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**CONSTITUTIONAL INTERPRETATION AND ORIGINAL INTENT -
A FORM OF ANCESTOR WORSHIP?**

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NORTH AMERICAN INTERLUDE DOWN UNDER

Constitutional interpretation is a fascinating subject. At least it is for judges and constitutional lawyers. I hope that it holds some fascination for law students as well.

I want to pose some questions to open this remarkable lecture with a little provocation: do United States judges, unlike their Australian counterparts, when ascertaining the meaning of the Constitution, engage in a ritual of ancestor worship? Are our American colleagues so mesmerised by the awe in which they hold

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the revolutionary founders of their republic who wrote their Constitution (Jefferson, Madison, Hamilton etc) that they feel obliged to construe the text, 220 years on, by ascertaining the intention of those great men at the time they wrote it, however inapt those intentions might be to contemporary circumstances? When a problem arises under their Constitution, is the investing its interpretation judicial duty to consult the historical records to find the original intentions of the founders? Is the task "rather like having a remote ancestor who came over on the *Mayflower*"¹ or in our case, perhaps the *Sirius*, and asking him or her the meaning of a political document that govern the affairs of the nation in the space age? Are there any risks that this quaint American ritual will travel to the Antipodes and capture the imagination of Australia's judges in the task of interpreting the Australian Constitution?

These were some of the controversies about constitutional interpretation which were debated recently in Auckland, New Zealand at a conference on constitutionalism, Justice Scalia of the Supreme Court of the United States and Justice Binney of the Supreme Court of Canada gave different answers. The former is probably the "most eloquent expositor"² of the modern theory of

¹ P Brest, "The Misconceived Quest for the Original Understanding" 60 *Boston Uni L Rev* 204 at 234 (1980).

² A F Mason, "The Interpretation of a Constitution in a Modern Liberal Democracy" in C Sampford and K Preston (eds)

Footnote continues

originalism. He believes that of its nature a written Constitution has a fixed meaning which does not change with time and that such meaning is the same as the words held when the Constitution was first adopted. Justice Binney, recently appointed to the Supreme Court of Canada, was called upon to answer the criticisms implicitly directed by his United States colleague to the process of elaboration of the Canadian Constitution and its Charter of Fundamental Rights and Freedoms. It was in the context of defending the approach to that task, as adopted in Canada, that Justice Binney let slip the opinion which he suggested was held by Canadian judges, that the approach of their counterparts in the United States could only be explained by a realisation that they were engaged in a form of ancestor worship.

The Constitutions of the United States of America and (1776-1790); Canada (1867); and Australia (1901) are amongst the three most enduring of such documents in the world today. But what do they mean? The question of constitutional interpretation arises at the very threshold of every case in which the constitutional text must be elucidated. The text of the Australian Constitution – like that of the United States and Canada – is written in language which is brief, sometimes obscure and often ambiguous. As recent shifts in the

Interpreting Constitutions: Theories, Principles and Institutions (1996) 13 at 14 (hereafter Mason).

Court's elaboration of the meaning of the Constitution demonstrate³, even the assertion that a particular construction is "settled" by many past decisions does not necessarily bolt the door against re-examination of the Constitution if that is considered necessary by the majority of the Justices of the High Court. This is why the approach to construction of the Constitution arises at the outset of all the great constitutional disputes. It is one which has fascinated the Justices themselves⁴. It has attracted a great deal of writing by scholars, both in Australia⁵ and overseas⁶. It ought to concern all practitioners and students of the law in a federation, like Australia, with a written constitution adopted long ago.

³ See eg *Cole v Whitfield* (1988) 165 CLR 360 referred to by Mason at 15.

⁴ See eg Windeyer J in *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Association of Professional Engineers* (1959) 107 CLR 208 at 267. See also *Bonser v La Macchia* (1969) 122 CLR 177 at 230. cf Brennan J in *Theophanous v Herald and Weekly Times Pty Limited* (1995) 182 CLR 104 at 143.

⁵ See; G Craven "Original Intent and the Australian Constitution – Coming Soon to a Court Near You?" (1990) 1 *Public Law Review* 166; J Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 *Fed L Rev* 1; H Patapan "The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia" (1997) 25 *Fed L Rev* 211.

⁶ See eg Brest, above n 1 at 234.

SOME RECENT CASES AND THEIR SIGNIFICANCE

As illustrations of the importance of this subject, it is useful to take three recent decisions of the High Court:

- *Re Wakim*⁷: where the Court upheld a challenge to the cross-vesting legislation of the Commonwealth, States and Territories⁸. I, alone, dissented and the foundation for my dissent was a different view about the approach proper to the interpretation of the constitutional provisions establishing the Judicature of Australia and permitting it to adapt what I saw as new realities⁹.
- *Sue v Hill*¹⁰: where the issue was whether the United Kingdom was, for the purposes of s 44 of the Constitution, a "foreign power" so that a subject or citizen of the United Kingdom was incapable of being chosen or of sitting as a senator in the Parliament of Australia. Plainly, having regard

⁷ *Re Wakim; ex parte McNally* (1999) 73 ALJR 839.

⁸ *Cross-Vesting (Jurisdiction of Courts) Act 19 ...* (Cth); *Cross-Vesting (Jurisdiction of Courts) Act 19 ...* (NSW).

⁹ See *Wakim* (1999) 73 ALJR 839 at 877, my own reasons par [186] see *infra*.

¹⁰ (1999) 73 ALJR 1016.

to the political realities, the Convention debates in the 1890's and textual provisions in the Constitution itself, such a classification of the United Kingdom as a foreign power would have been inconceivable in 1901. But the majority of the High Court¹¹ expressed the conclusion that the Constitution, read today, had that consequence. I did not dissent from that opinion. However, I found it unnecessary to reach a conclusion upon the question because of the view which I¹² took of the entitlement of the High Court as a Court of Disputed Returns, to decide the matter of qualifications before that question had been ruled upon by the Chamber of Parliament affected (the Senate). One Justice¹³ expressed strong reservations about the "evolutionary theory" of constitutional construction advanced by the majority in that case.

- *Ex parte Eastman*¹⁴: where the Court, over my dissent, adhered to longstanding authority¹⁵ holding that the Australian

¹¹ Gleeson CJ, Gaudron, Gummow and Hayne JJ.

¹² Together with McHugh and Callinan JJ.

¹³ *Sue v Hill* (1999) 73 ALJR 1016 at 1077 par [297].

¹⁴ *Re the Governor, Goulbourn Corrections Centre; ex parte Eastman* [1997] HCA 44

Territories are, for the purpose of the judiciary "disjoined" from the Federation and not "federal courts" under the Constitution, even where they were created by the Parliament of the Commonwealth itself. This was a view which I could not hold because of the approach which I took to the task of construing the Constitution. Whatever may have been the position in 1901, to regard the Australian Capital Territory and the Northern Territory today as "non-federal" and to view their court systems as outside the constitutionally protected right of appeal to the High Court, did not seem to me an acceptable construction of the Australian Constitution read with the eyes of 1999.

My purpose in mentioning these three recent and dissenting opinions is not to reargue the debates settled in those cases. That would be tedious and inappropriate. But these three cases show how vitally important is the way the Justices of the High Court approach their task of interpreting the sparse text of the Constitution. The cases raise the questions:

- Should the Justices confine themselves to ascertaining what the words meant according to the original intentions of the

¹⁵ *Bernasconi v The King* (1915) 19 CLR 629; *Spratt v Hermes* (1965) 114 CLR 226; *Central TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591.

Founders, as expressed in the 1890s at the Conventions and elsewhere?

- Should they accept those intentions as relevant to their task but decline to view them as determinative of the meaning of the Constitution as it operates in Australia today?
- Or should they regard the constitutional document as having been set completely free in 1901 from the subjective beliefs and wishes of those who drafted it so that it is to be viewed by each succeeding generation of Australians with the eyes of their times, to be interpreted by the succeeding Justices of the High Court in a search for meaning in which "the subjective intentions of the framers may not fetter the present and the future to the distant past"¹⁶?

OPPOSING OPINIONS ON ORIGINAL INTENT

In the New Zealand conference, at which Justice Scalia was presented in combat over this issue with Justice Binney, each expressed in eloquent advocacy the viewpoint he espoused. It was not difficult for Justice Scalia. He has been writing on this topic for

¹⁶ *Eastman v R* [1999] HCA 44 at [87].

many years, both as a member of the Supreme Court of the United States and extracurricularly. In 1997, in a book *A Matter of Interpretation*¹⁷, he explained his viewpoint:

"The American people have been conditioned to belief in the Living Constitution, a 'morphing' document that means from age to age what it ought to mean. And with the conversion has inevitably come the new phenomenon of selecting and confirming federal judges, at all levels, on the basis of their views regarding a whole series of proposals for constitutional evolution. If the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that. This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority. By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all".

And elsewhere, Justice Scalia continued¹⁸:

"It certainly cannot be said that a constitution normally suggests changeability; to the contrary. Its whole purpose is to prevent change - to embed certain rights in such a matter that future generations cannot readily take them away ... [This is] the whole anti-evolutionary purpose of a Constitution. A Living Constitution 'means ... what it ought to mean ... If it is good, it is so ... till we have arrived at the stage when it is publicly proclaimed, and taught at Law Schools, that judges *ought* to make the statues and the Constitution say what they think best".

¹⁷ *Ibid*, at p 47.

¹⁸ *Ibid*, at pp 40, 43, 44, 132.

Justice Binney, for his part, appealed to developing notions about construing statutes generally; to the need for the courts to respond to cases before them which raise novel problems; to the frequent failures of the other branches of government to do so; and to the strongly supportive opinion of the Canadian people, as disclosed in successive opinion polls, concerning the work of the Supreme Court in the elaboration of the Canadian Constitution and Charter. In his paper, Justice Binney called in aid the views expressed by another distinguished North American jurist, Chief Judge Richard Posner of the United States Court of Appeals in Chicago¹⁹:

"Some constitutional and other legal issues cannot be resolved [on the facts or in terms of institutional competence] and then the judge has two choices. One is to say that if public opinion is divided on a moral issue, judges should refuse to intervene, should leave resolution to the political process. The other is to say, with Holmes, that while this is ordinarily the right way to go, every once in a while, an issue on which public opinion is divided will so excite the judge's moral emotions that he simply will not be able to stomach the political resolution that has been challenged on constitutional grounds ... I prefer the second route".

So there one has the competing views. The one that a Constitution is anti-evolutionary. The other that it must be evolutionary. The one that it is necessary to anchor the text and its

¹⁹ R Posner, "The Problematics of Moral and Legal Theory" 111 *Harvard L Rev* 1637 at 1708 (1997).

meaning in the ascertainable fact of the intentions of the drafters in an earlier century. The other, that this is a primitive form of ancestor worship inappropriate to constitutional interpretation in a modern state today. The one believing that legitimacy can be found, and found only, in legal history. The other believing that the Constitution is a living tree which continues to grow and to provide shelter in new circumstances to the people living under its protection. We have had similar debates in Australia.

It is an honour for me to be invited to deliver a second lecture which celebrates the work of Sir Anthony Mason, past Justice and Chief Justice of the High Court of Australia. My earlier lecture has been published²⁰. It was delivered soon after my appointment to the High Court. Now, nearly three years on, to the same rostrum I return. The interval has made me even more respectful of, and grateful to, Sir Anthony Mason for his work in and out of the High Court as a modern Chief Justice, in a changing country, in a dynamic world.

MASON AND THE THEORIES OF CONSTITUTIONAL INTERPRETATION

²⁰ M D Kirby, "Mason - From *Trigwell* to *Teoh*" (1996) 20 MULR 1087.

As might be expected, both in his judicial decisions and in his extra-curial writing, Sir Anthony Mason has addressed many times the issue of interpretation of the Constitution. Most recently he did so in an essay on "The Interpretation of the Constitution in a Modern Liberal Democracy"²¹. In that essay Sir Anthony classified various approaches to the interpretation of the Constitution: originalism²²; intentionalism²³ (a variant of originalism); literalism²⁴; "progressivism" or "flexible interpretation", the last as favoured by Chief Judge Posner²⁵; and a mixture of various combinations of the above. Sir Anthony Mason does not expressly align himself with any of the doctrines. Perhaps at different times of his long judicial career, he has invoked different theories and applied different principles. But after recounting the opinions of leading United States and Australian scholars, he makes it fairly clear that the Australian High Court has, for a long time, turned its back upon originalism and intentionalism.

²¹ See Mason, above n 2.

²² Mason, 14.

²³ Mason, 15.

²⁴ Mason 16. The literalist approach was favoured in *Australian Society of Engineers v Adelaide Steamship Co Ltd* (the *Engineers' case*) (1920) 28 CLR 129.

²⁵ Mason, 16.

Indeed, no clearer illustration of this fact could be found than in the 1935 decision that the federal Parliament's legislative power with respect to "postal, telegraphic, telephonic and other like services" extended to radio and television broadcasting - services which did not exist (and were not even known to) the framers of the Constitution in the 1890s²⁶. Yet, Sir Anthony Mason points to various inconsistencies in the opinions of even the greatest judges of the High Court on this score. Thus he contrasts the reasoning of the *Engineers' Case*, with its embrace of literalism and the willingness of many of the judges who accepted that rule to hold that implications could be found for the importation of rights and obligations not stated in the text of the Constitution but based on the structure of the document or upon inferences derived from its language and purpose.

Sir Anthony Mason concludes his survey on this subject with an emphasis that was certainly not present twenty or thirty years ago. He refers to the foundation of the Australian Constitution as resting in the sovereign rights of the people of Australia²⁷. Twenty or thirty years ago, especially in legal circles, the ultimate foundation of the legitimacy and binding force of the Australian Constitution was

²⁶ *R v Brislan; Ex parte Williams* (1935) 54 CLR 262.

²⁷ Mason, 30.

given, virtually without dissent, as the Act of the Imperial Parliament at Westminster. That Parliament had enacted the Constitution and its power gave rise to the legal quality of the norms which it established. Nowadays, a different foundation for the Constitution must be found – one consistent with its origins, history, function and method of amendment. But that very fact illustrates, quite vividly, the evolutionary character of the Constitution – a fact which must affect approaches to ascertain its meaning.

Sir Anthony Mason his eessay on this subject by expressing the view that a constitutional court, such as the High Court of Australia, must interpret the constitutional charter in a way that will "reinforce and enhance the concept of a modern liberal democracy"²⁸. He cautions²⁹:

"Just how far a constitutional court can travel down such a path will be affected by the court's own assessment of legitimacy and perceptions of legitimacy. In other words, much depends upon the court's perception of the underlying political philosophy of the nation, as to the appropriate limits of the law-making function of a non-elected judiciary".

There is no task performed by a Justice of the High Court which is more important than the task of interpreting the Australian

²⁸ Mason, 30.

²⁹ *Loc cit.*

Constitution. Each judge – and indeed every lawyer - who has ever embarked upon that task is obliged to do more than to stumble about looking for a solution to the particular case. Intuition and instinct about such matters are not enough. Sitting at a desk with the Constitution in one hand and a dictionary in the other, is also not enough. Following blindly judicial opinions written in earlier and very different times may not be enough, as *Sue v Hill*³⁰ vividly demonstrates. That is why it is vital that each judge (indeed each reader of the Constitution) must have a theory of constitutional interpretation. Only such a theory will afford a consistent guide to the that approach to be taken to the task. In the absence of a theory, inconsistency will proliferate. The judge will be castigated, perhaps correctly, for saying incompatible things and construing the same words at different times in incompatible ways. Guided by Sir Anthony Mason's introduction to this most important topic, I want to add a few words of my own as to why history and original intent provide poor guides and why it is incumbent on us to construe the Australian Constitution as a living document so that it serves effectively (as far as its words and structure permit) the governmental needs of contemporary Australians.

HISTORY IN THE HIGH COURT

³⁰ *Sue v Hill* (1999) 73 ALJR 1016.