from the express provisions of the Constitution, then;
(c) reference may be had to "... the structure of the Constitution, particularly ... the concept of representative government which is enshrined in the constitution ...",[18] as a base from which rights might be implied such that;
(d) it is then open to ask what implications flow from the need to "... ensure the efficacious working of representative democracy and government."[19]

When rights are implied in this manner, ie, inferred from the *function* said to be served by the *structures* of government established by the constitution, we might refer to them as *functional rights.*

(B) The nature of functional rights

In addition to identifying freedom of communication as a functional right established by the Constitution, the majority discussed the nature of rights implied in this fashion. From what was said it is clear that functional

17 Mason CJ, Gaudron and Toohey JJ offered no direct justification of their approach to interpretation, other than that the Court should not feel bound by what the framers of the Constitution might have thought on a particular matter: above, n 6, at 16.

18 Above, n 6, at 11.

19 Above, n 6, at 14.

rights prevail over all other inconsistent legal rules,[20] be they found in the common law or legislation of the Commonwealth, State or Territory Parliaments. It was assumed that functional rights would give way only to express constitutional provisions with which they are contrary. It was also made clear that functional rights do not give rise to unlimited warrants of freedom; their effect extends only so far as is necessary to safeguard the effective working of the system of government established by the Constitution. It is for this reason that the liberalisation of defamation law established by the case is limited in scope, extending only to 'political' speech.[21] Put differently, rights so inferred are not of the nature of general human rights,[22] and so do not give rise to freedoms that are absolute in nature.

Less certain, and related to what is said of the substance of functional rights, is the question of the logic of their application. Much depends upon how this question is settled, for at issue here is whether these rights take the form of limited negative rights,[23] general negative rights,[24] or free standing positive rights.[25] The implications of how functional rights are thought to operate are obvious. Depending upon how this matter is resolved, the uses to which such rights can be put will be either confined or greatly expanded. To support the outcome in *Theophanous* functional rights need be read no higher than general negative rights. As employed in the case, freedom of expression was required to do no more than ground a defence against the common law and legislation.[26] Even so, the majority chose to expressly leave open the possibility that functional rights might also operate as positive rights:

> "The decisions in *Nationwide News* and *Australian Capital Television* establish that the implied freedom is a restriction on legislative and executive power. Whether the implied freedom could also conceivably constitute a source of positive rights was not a question which arose for decision in those cases and it is unnecessary to decide it in this case."[27]

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20 Above, n 6, at 25.

21 The majority recognised that the boundary between 'political' speech and other forms of discourse, loosely denoted as 'private' or 'commercial speech', is difficult to define. "Notwithstanding ... the difficulty of drawing a workable ... distinction between political discussion and other forms of expression, it should be possible to develop, by means of decisions in particular cases, an acceptable limit to the type of discussion which falls within the constitutional protection" above, n 6, at 13.

22 Above, n 6, at 14.

23 Operating as no more than a limitation on the legislative and executive powers of the Commonwealth.

24 Operating as a personal right of defence against the effect of all contrary legal rules other than expressed constitutional provisions.

25 A personal right including rights of enforcement.

26 "The law of defamation, whether common law or statute law, must conform to the implication of freedom ..." above, n 6, at 23.

27 Above, n 6, at 14–15.

(ii) 'Qualified Structuralism'

(A) Limiting functional rights: the reasoning

Of the three minority opinions, Brennan J had most sympathy for the method of interpretation adopted by the majority, but was nevertheless highly critical of the result arrived at by the majority. Brennan J based his dissent on several points, of which questions of interpretation were especially stressed. And in what must be taken as a direct comment on a perceived excess of juristic enthusiasm in the case, Brennan J opened with a lesson on judicial policy. While he acknowledged that personal convictions as to what the law should be are properly part of the curial role in determining the content of the common law and in the interpretation of legislation, in constitutional cases he insisted the rule must be that policy has "... no role to play."[28] It is clear from the detail of what he had to say on this matter that he believed the approach taken by the majority in *Theophanous* strayed beyond what was legitimate.

So where did the error of method lie? Most problematic was that the majority approach wholly uncoupled interpretation of the Constitution from the literal text of the document. Specifically, how was that achieved? In their application of a structural reading of the Constitution, the majority assumed the Constitution speaks for representative government as a *system of government in general*. Thus, apart from whatever the Constitution might say as to the detail of the *specific institutions of government* established by it, the document is read also as giving force to the general notion of "... representative government which is enshrined in [it] ..."[29]. It follows that an ideal notion of representative government may become available to the Court as a fundamental reference in construction of the Constitution. The methodological effect of all of that is to open wide a window of discretion through which the opportunity to improve or develop the Constitution might be driven.

That a method of reading the Constitution could produce so significant an opportunity for discretionary interpretation was unacceptable to Brennan J. This was the ultimate basis upon which he found fault with the view of the majority, for to interpret the Constitution on an assumption that it prescribes representative government as a general political form was necessarily to expand the constitutional law-making powers of the Court. However critical he was of the majority, Brennan J nevertheless accepted that the system of government established by the Constitution is relevant to the interpretation of it. But the relevance of structure is conceded in a qualified fashion. In his view, the correct structural method is one which first refers to the literal text of the Constitution and enquires after the *specific form* of representative government established by it:

[28] Above, n 6, at 28.
[29] Above, n 6, at 11.

> "... the Constitution prescribes a system of responsible as well as representative government, the Parliament being elected democratically ..."[30]

Once it is concluded that a system of responsible and representative government incorporating a democratically chosen parliament is the particular form of government prescribed by the Constitution, the ideal terrain across which constitutional implications may be reasoned for is greatly limited. In respect of what may be implied for a freedom of discussion of politics and government, Brennan J framed what is, certainly by contrast with the open formulae of the majority reasoning, a limited deductive premise:

> "The system implies that the 'people of the Commonwealth' ... should be able to form and to exercise the political judgments required for the performance of their constitutional functions."[31]

What is apparent from this is that on the use of structural method Brennan J disagreed with the majority in one key respect; any structural reading must be grounded in the *specific text* of the constitution. The implications of this difference in opinion are significant. To the extent that *general constitutional doctrines* such as representative government are available to inform the interpretation of the Constitution, Brennan J insisted that their content must be *assembled from the relevant specific text* of the Constitution. He was adamant that constitutional doctrine must not be introduced in the form of ideal-constructs. If it were otherwise, political philosophies would be permitted to enter the judicial calculus as ideal concepts to be laid over the text of the document.

Put differently, the approach preferred by Brennan J works in reverse order to that of the majority. Brennan J began with the text of the Constitution, from which particular forms of constitutional doctrine such as representative government may be assembled. So discovered, general doctrine may inform interpretation of the Constitution. The obvious effect of the method endorsed by Brennan J would be to tame judicial subjectivity through the discipline of close adherence to the objective constitutional text.

(B) Limited functional rights

Just as the interpretive method of the majority has implications for the nature of functional rights under the Constitution, so also does the approach of Justice Brennan. Put simply, the interpretive doctrine approved by Brennan J greatly restricts functional rights. For instance, functional rights would work as negative rights only, the most restricted of the three

[30] Above, n 6, at 31.
[31] Above, n 6, at 33.

possibilities raised by the majority. Limited in this way, functional rights operate solely as a limit on legislative and executive power and do not establish any form of true personal right. So it appears that a freedom created by such a right is no more than the corollary of what limitations are imposed on the powers of the Commonwealth by reference to the constitutional requirement that the people must be able to form and exercise political judgements. It is "... an immunity consequent on a limitation of legislative power."[32] As a practical matter, where the effect of a functional right is raised as an issue before a court, the question would not be as to the scope of the freedom created by the right, but whether nominated legislation or particular exercises of executive power can be invalidated on the basis that they go beyond power. Described in this way, functional rights are but a particular instance of the established doctrine of constitutional freedoms which Brennan J identified as the effective logic of *Nationwide News*, *ACTV* and as the core principle in section 92 cases.[33]

It follows also from what Brennan J said of the logic of functional rights that their scope is determined by default. So, to the extent that the Constitution implies a limitation on the curtailment of freedom of political speech, a law may nevertheless restrict that freedom and be valid so long as it satisfies two tests, firstly is it "... appropriate and adapted to achieving a purpose within legislative power ...", and, secondly, that the "... restriction ... (is) ... incident[al] to the achieving of that purpose."[34] The point at which the reach of valid laws is exhausted is, by reason of the absence of legal regulation, the point at which the freedom created by functional rights begins.

(iii) 'Textualism'

(A) There are no functional rights

Of the remaining members of the Court, neither McHugh nor Dawson JJ were prepared to imply functional rights under the Constitution. This conclusion was a direct result of the textual method applied by each. McHugh J put the argument thus:

> "The theory of constitutional interpretation that has prevailed since the Engineers' Case[35] is that one starts with the text and not with some theory of

[32] (1992) 177 CLR at 150 per Brennan J, cited in above, n 6, at 32.

[33] "The freedom which flows from the implied limitation on power considered in *Nationwide News* and *ACTV* is not a personal freedom. It is not a sanctuary with defined borders from which the operation of the general law is excluded. Like s 92, the implication limits legislative and executive power" above, n 6, at 33.

[34] As an assessment would be made in deciding the scope of freedoms established by s 92: above, n 6, at 34.

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

federalism, politics or political economy. 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 ... An examination of the Constitution shows that the terms `representative government' and `representative democracy' are not mentioned ... I can find no support in the Constitution for an implication that the institution of representative government or representative democracy is part of the Constitution independently of the terms of ss 1, 7, 24, 30 and 41 of the Constitution ..."[36]

Having determined that it is not proper to interpret the Constitution in light of any general notion of representative government, McHugh and Dawson JJ could find no basis for the claim of the defendant that the Ruxton letter was protected by an implied right of free expression.

(B) The Textual critique

What is most interesting about the judgements of McHugh and Dawson JJ is that they express their dissent in such strong tones and that most of their remarks are directed to the question of interpretive method. Dawson J expressed his general attitude to the claims and arguments of the defendant, and so also his attitude to the decision and reasoning of the majority of the Court, in the following terms:

> "The first defendant's submission is startling, not so much because of the change which it seeks to establish in the law of defamation, though the desirability of that is at the very least debatable, but because of the means by which it says that the change has been made."[37]

That there is a significant difference in the approach to construction of the constitution approved by McHugh and Dawson JJ as opposed to the views of either the majority of the Court or the views of Brennan J is clear from the further detail of their separate dissenting judgments. From the numerous issues canvassed by McHugh and Dawson JJ, three major points emerge:

(1) To the extent that the Constitution provides for a system of responsible government, it does so in a very minimal fashion. Only some of what may be suggested to be the complete array of institutions required by the full notion of representative government, most notably those which provide for the election of members to the Houses

[36] Above, n 6, at 71–72. See also Dawson J "... it has never been thought that the implications which might properly be drawn are other than those which are necessary or obvious having regard to the express provisions of the Constitution itself" above, n 6, at 67.
[37] Above, n 6, at 64.

of Parliament, are prescribed by the Constitution. That the Constitution does not prescribe representative government in its full sense does not licence the courts to paint in the "missing details."[38]

(2) Interpretation of the Constitution must be based on the text and should not seek to imply from the document structures not described in it. Given that the provisions of the Constitution cannot be assembled so as to describe the institution of representative government in any complete form, that form of government cannot be considered to be prescribed by the Constitution:

"It does not follow either logically or as a matter of necessary implication that, because some provisions of the Constitution give effect to an aspect of a particular institution, that institution itself is part of the Constitution."[39]

(3) The extent to which members of the Court understood they were in real dispute is made particularly clear in the latter part of the reasoning of Justice McHugh. After noting that the majority base their decision on the reasoning of the Court in *ACTV*[40] and *Nationwide*[41], and in so far as the reasoning in those cases might be seen to support the proposition that representative government can be implied in the Constitution, Justice McHugh asserted that "... the reasoning that has led to that holding should not be followed."[42]

Seeking the Outcome in *Theophanous*

That the attitude of the High Court to interpretation of the Constitution has undergone significant change over the last decade or so has been much commented upon. Explanations of why such change has occurred are doomed to be at best partial, but nevertheless should be attempted. On the question of implied constitutional rights, the outcome in *Theophanous* is consistent with the direction taken by the Court over the last decade. But the question remains: why that direction? While there may be many partial answers to a question of this type, I would point to three factors which coalesced and motivated the Court to seek the outcome in *Theophanous*.

[38] In particular, the Court should not take it upon itself to imply constitutional freedoms which have no basis in the express provisions of the Constitution.
[39] Above, n 6, at 75.
[40] (1992) 108 ALR 577.
[41] (1992) 108 ALR 681.
[42] Above, n 6, at 75.

(a) Loosening bonds of Precedent

In recent times there has occurred a further liberalisation in the attitude of the Court to the binding effect of precedent. Horrigan[43] is not alone in his assessment of the current period as "... an era when the Court is more inclined to reinterpret settled law ..." Thus although the Court has long asserted its power to overrule its own past decisions and to develop the techniques of reasoning applied by it,[44] the Mason Court leaves an impression of approaching precedent with a degree of liberalism not previously seen.[45] However, merely to adopt a more relaxed approach to precedent is to do no more than make way for the possibility that change might occur. That change should actually occur, ie, the opportunity be taken, and that it should track along a particular path is to be explained otherwise. What then of the factors which encouraged the Court to the outcome in *Theophanous*?

(b) Internationalisation

'Internationalisation' is a notion with which we have become increasingly familiar in discussions on the state of the economy. There are some obvious reasons for the recent elevation of internationalist economic debate in Australia. Integration of the national economy with global finance markets first occurred only in 1983 when the Commonwealth government moved to float the currency and to allow foreign banks access to domestic markets.[46] Government pursuit of `micro-economic' reform throughout the 1980s further emphasised internationalisation of the local economy[47]. Just as we can trace definite changes in the relationship between Australia and the world beyond through the run of economic history, so too is it clear that internationalisation has had a significant effect within the realms of local culture. To the extent that these changes are an

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[43] B Horrigan, "Towards a Jurisprudence of High Court Overruling", (1992) 66 *Australian Law Journal* 199. The decision in *Cole v Whitfield* (1988) 165 CLR 360 is an outstanding example.

[44] See D Solomon, *The Political Impact of the High Court*, Sydney: Allen and Unwin, 1992; M Byers, "The Lawmaking Role of The High Court", (1994) 11 *Australian Bar Review* 187–196.

[45] This is reflected in the frequency with which comment on the Court proclaims the decline of 'legalism' as the dominant mode of reasoning. See for example, D Smallbone, "Recent Suggestions of an Implied Bill of Rights in the Constitution", (1993) 21 *Federal Law Review* 254–270; W Rich, "Approaches to Constitutional Interpretation in Australia: An American Perspective", (1993) 12:1 *University of Tasmania Law Review* 150–181; T Jones, "Legal Protection For Fundamental Rights and Freedoms: European Lessons for Australia?", (1994) 22 *Federal Law Review* 57–91.

[46] E Carew, *Fast Money: The Money Market in Australia*, Sydney: Allen and Unwin, 1983.

[47] The dominant theme of economic policy through the 1980s was the notion of 'economic restructuring' with a view to creating an economy that could compete in free trade markets. See D McEachern *Business Mates: The Power and Politics of the Hawke Era*, Melbourne: Prentice Hall, 1991; F Stilwell, *The Accord and Beyond*, Sydney: Pluto Press, 1986.

artefact of particular technologies, the recent explosion in access to computer linked data is of especial importance.[48]

New information technologies are as likely to have an impact on the law as on any other institution for which information is vital. So it is no surprise that Australian legislatures and courts do increasingly exhibit symptoms of having begun to pay closer attention to international happenings as a source of ideas and examples. In particular, and although the laws of other countries are a source from which the Australian High Court has long drawn upon,[49] there has recently emerged a greater propensity for the Court to accept that the laws of Australia are apt to be developed by reference to the standards of other, comparable jurisdictions, and in light of international law. The reasoning of Justice Brennan in *Mabo*[50] is a prime example of openness to international standards.

Consistent with the apparent internationalism of the Court, are the many out-of-jurisdiction sources used by the majority in *Theophanous*. At various points in the discussion of how to formulate an appropriate balance between freedom of speech and the protection of reputation, reference was made to decisions of the House of Lords,[51] the European Court and the European Convention on Human Rights,[52] decisions of the Supreme Court of Canada and the Canadian Charter of Rights and Freedoms,[53] the US Constitution and decisions of the US Supreme Court.[54] The degree to which the Court was prepared to consider international data leaves no doubt that where a matter before the Court raises novel questions of social and political philosophy, comparative and international legal analysis will figure in the decision making of the Court.

(c) A 'rights' Constitution

In *Street v Queensland Bar Association*,[55] Deane J said:

> "It is often said that the Australian Constitution contains no bill of rights. Statements to that effect, while literally true, are superficial and potentially

[48] For example, a user of the Australian Academic Research Network (AARNET) and the Internet can obtain the full text of US Supreme Court decisions within hours of handing down. Services such as Lexis-Nexus access an astounding range of international data.

[49] On the use of United States precedents see P von Nessen, "The Use of American Precedents by the Australian High Court, 1901–1987", (1992) 14 *Adelaide Law Review* 181–218.

[50] When rejecting the notion of *terra nullius* Brennan J noted, inter alia, the degree to which that doctrine was inconsistent with the norms of current international law: *Mabo v The State of Queensland* (1991–1992) 175 CLR 1 at 42.

[51] For example, *Derbyshire CC v Times Newspapers* [1993] AC 534 referred to in *Theophanous*, above, n 6, at 17–19.

[52] Above, n 6, at 18.

[53] Above, n 6, at 14 and 18.

[54] In particular, *New York Times v Sullivan* 376 US 254 (1964) in *Theophanous*, above, n 6, at 18–24.

[55] (1989) 168 CLR 461 at 521.

misleading. The Constitution contains a significant number of express or implied guarantees of rights and immunities."

Within the context of what has been said above about loosening the bonds of precedent and the development of a heightened internationalist perspective, the Mason Court embraced a new style of constitutional interpretation. Australian constitutional theory as yet has not focussed on questions of individual rights. Typically, the Constitution has been approached on the (not unreasonable) assumption that its fundamental objective was to establish institutions of government. As it speaks little of the rights of the citizenry, constitutional questions have usually been resolved within a framework that scarcely admits of the role of the citizen. So, the established terrain of constitutional debate is populated by descriptions of the central institutions of government, enumerations of powers granted to those institutions, the text of a few guarantees directed to issues such as the federal balance and some assumptions of related general doctrine such as separation of powers and the rule of law. Individual rights have entered the Australian constitutional scheme only in so far as they have been protected by particular findings that limits are to be read into given powers,[56] or that there is described in the Constitution a number of limited rights and guarantees.[57]

If this is a fair summary of the approach which has dominated Australian constitutional law since federation, it is no longer adequate. In a series of decisions commencing in the late 1980s, the Mason Court steadily moved to a view of the Constitution from which a doctrine of general citizen rights might be assembled. The rights philosophy of the Mason Court emerged in two categories of case. In *Street*,[58] *Leeth*[59] and *Dietrich*[60] members of the Court argued for implied process rights. In *ACTV*,[61] *Nationwide*,[62] *Theophanous*,[63] *Stephens*,[64] and *Cunliffe*[65] the court developed the

56 For example, a case which carries such an apparent concern with civil liberties as does *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, actually turns on limitations to legislative and executive power. See L Zines, *The High Court and the Constitution*, 3rd ed, Sydney: Butterworths, 1992, Ch 11; B Galligan, *The Politics of the High Court*, Queensland University Press, 1987, 203.

57 For example, electoral procedures: ss 8, 24, 30, 41; legal process: ss 75, 80, 117; Commerce and Property; ss 92, 51(xxxi).

58 Above, n 55, at 461; examining s 117 and limits to interstate discrimination.

59 *Leeth v Commonwealth* (1991–1992) 174 CLR 455; minority support for a general constitutional guarantee of equality before the law, per Deane and Toohey JJ at 486 and on.

60 *Dietrich v R* (1992) 109 ALR 385; minority support for an implied right of representation for criminal accused, per Deane J at 408 and Gaudron J at 436.

61 Above, n 40.

62 Above, n 41.

63 Above, n 6, at 1.

64 *Stephens v West Australian Newspapers Ltd* (1994) 124 ALR 80.

65 *Cunliffe v The Commonwealth* (1994) 124 ALR 120.

implied freedom of communication. This shift in view I call the rights jurisprudence of the Court.[66]

Where to Now?

I have argued that the result in *Theophanous* was made possible by the adoption of a particular method of interpretation, which itself was informed by a shift in attitudes to precedent and an increased internationalist perspective. It is my further contention that *Theophanous* leaves constitutional doctrine in such a state of disarray that the current leading question in constitutional law is whether the spirit of the case will be followed. It is my view that it will not. I deliberately choose to base this opinion on what I see as the vulnerability of the underlying reasoning of the case. No matter what may be usefully said about currents of ideology within the Court, conjecture of that sort is invariably imprecise and is notoriously a poor predictor of behaviour. By comparison, the implications of modes of legal analysis are an overt part of the judicial method and, in the context of a fresh dispute in which opposing methodological positions are strongly held by members of so small a group, it is implausible to think that when the next chance to settle the matter arises the opportunity will not be taken.[67]

Why then do I say that the reasoning which carried the day in *Theophanous* is unlikely to survive? First of all I would point to that factor which has least significance for the long term, but which has nevertheless set terms that demand an early resolution of the issue. I refer to the controversy that greeted *ACTV* and *Nationwide*[68] and was advanced by the result in *Theophanous*. Of this debate, which covers a great range of issues, I wish to do no more than note its prominence. So, just as the issues discussed in this note have polarised opinion within the Court, they have given rise also to constituencies of divided opinion within academia,[69]

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66 See M O'Neill and R Handley, *Retreat from Injustice: Human Rights in Australian Law*, Sydney: Federation Press, 1994, Ch 4; T Jones, "Legal Protection for Fundamental Rights and Freedoms: European Lessons for Australia?", 22 *Federal Law Review* 57–91; L Zines, "A Judicially Created Bill of Rights?", (1994) 16 *Sydney Law Review* 166–184.

67 This is not to suggest that methodological dispute cannot be seen as a proxy battle behind which lies a fundamental ideological difference. In many cases it is precisely that.

68 The controversy sparked by Justice Toohey's, "Darwin Speech", is well recorded. See J Toohey, "A Government of Laws, and Not of Men?", (1993) 4 *Public Law Review* 158–174; B Virtue, "The End of Democracy? A Political Storm over the High Court", (1992) *Australian Law News* November 7–11, and 12–14 for an exchange of letters between Law Council of Australia President Rob Meadows and the then Minister for Justice Senator Michael Tate.

69 Strong criticism is levied by some, A Fraser, "False Hopes: Implied Rights and Popular Sovereignty", (1994) 16 *Sydney Law Review* 213–227; T Campbell, "Democracy, Human Rights, and Positive Law", 16 *Sydney Law Review* 186–212. Equally strong support is given by others, J Detmold, "The New Constitutional Law", (1994) 16 *Sydney Law Review* 228–249.

and within the community at large. It is inevitable, however indirectly, that the Court must be affected by the run of that wider controversy.[70]

The second and essential basis on which I suggest the bold spirit of the Mason Court will be seen to have reached its highest point in *Theophanous*, is the vulnerability of the interpretive style of the majority. In particular I suggest the obvious problem with the approach used by the majority in *Theophanous* is that it fails to disclose a legitimate method. While this is not the place for a full consideration of what the Court has said in the area of implied rights generally, there is one aspect of what has been done that I wish to pursue, for it illustrates the problem of method I have noted.

A great difficulty raised by the implied rights cases is the wide variety of bases from which implied constitutional rights are suggested to arise. From the point of view of a fellow judge or an outside observer of the Court, the multiplication of rationales for finding rights is baffling. A by no means exhaustive list of possibilities includes:

(a) *Street*, Toohey J: As an incident of citizenship,[71]
(b) *Leeth*, Toohey and Deane JJ: Based on a doctrine of legal equality,[72]
(c) *Dietrich*, Gaudron J: A constitutional requirement that a trial be fair,[73]
(d) *ACTV*, Mason CJ: From the concept of representative government,[74]
(e) *Cunliffe*, Mason CJ: In the interests of the maintenance of an ordered society under a system of representative government,[75]
(f) *Nationwide*, Deane and Toohey JJ: From fundamental rights and principles recognised by the common law at the time the constitution was adopted.[76]

What is to be made of this? If it is accepted that the reasoning of the majority in *Theophanous* is properly seen in the context of the style adopted in other cases dealing with implied rights, the conclusion is this: the outcome in *Theophanous* is reached either via a method which allocates even greater constitutional discretions than Brennan J finds acceptable, or it is a result which is not driven by a particular method of interpretation but is in fact driven by a more general project. And if any one project is capable of underpinning the sweep of premises that I have noted immediately above, it must be assumed that the Mason Court was genuinely

[70] The appointment of Justice Gummow to the Court could be seen as an affect of government disapproval. See C Merritt, "The Jury's out on Gummow" *Australian Financial Review* 30 March 1995; M Kingston and A Davies, "Crucial Role for Conservative Choice for the High Court (Gummow's Appointment may Tip Bench to the Right", *Sydney Morning Herald* 30 March, 1995.
[71] Above, n 55, at 553.
[72] Above, n 59, at 484–485.
[73] Above, n 60, at 436.
[74] Above, n 40, at 594–595.
[75] Above, n 65, at 133.
[76] Above, n 41, at 721.

guided in many instances by an intention to create something akin to a Bill of Rights in the fabric of the common law of the Constitution.

Conclusion

Theophanous in many ways, is an unlikely case. In his 1980 publication *Australian Democracy in Crisis*, Dr Andrew Theophanous made a number of impassioned defences of the virtues of free speech[77]. It is not easy to reconcile the strands of libertarian philosophy expressed in that publication with the plaintiff in the case who, going on the text of the Ruxton letter alone, appears to have been over sensitive. Looked at in terms of the apparent merits of the claim, it is possible to sympathise with a view which says that a letter of the type complained of in *Theophanous* should never become the subject of a claim of any type, be it in the context of an election or not.

Just as we might see overreaction by the Plaintiff in the case, it can also be said that the case tempted the Court into overplaying its hand. While there is a substantial, on-going debate as to the merits of the High Court's taking a long handle to what are thought overdue improvements to the 'rights' content of the Constitution, I am unable to see that this can be a legitimate part of the role of the Court. I do not suggest that there was anything improper in what the Mason Court set out to achieve; as that Court was constituted, there was from time to time sufficient voice for the extensions to principle that have been noted. However, in the long run it is difficult to say other than that the High Court of Australia is established within bounds that offer limited scope for the recognition and development of true Constitutional rights.

The extent to which *Theophanous* tempted members of the Court to operate beyond the range of what can fairly be described as articulated doctrine — perhaps allowing themselves to be motivated by a project rather than operating from a frame of reasoning — is a pointer to the barren substance of the Constitution as a rights document. It would not be surprising to find that the coming period is one in which the Court turns back to the security of doctrine. As far as implied rights are concerned, it is to the principles articulated by Brennan CJ that one should look for the outside limit of what will emerge over the medium term.[78]

[77] "Full democratic participation of the people, involving discourse on values and purposes, is a necessary condition legitimation of society" at 230, and "Every invasion of the right to assemble, strike, demonstrate, express one's views, etc., must be strongly defended" at 379, *Australian Democracy in Crisis*, Melbourne: Oxford University Press, 1980.

[78] While this is not the place for a discussion of what may follow from the retirement of Mason CJ and Deane J, it can be said that the elevation of Brennan J to Chief Justice and the appointments of Gummow and Kirby JJ confirm rather than conflict with a prediction that the Court will turn back from the radical spirit of *Theophanous*.