Constitutional implications—a misty and uncertain light

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1. Introduction

> [I]t is not permissible to wander at large upon a sea of speculation searching for a suitable intent by the misty and uncertain light of what is sometimes called the spirit of the document, for that is largely fashioned subjectively by the preconceptions of the individual observer.[1]

Herbert Vere Evatt, in his biography of Holman, refers to the 'exceedingly fierce brushes' between Griffith CJ and Isaacs J, which he says 'delighted the law students, if they scandalised the public.'[2] The principal issue which precipitated these public displays of animosity was the question of whether implications should be drawn from the *Constitution*[3]—specifically the implied immunity and reserved states' powers doctrines. The variations in viewpoint and the state of confusion on those topics by the end of the second decade of federation were such that the High Court was forced to clean the slate and start afresh.[4]

The more recent resort to implications has provoked a similar diversity of opinion. Fortunately, the current members of the High Court are more civilised in their public relationships, but some have warned of the need to anchor this approach in plain textual or structural foundations if confusion is to be avoided. Justice McHugh has protested about the recent trend:

> Interpreting the Constitution is a difficult task at any time. It is not made easier by asking the Justices of this

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1 *Huddart Parker & Co. Pty Ltd v. Moorehead* (1909) 8 CLR 330 at 388, per Isaacs J.

2 Evatt, H.V. 1979, *William Holman*, Angus and Robertson, Sydney, 116.

3 *Commonwealth of Australia Constitution Act 1900* (UK).

4 *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920) 28 CLR 129 ('*Engineers* case'). A similar sequence of events took place in relation to the specific, but vague, prohibition contained in s. 92: see *Cole v. Whitfield* (1988) 165 CLR 360.

> Court to determine what representative democracy requires.[5]

Individual views about the nature of representative democracy can exhibit the same degree of divergence as the proverbial length of the Chancellor's foot.

2. Structural implications

For some years following the *Engineers* case, the judicial fashion was to abhor implications. But two or three decades later, justices, led by Sir Owen Dixon, were driven to point out that that decision did not mean that no implications could be drawn. They adopted a modified implied immunity doctrine based on the federal structure revealed in the *Constitution*.[6] Implications concerning the need to confine the exercise of judicial powers to Chapter III courts were also drawn from structural considerations.[7]

3. The Murphy views

Like Evatt J, Murphy J has had to depend on posterity to vindicate his views. But although some of his broad conclusions about freedom of communication and a right to counsel have been upheld, the underlying reasoning processes have often differed.

Dawson J in particular has criticised the Murphy J approach of basing such implications on vague notions of society and considerations extraneous to the *Constitution*.[8] McHugh J has expressed similar cautionary views.

4. Political discourse

In *Theophanous v. Herald & Weekly Times*,[9] Dawson J ridiculed the notion that the *Constitution* radically altered the law of defamation without its impact being appreciated for 93 years. A similar

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5 *McGinty v. Western Australia* (1996) 134 ALR 289 at 348.

6 *West v. Commissioner of Taxation* (1937) 56 CLR 657 at 681; *Melbourne Corporation v. Commonwealth* (1947) 74 CLR 31; cf *Queensland Electricity Commission v. Commonwealth* (1985) 159 CLR 192.

7 *R. v. Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ("*Boilermakers* case").

8 *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 CLR 106 at 186 ("*Australian Capital Television* case"); cf *Queensland Electricity* case, fn. 6 at 231, per Brennan J.

9 (1994) 182 CLR 104 at 188 ("*Theophanous*").

observation can be made about the basic implication (of freedom of political discourse) itself, as a limitation on legislative power.

The point may be illustrated by the *Communist Party* case.[10] In that case Evatt, who was a pertinacious and knowledgable lawyer, particularly in the field of public law, argued against the constitutionality of the *Communist Party Dissolution Act 1950* (Cwlth) for many days. His was the principal argument for the plaintiffs in a debate which occupied 24 days. The condensed version of his argument takes up 40 pages of the authorised reports. Yet, if those reports are accurate, it does not seem to have occurred to the learned jurist to advance any contention based on an implied freedom of political discourse. The legislation, which proscribed membership of a political party, presented a perfect vehicle for the advancement of such a contention.

The only counsel who got even close to advancing such an argument was Paterson, who contended that provisions of the *Constitution*, including ss. 7 and 24, showed that the parliamentary system established under the *Constitution* was a system of representative government, and that the legislation substantially interfered with the working of that system.[11] In holding the legislation unconstitutional, the majority undertook a convoluted process of reasoning that boils down to one of characterisation—the legislation was simply not supported by any relevant head of power. The simpler and more obvious answer would have been that it offended the implied freedom, if that were thought to exist.

From a logical point of view, the majority did not need to deal with the latter question, having held for the plaintiffs on the basis of an absence of legislative power. But they did not even condescend to deal with Mr Paterson's argument. Not even the conventional sentence or two to the effect that the question would be dealt with when it became of critical importance.

Latham CJ, who dissented, considered that the legislation was within power. Accordingly, logic required that he should grapple with the argument based on ss. 7 and 24. He said that it had been argued that the *Constitution*, in providing for voting for electors, impliedly provided that the electors should have the constitutional right to vote for any body of persons which was a political party. He dismissed the argument in one brief paragraph:

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10 *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1 ("*Communist Party* case"); cf Williams, G., 'Engineers is Dead, Long Live the Engineers' (1995) 17 *Syd LR* 62 at 85-6.

11 Id at 37-8.

> It is difficult to deal with an argument so insubstantial. The Commonwealth Parliament has full power to make laws with respect to traitorous and subversive activities of persons whether they act individually or in association. If that be so, the fact that the bodies have other characteristics—political, athletic, artistic, literary etc.—cannot possibly exclude the application of such laws.[12]

5. Separation of powers

Although the High Court has made a number of inroads into the separation of powers doctrine since the *Boilermakers* case, it continues to insist that judicial powers should not be exercised by non-judicial bodies.[13] But those who seek the protection of judicial independence should recognise that the doctrine involves reciprocal obligations of restraint on the part of each organ of government. There are, as Kirby J has observed, dangers attending 'the development by judges (as distinct from the development by the people's representatives) of a doctrine of fundamental rights more potent than Parliamentary legislation."[14] In developing what McHugh J has described as a 'free-standing principle' of representative democracy,[15] the High Court exposes itself to the reproach that it is engaging in counter-majoritarian revisionism and the undemocratic arrogation of legislative power.[16]

To forestall criticism of that kind, some of the proponents of the free-standing principle have relied on notions of popular sovereignty.[17] It is, however, difficult to see how the fact that governmental powers derive from the people supports the development of implied rights by a judicial oligarchy. The fact that the people have not countermanded the free-standing principle means

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12 Id at 169.

13 See, for example, *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1.

14 *Building Construction Employees & Builders' Labourers Federation of NSW v. Minister for Industrial Relations* (1986) 7 NSWLR 372 at 405. Cf *Ballina Shire Council v. Ringland* (1994) 33 NSWLR 680 at 704.

15 Fn. 5. See text below, at fns 29-32.

16 See, for example, Callinan, I., QC, 'An Over-Mighty Court?', in 1994, *Upholding the Australian Constitution*, Samuel Griffith Society, East Melbourne, at 101-2.

17 *Australian Capital Television*, fn. 8 at 137-8, per Mason CJ; *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1 at 71, per Deane and Toohey JJ.

little, having regard to the notorious difficulty of amending the *Constitution* by using s. 128. In any event, the people have not shown any enthusiasm for entrenching basic freedoms in the *Constitution* on those occasions in recent years when they have been afforded the opportunity to support them in referenda.[18]

If tensions with the legislature and doctrinal confusion[19] are to be avoided, the principle must be restricted to consequences which flow as a matter of necessity from the text of the *Constitution*. Recent cases suggest that the principle is being curtailed in this manner, at least insofar as the principle operates as a restraint on legislative power.

6. Textual foundations

Cunliffe v. Commonwealth[20] concerned the constitutionality of Part 2A of the *Migration Act 1958* (Cwlth), which established a scheme for the registration of migration agents. The plaintiffs, who were solicitors, would, unless they became registered, have been forbidden to provide advice for reward to non-citizens. They contended that the legislation infringed the implied freedom of communication.

The High Court rejected this argument by a four to three majority. Dawson J emphasised that the *Constitution* guaranteed 'not freedom of communication but representative government.'[21] The limits of legislative power were to be defined 'by reference to the irreducible requirements of representative government imposed by the Constitution.'[22]

> The short answer to the suggestion made by the plaintiff is that, although the administrative procedures for dealing with entrance applications are laid down directly or indirectly by Parliament in an exercise of the democratic process, those procedures, including the system of

18 For example, the 1988 proposal to clarify guarantees of trial by jury, religious freedom and just terms for acquisition of property, and to extend them to the States, was supported by only 30.33% of the people. It received its greatest support in Victoria, where 32.76% voted in favour of the proposal.

19 One of the difficulties about the principle is that it is amorphous: Callinan, fn. 16 at 102; cf Kirby P, fn. 14 ('once allowed, there is no logical limit to their ambit'); and cf fn. 32, below.

20 (1994) 182 CLR 272 ("*Cunliffe* case").

21 Id at 363.

22 Ibid.

> registration of agents, are not themselves part of the democratic process.[23]

Even Toohey J, who has generally been in the vanguard of the implied rights development, upheld the legislation. Mason CJ, Deane and Gaudron JJ dissented.

With the departure from the bench of Mason CJ and Deane J, the trend away from any free-standing principle of representative democracy has continued.

Langer v. Commonwealth[24] was, unlike the *Cunliffe* case, very much concerned with the electoral process. It concerned the validity of s. 329A of the *Commonwealth Electoral Act 1918* (Cwlth), which proscribed the publication during elections of material with the intention of encouraging electors to vote otherwise than in accordance with s. 240. Section 240 in turn prescribed what Brennan J described as 'full preferential voting'. There were other provisions in ss. 268 and 270 which operated as a proviso to s. 240, so as to save some votes that departed from the prescription contained in s. 240, but they did not affect the prohibition contained in s. 329A.

Langer belonged to the 'neither' party, which did not favour either of the major political parties. He advocated a selective preferential vote, such as '1, 2, 3, 3', which would result in the ballot paper being exhausted after the second preference vote was counted.

Langer sought to justify his promotion of the selective preferential vote in an argument in person. Although his principal argument was directed at the validity of s. 240, rather than s. 329A, the court dealt with the question of whether s. 329A was consistent with the implied freedom of political discourse. By a majority of five to one, the court upheld the validity of s. 329A.

Brennan CJ considered that the prohibition contained in s. 329A was a means of protecting the method of voting selected and prescribed by Parliament. Toohey and Gaudron JJ, after analysing whether ss. 240 and 329A were consistent with the requirements of ss. 7 and 24 of the *Constitution*, concluded that they were. The provisions enhanced the democratic process. McHugh J concluded that it was no breach of the implied freedom to punish those who sought to undermine the system of compulsory voting laid down by the Act.

Of particular interest is the judgment of Gummow J, for the future development of the implied freedom will depend to a large

23 Id at 365.

24 (1996) 134 ALR 400 ("*Langer* case").

degree on the views of Gummow and Kirby JJ.[25] Gummow J stressed that s. 329A was directed at the particular processes by which the franchise was exercised:

> It is one thing to advocate the abrogation or modification of the particular system by which the legislature provides for the exercise of the franchise. It is another intentionally to seek to undermine the effective franchise by encouraging a course of action which may lead to the casting by electors of informal votes in an election for the House of Representatives, thereby denying the effective exercise by those electors of their right to participate in the activity whereby representative government is constituted and renewed.
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> The constitutional implication of freedom of political communication has been formulated in the authorities as operating in aid of representative government. It does not facilitate or protect that which is intended to weaken or deplete an essential component of the system of representative government. It cannot be inimical to representative government to forbid intentional conduct comprising advocacy of the casting of a vote in such a way as may be an ineffective exercise of the franchise.[26]

The one dissentient, astonishingly, was Dawson J, who had earlier excoriated his colleagues for drawing the implication. He considered that s. 329A was not reasonably and appropriately adapted to the achievement of an end which lay within power. Rather, it was a law which was designed to keep from voters information which was required to enable them to exercise an informed choice. It thus offended s. 24 of the *Constitution*.

Although Dawson J reached his conclusion without reliance on the reasoning of the majority in the earlier cases, he confessed to being unable to see how his colleagues could find s. 329A valid consistently with their earlier reasoning.

On the same day as reasons were delivered in the *Langer* case, judgment was handed down in *McGinty v. Western Australia*.[27] That case concerned an attempt, in the context of a State election, to reopen the issues raised in *A.G.(Cth); Ex rel McKinlay v. Commonwealth*,[28] based on the intervening discovery of the implied freedom of political discourse. The plaintiffs contended that the disparities in voters enrolled in various electoral districts in Western

25 Kirby J did not sit in the *Langer* case.
26 Fn. 24 at 431-2.
27 Fn. 5.
28 (1975) 135 CLR 1.

Australia were inconsistent with the principle of representative democracy.

The challenge failed, and again the court stressed that it was essential to found any implication on 'the actual terms of the Constitution, or on its structure.'[29] McHugh J emphasised, as he had in *Theophanous*,[30] that it was not legitimate to construe the *Constitution* by reference to political principles 'that are not anchored in the text of the Constitution or are not necessary implications from its structure.'[31] He characterised the reasoning of Deane and Toohey JJ in *Nationwide News Pty Ltd v. Wills*[32] as 'top-down reasoning', and suggested that their conclusion that there was a 'free-standing' principle of representative democracy in the *Constitution* involved a rejection of the principles laid down in the *Engineers'* case.

McHugh J also pointed out that there was a 'great difficulty' in determining the nature of the implication.[33] He likened the position to one in which a s. 129 had been inserted into the *Constitution* guaranteeing representative democracy. In a trenchant passage, he described the reasoning in the earlier cases as fundamentally wrong, and said that he felt compelled to reject it. He added:

> It may be that ultimately the representative democracy line of reasoning in *Nationwide News* and subsequent cases will be so widely followed and applied that, however erroneous one may think that reasoning is, it must be taken to reflect the meaning of the Constitution. But until that time arrives, I conceive that I have no option but to reject the authority of that reasoning.
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> To decide cases by reference to what the principles of representative democracy currently require is to give this Court a jurisdiction which the Constitution does not contemplate and which the Australian people have never authorised ... [What representative democracy requires] is a political question and, unless the Constitution turns it into a constitutional question for the judiciary, it should be left to be answered by the people and their elected representatives acting within the limits of their powers as prescribed by the Constitution.[34]

Gummow J expressed some more cautious reservations about the implication, which he said embodied 'a category of indeterminate

29 Fn. 5.
30 Fn. 9 at 198.
31 Fn. 5 at 345.
32 Fn. 17.
33 Fn. 5 at 345.
34 Id at 348.

reference'.[35] He later adverted to the *Australian Capital Television* case in terms that suggest a narrow view of its impact.[36] In a subsequent passage, he referred to McHugh J's observations about the departure from previously accepted methods of constitutional interpretation in the drawing of the implication. He added that, if it now were sought to apply the principle, 'then the need for further examination of it would arise.'[37]

7. Conclusion

In the field of defamation, obviously the last word has not been spoken. Although the plaintiffs in *Theophanous* and *Stephens v. W.A. Newspapers Ltd*[38] were both politicians, the principles enunciated in those cases do not appear to contain any 'public figure' limitation.[39] In this respect the constitutional defence may have a wider ambit than that developed in the United States, based on the provisions of the first amendment.

So far as the implication's operation in limiting legislative power is concerned, it would appear that the trend is to narrow its ambit, by emphasising the need for a textual basis. If that trend is not pursued, there is a risk in the long term that the implication will suffer the same fate as that experienced by the reserved states powers principle and the pre-*Cole v. Whitfield*[40] body of doctrine.

35 Id at 374, citing Stone, J. 1964, *Legal System and Lawyers' Reasonings*, Maitland Publications, Sydney, 263-7.

36 Fn. 5 at 387.

37 Id at 391.

38 (1994) 182 CLR 211.

39 Cf *New York Times v. Sullivan* (1964) 376 US 254. As a trial judge presiding in a jury defamation action in 1995, I had to consider the applicability of the principles in *Theophanous* to a situation where the plaintiff was not a public figure. The imputation was that he had engaged in a workers' compensation rort—an issue that had attracted a good deal of publicity. I concluded that those principles did apply, since the discussion of a political issue was involved.

40 Fn. 4.