Freedom of Speech, the Rule of Law and Political Debate

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Introduction

The relationship between freedom of speech, expression and opinion and the rule of law is a collegial one: one supports the other. It is fundamental to the rule of law:

- that the law is made by representatives of the people in an open and transparent way,
- that the law and its administration is subject to open and free criticism by the people, and
- that the judicial system is independent, impartial, open and transparent and provides a fair and prompt trial.

For the rule of law to function we need freedom of speech, so people can observe and critique the making and application of laws and their interpretation and application in the court system.

Just this week we had the findings of the ICAC inquiry into the activities of the Obeid family, former Minister Ian MacDonald and a number of Australia's richest men. The inquiry demonstrating the extent of government corruption was prompted after years of painstaking investigations by a number of investigative journalists. The three reports that resulted from the inquiry ran to 174, 44 and 40 pages respectively. Shortly after they were released, ICAC's website crashed with the volume of traffic.

Fortunately for the public, acute journalists had already digested and critiqued the reports that describe a ten year history of massive fraud committed by then members of the NSW Parliament and their associates, abusing the power that came with office. The rule of law is fortunate that journalists of that calibre continue their hard work, despite the constant threat of defamation and contempt proceedings.

Conversely, the rule of law needs to support those freedoms of speech, expression and opinion. Although we do not have a constitutionally entrenched bill of rights in Australia that guarantees freedom of speech, and the comment is often made that freedom of speech here is what is left over after the laws of defamation, sedition, blasphemy, obscenity, racial vilification, privacy and public interest immunity, to name a few, have taken their cut, we do have at least have a robust debate about the need for freedom of speech. Entertainment lawyer, Shane Simpson has described the laws of defamation as "providing our society with an expensive, highly complex, unsatisfactory apparatus by which some of its individuals can defend their reputation after others have exercise their freedom of speech." And Professor Gillian Triggs, President of the Human Rights Commission, has described freedom of speech as "a fragile flower that must be protected vigorously by each new generation". This is where educators such as yourselves play your part.

The sources of freedom of speech

The difficulty, it seems to me, is to explain the complex form that the protections of freedom of speech take in Australia to students. In terms of its legal sources they run the full gamut: the implied freedom of political communication in the Constitution, common law freedoms, and international treaties half incorporated into Australian domestic law, which then need to be interpreted in the light of state and federal statutory limitations on those freedoms. Explaining that in itself can be a challenge. Former federal Attorney General

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Michael Lavarch, now executive dean in the Law Faculty at the Queensland University of Technology, has a more positive, if macabre, spin, describing it as "an amalgam of a high-level constitutional skeleton and of flesh supplied by parliaments in various laws, particularly anti-discrimination legislation, and maintained by our courts through common law traditions and decision-making under statutory provisions".

But then even the expression of freedom of speech in its purest form in Article 19 of the International Covenant on Civil and Political Rights is tempered with various provisos. They state that it is limited by restrictions in law for the respect of the rights or reputations of others; and for the protection of national security; or of public order or of public health or morals. So there is no easy way out. Visually I think of freedom of speech as having a strong core insofar as it relates to political communication but more malleable on the outside as legislators and courts respond to changing ideas about the line to be drawn in relation to the rights or reputations of others, national security, public order, public health and morals, to adopt the conceptual framework of Article 19.

In what follows I will be taking a look at one aspect of freedom of speech which is fundamental to the rule of law, namely the freedom of political communications as it has been interpreted in recent High Court decisions. But to understand those decisions we first need to go back to the last century.

Freedom of political communication: the High Court cases

In the early 1990s, at a time at which debate about the merits of a constitutionally entrenched bill of rights was in full flight, the High Court announced in two 1992 decisions that, although there is no explicit mention of freedom of speech in the Australian Constitution, in fact a freedom of political communication was to be implied from sections 7 and 24 of the Constitution. Those sections provide for the Australian Parliament to be comprised of the Senate "directly chosen by the people of the State" and the House of Representatives which is to be "composed of members directly chosen by the people of the Commonwealth". These provisions, the High Court said, require an informed choice to be made by the people which, in turn, means there must be free access to political information.

The context for the first case, *Nationwide News Pty Ltd v Wills* was an article in *The Australian* in November 1989 headed "Advance Australia Fascist" which criticised the integrity and independence of the then federal Industrial Relations Commission. Nationwide News, as the publishers of *The Australian*, was prosecuted under the *Industrial Relations Act* for the offence of "bringing the Commission into disrepute".

Nationwide challenged the validity of that offence on the basis that it was contrary to an implied freedom in the Constitution to criticise governmental institutions subject to reasonable legal constraints. The High Court agreed. According to Justice Brennan:

"To sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential".

But, there are limits. In the words of Justices Deane and Toohey:

"The Constitution's implication of a freedom of communication with and about the government of the Commonwealth is not an implication of an absolute and uncontrolled licence to say or write anything at all about matters relating to the government of the Commonwealth. It is an implication of freedom under the law of an ordered society".

In the second case, *Australian Capital Television Pty Ltd v Commonwealth*, which concerned legislation restricting the broadcasting of political advertising in the period leading up to an election, the High Court emphatically confirmed that such legislation was unconstitutional as it limited the freedom of political communication which is essential to the system of responsible government provided for in the Constitution.

This implied freedom was expanded upon by the High Court a year later in two cases: *Theophanous v Herald & Weekly Times Ltd* and *Stephens v West Australian Newspapers Ltd*. Those cases created a new defence to defamation actions involving political figures

and extended the protection offered by the implied freedom to state laws and state political matters. In effect, it made politicians fair game.

In 1997, this expansive approach to freedom of speech was reined in by the High Court in its decision in *Lange v Australian Broadcasting Commission*, concerning an allegedly defamatory Four Corners program on the then Prime Minister of New Zealand, David Lange. In it, the High Court held unanimously (a rare event) that while the freedom of political communication was an ongoing one, not limited to election periods, it is a negative one that operates to restrain executive and legislative power, rather than a positive right. But, while it limited the nature of the right, it widened the scope of responsible government to include all of the executive government including the public service, the "institutions and agencies of government" and those who staff them.

The Lange test

In its unanimous judgement, the Court came up with what is now known as the "Lange test" to assess whether a law is contrary to the implied freedom of political communication. It involves asking first, does the law effectively burden freedom of communication about government or political matters? And, if it does, is the law reasonably appropriate and adapted to serve a legitimate end which is compatible with the maintenance of representative and responsible government, taking into account the objectives of the particular law? If it is not, then the law will be invalid as contrary to the Constitution.

Just how offensive political communication can be was considered by the High Court in the 2002 case of *Roberts v Bass* which dealt with untrue allegations made against a member of the South Australian Parliament, including travel "junkets" at public expense. During the course of his judgment in the case, Justice Kirby made the true, if disturbing observation that:

"The purpose of those who support candidates for such elections is necessarily to harm their opponents, at least electorally. Often, if not invariably, this purpose will involve attempts to harm the *reputation* of an opponent. In the nature of political campaigns in Australia, it is unrealistic to expect the genteel conduct that may be appropriate to other circumstances of privileged communication. Political communication in Australia is often robust, exaggerated, angry, mixing fact and comment and commonly appealing to prejudice, fear and self-interest. In this country, a philosophical ideal that political discourse should be based only upon objective facts, noble ideas and temperate beliefs gives way to the reality of passionate and sometimes irrational and highly charged interchange. Communications in this field of discourse including in, but not limited to, the mass media, place emphasis upon brevity, hyperbole, entertainment, image and vivid expression".

The low bar Justice Kirby recognised for political communication in this country is a matter I will return to a bit later.

In 2004 came the High Court's decision in *Coleman v Power*. Student Patrick Coleman was charged and convicted under the *Vagrants Gaming and Other Offences Act* (Qld) for handing out leaflets in Townsville Mall stating "Get to know your corrupt type coppers" and identifying a local police officers Constable Brendan Power as one of the "slimy lying bastards". He was also convicted of assaulting and obstructing a police officer after a scuffle between him and Constable Power. Having found that criticising police is covered by the freedom of political communication, given the wide power of police over citizens, the High Court read down the Vagrants Act so that it did not apply to political communication, because otherwise it would be an invalid state law (being contrary to the implied freedom of political communication in the Constitution). But that didn't leave Coleman entirely free: the High Court did not interfere with his conviction for assault and obstructing police.

The 2013 Cases

So now we come to the latest instalments on the state of freedom of political communication according to the High Court in two decisions published on 27 February this year.

Attorney-General for the State of South Australia v Corporation of the City of Adelaide concerned two

preacher brothers of the "Street Church", Caleb and Samuel Corneloup, who expounded their gospel in Rundle Mall in Adelaide. They were convicted and fined for breaching a by-law made by the City Council which prohibited people from haranguing, canvassing or preaching on a road without a permit or distributing printed matter on any road to passers-by. The same by-law also prohibited using roads to repair vehicles, collect donations, leading or driving livestock and erecting structures such as fences, hoardings, ladders and trestles.

A challenge to their conviction eventually made its way to the High Court. Applying the Lange test, the majority of the Court found that while the by-law did burden the freedom of communication, its object was the prevention of obstruction of roads, which was conducive to the safe use of those roads. This, according to the majority was a legitimate object which is compatible with the maintenance of representative and responsible government and the prohibition was proportionate to that object.

The critical point to note about the facts of this case and the law in question is that it was not intended to interfere with political communication; its purpose was quite different. It was intended to promote road safety and it did so in a measured way. In making this point, the Court picked up on a distinction it had previously made in its 2011 decision in *Hogan v Hinch* concerning broadcaster Derryn Hinch's assertion that suppression orders which can be made under the *Serious Sex Offenders Monitoring Act (Vic)* to protect the identity of sex offenders are an invalid restriction on the freedom of political communication. There the Court found that the purpose of the law was the protection of the community by the effective operation of released sex offenders, which was a reasonably appropriate law adapted to serve a legitimate end.

So it would be fair to say that if there is a law that is intended to promote the health or wellbeing of the community, for example, the prevention of litter or the protection of children, but which also has the consequence of restricting political communication, then the High Court is unlikely to find it an unconstitutional limitation on freedom of speech provided it is proportionate to its aim.

The more difficult decision, handed down on the same day, is *Monis v The Queen* and *Droudis v The Queen*. Mr Monis wrote letters to the families of soldiers killed on active service in Afghanistan. Beginning on a sympathetic note, the letters turned into a personal attack on the deceased soldier. He was charged with a provision of the *Criminal Code (Cth)* that prohibits using the postal service in a way that reasonable persons would find offensive and convicted and his accomplice, Ms Droudis was charged with aiding and abetting him. In response they challenged that provision of the Code on the ground that it infringed the freedom of political communication.

All of the High Court judges found that the provision did have that effect. The issue then was, under the Lange test, whether it served a legitimate and proportionate purpose. On that issue the Court was split. In a joint judgment, Justices Crennan, Kiefel and Bell found that that the provision had a protective purpose which was to prohibit the misuse of postal services to:

"effect an intrusion of seriously offensive material into a person's home or workplace and that this purpose was not incompatible with the maintenance of the constitutionally prescribed system of government".

They pointed out that in the United Kingdom, the United States and New Zealand there are analogous offences protecting citizens from the receipt of material through the post that is grossly offensive, obscene or offensive, notwithstanding that those jurisdictions also have a positive, constitutionally entrenched, personal right of freedom of speech.

The other three judges disagreed that the purpose of the provision was "legitimate". They were troubled by the open-ended nature of the term "offensive" and the vague nature of its purpose. Was it to protect the "integrity of the post" and, if so what does that "integrity" mean? Or to protect an intrusion upon the feelings of the recipient? Or to promote "civility of discourse", in which case, per *Coleman v Power*, the case about the Townsville Mall, that is not a legitimate object or end.

According to Justice Hayne "the elimination of communications giving offence, even serious offence, *without more* is not a legitimate object or end".

Like Justice Kirby in *Roberts v Bass*, Justice Hayne emphasised the "robust" nature of political debate in Australia which he said deserves protection under the Constitution.

"Political debate and discourse is not, and cannot be, free from passion. It is not, and cannot be, free from appeals to the emotions as well as to reason. It is not, and cannot be, free from insult and invective. Giving and taking offence are inevitable consequences of political debate and discourse. Neither the giving nor the consequent taking of offence can be eliminated without radically altering the way in which political debate and discourse is and must be continued if "the people" referred to in sections 7 and 24 of the Constitution are to play their proper part in the constitutionally prescribed system of government."

The end result of the split in the High Court was that the previous decision in the matter by the NSW Court of Criminal Appeal that the charges were valid was upheld because there is a rule that when the outcome is tied, the status quo, the decision under appeal (of the NSW Court of Criminal Appeal) stands.

So what does that mean for the freedom of political communication, now and for the future for students? It is clear that this is one aspect of freedom of speech that the High Court is determined to protect, within the limits of the Lange test. If, like student Patrick Coleman who gave out pamphlets in Townsville Mall, condemning the actions of police, you fight your conviction to the High Court, then there is a good chance you will be successful in your argument that you are entitled to condemn the actions of police. But, if like the Corneloup brothers handing out their pamphlets in Rundle Mall, there is a good public safety or other legitimate reason to prohibit your behaviour then you will be unsuccessful because the right of political communication is only a negative one.

And if, like Mr Monis, you use the postal service to express your political views in a very strong and upsetting fashion, targeting members of the public rather than politicians then it is borderline as to whether the right of political communication will protect you. But if you target a politician then the standard is much lower, reflecting the accepted nature of political debate in this country (sadly, some might add). But, getting to the High Court to establish your right of political communication is going to be a long process starting with being charged or convicted of an offence or dealing with a defamation action, or charges of the offensive behaviour kind.

An exercise in the rule of law and freedom of political communication could be to ask students to think critically about ways in which they might express their opinions about politicians, political debate or the bureaucracy, and the laws that prohibit that expression of opinion. And that may lead a step further, to the need for transparency in the political and executive processes of the kind that so blatently did not happen in the events that led to the recent ICAC Inquiry. Just as sections 7 and 24 the Constitution have been found to imply a right of freedom of political communication, perhaps one of those students may end up one day arguing in the High Court that it also implies a right to accurate information about government decision-making and accountability.

Having explored the breadth of the freedom of political communication, being the most solidly founded aspect of freedom of speech, I want to say some final words about one of the many limitations on freedom of speech that has received a lot of publicity. It is the laws prohibiting racial vilification, and in particular the prohibition of it in the federal *Racial Discrimination Act 1975*.

The prohibition on racial discrimination

Australia, to its credit, was one of the early ratifiers of the International Convention on the Elimination of All Forms of Racial Discrimination. This Convention had been a priority of the United Nations after the racially motivated genocide of the Second World War. Article 4 of the Convention states that ratifying states, as countries are called in international law:

"shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof".

When Australia ratified the Convention and undertook to implement it within Australia, it reserved in relation to Article 4, not committing itself implementing that provision. As a result, the original version of the *Racial Discrimination Act*, which is the means by which the Convention applies within Australia, did not contain any prohibition of what is now known as racial vilification. After much debate, a watered down version of Article 4 was finally included in amendments to the Act which came into effect in 1995.

Section 18C of the Act now prohibits doing an act that is reasonably likely to offend or humiliate a person on the ground of their race in a public place that is not covered by the exemption in section 18D for artistic works, any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest, or fair and accurate reports in the public interest or fair comment. Section 18C does not make it an offence to do such an act, it only makes it grounds for someone to make a complaint to the Human Rights Commission.

Once such a complaint is made, the Commission is obliged to investigate it and try and resolve it through a confidential conciliation process. Only if that is not successful, the original complainant is entitled to take the matter to court. If the court ultimately finds that the act in question comes within the definition in section 18C, and is not covered by the exemption in 18D then it can make orders such as payment of compensation or an apology.

Pursuing a complaint in this way is not for the faint-hearted. And it is fair to say that in the cases that have gone to court, the exemption for artistic works, genuine debate and fair comment have been robustly interpreted. For example, in a case about a play written by Louis Nowra and produced by the Melbourne Theatre Company called Miss Bosnia (*Bryl v Anna Kovacevic and Louis Nowra and Melbourne Theatre Company*), which arguably offended Bosnians and Herzogovians, the Human Rights Commissioner hearing the matter talked about a "margin of tolerance" that should be exercised", and that a wide berth should be given to artistic works. This idea of a margin of tolerance was adopted in a subsequent case (*Bropho v Human Rights and Equal Opportunity Commission)* concerning a complaint by a group of Aboriginal men in Western Australia who complained about a newspaper cartoon depicting them as government grant grabbing drunks. As a result, none of the complaints were successful. Over the years, the only type of complaints that have had any consistent measure of success in the courts have been those concerning anti-Jewish publications and website and holocaust deniers, which reflects the World war II origin of Article 4 of the Convention.

Which brings us to Eatock v Bolt, the case about commentator Andrew Bolt's pieces in the Herald Sun questioning the racial heritage of nine, what he called, "fair-skinned Aborigines". In his judgment, Justice Blomberg said that the fair comment defence in s.18D of the Act extended to protect opinions that "reasonable people would consider to be abhorrent", but they do need to be based on factual accuracies. The case has generated a lot of media and kneejerk responses about the perils of racial vilification legislation. Without adopting a position about that, the best advice I can give about the case is to repeat Justice Blomberg's dicta and get the facts right about his judgment by reading it, before expressing an opinion about it. It is a complex legal argument that is poorly served by being squashed into a screaming headline. As I have described today, freedom of speech is a very complex concept with a lot of social and legal history behind it.

Case citations

- *Australian Capital Television Pty Ltd v Commonwealth* [1992] HCA 45
- *Nationwide News Pty Ltd v Willis* [1992] HCA 46
- *Theophanous v Herald & Weekly Times Ltd* [1994] HCA
- *Stephens v West Australian Newspapers Ltd* [1994] HCA
- *Lange v Australian Broadcasting Commission* [1997] HCA 25
- *Roberts v Bass* [2002] HCA 57
- *Coleman v Power* [2004] HCA 39
- *Hogan v Hinch* [2011] HCA 4
- *Attorney-General for the State of South Australia v Corporation of the City of Adelaide* [2013] HCA 3
- *Monis v the Queen* [2013] HCA 4
- *Bryl v Anna Kovacevic and Louis Nowra and Melbourne Theatre Company* [1999] HREOCA 11
- *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16
- *Eatock v Bolt* [2011] FCA 1103

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