Levy v State of Victoria – High Court

Levy v State of Victoria[51] is essentially an application of the principles outlined in *Lange*. The case concerned a protester who wanted to bring to the public attention the unnecessary slaughter of ducks which took place during duck shooting season. Levy argued that the regulation prohibiting anyone without a duck shooting license from entering the hunting area on the first two days of the season was unconstitutional as it interfered with the implied constitutional right to freedom of political communication. All members of the High Court agreed that the purpose of the regulation was to protect members of the public, including protesters, from harm. However, the safety regulations in force during the remainder of the duck-shooting season were less stringent, and allowed circumscribed entry to the duck shooting areas. Most members of the court admitted that the only justification for the different regulation on the first two days of the season was to prevent political protest. Nevertheless, the court adopted the two prong test in *Lange* and found that the regulation was reasonably appropriate to protect the safety of persons in hunting areas.[52]

A preliminary question that had not arisen in the earlier cases did not cause much concern in *Levy's* case. In what could be seen as an important extension of the freedom of political communication, the Court recognised that the freedom of political communication and debate is not only concerned with written and verbal communication but also with actions. Accordingly, Levy's actions in protesting at the hunting area were sufficient to constitute political communication.[53] Similarly, the court had no difficulty in accepting that the regulation did effectively burden communication "about government or political matters either in its terms, operation or effect", although this was the subject of much

discussion.

Justice Gaudron noted that there are various tests for determining whether a law infringes on the freedom of political communication, but chose to focus on whether the direct purpose of the law was to restrict political communication. She was of the view that such a law is only valid if it is necessary to obtain some overriding public purpose. If it is some other purpose, connected with a subject matter within power and this purpose only incidentally restricts political communication, it is valid if it is reasonably appropriate and adapted to that other purpose.[54] Justice Kirby discussed the tests in determining the appropriate limits on this freedom. In particular he defended the proportionality test as a process of reasoning, and looked at the concept of a margin of appreciation.[55] Justice McHugh stressed that the freedom to political communication in the Constitution does not confer a personal right on individuals. He strongly argued that the freedom protected by the Constitution is not a freedom *to* communicate. Rather, it is a freedom *from* laws that effectively prevent communication about political and government matters relevant to the system of representative and responsible government provided for in the Constitution.[56]

The test developed in these cases was relatively unproblematic in *Lange*, as the standard of protection afforded those subjected to actions for defamation was resolved in *Theophanous* and *Stephens.* However, when we compare the outcome of the decision in *Levy* to that which we would have expected using the earlier developed tests, it becomes clear that the standard of protection afforded has been significantly lowered. In the test concerned with the nature of the restriction placed on freedom of political communication, if the restriction on freedom of political communication was a restriction on the content of the communication, then the threshold for allowing such a restriction was very high; if the restriction imposed by the law was simply a matter of the form of the political

communication, then it was permissible to interfere with the speech. The question in *Levy's* case would then be one of fact -- is the law about the content or the form of the communication? It was clearly directed at preventing political protest, and this would appear to be just the sort of situation for which Mason CJ commented that it would be "extremely difficult to justify restrictions imposed on free communication which operate by reference to the character of the ideas or information". In this situation "paramount weight should be given to the public interest in freedom of communication", such that "in the area of public affairs and political discussion, restrictions of the relevant kind will ordinarily amount to an unacceptable form of political censorship".[57] Of course it could be argued, as Kirby J implies in his analysis of the situation, that the regulation actually only imposed a limitation on the form of the political protest -- anti-duck shooters could use old graphic footage of the carnage, and could find another mechanism to direct action to draw media attention to their cause. It is submitted, however, that the law went much further than regulating the form of the political message.

Where, in the previous cases, a proportionality or balancing test had been adopted, there was a clear weighting in favour of freedom of speech or communication. For a restriction on freedom of political communication to be upheld, it was necessary not only to show that there was a competing and legitimate interest which the legislation served. It was necessary to show that that restriction was "overwhelming" and "compelling", and not more than the minimum interference with the communication. According to *Lange* and *Levy*, it is sufficient justification of an infringement of freedom of speech that it serve a "legitimate end" and that the law is "reasonably appropriate and adapted" to that end. No one would disagree that public safety is a legitimate end to be served by legislation. However, we can ask whether a total prohibition to a controversial area is "reasonably appropriate and adapted" to public safety when it is clearly directed not at safety but at political

protest. Even if there was a (paternalistic) fear for the safety of the protesters, there is significant doubt whether that could have been "overwhelming" or "compelling". Afterall, the regulation could have limited the actions of the duck-shooters over those two days rather than the political speech of the protesters. There can be no doubt that serving a legitimate end in an appropriate and reasonable manner is a much lower requirement than promoting a competing public interest because its need for promotion is significant and the importance of the interest is overwhelming.

Conclusion

Freedom of speech has never been an absolute value in the Australian political and legal landscape. Laws dealing with defamation, blasphemy, copyright, obscenity, incitement, use of insulting words, official secrecy, contempt of court and of parliament, censorship, sedition and consumer protection legislation place limits on speech. These laws suggest that there are countervailing interests that might take precedence over freedom of speech in some circumstances. Our current law reflects the belief that the need for social cohesion and the need to maintain public order requires limitations on freedom of speech where it may lead to a breach of the peace. It accepts that words can seriously injure individuals and their economic and social well-being through the law of defamation. Words are also prohibited where they cause or threaten to cause serious harm, such as personal injury, property loss and damage to an important institution. The criminal law recognises that it is a crime to counsel another to commit a crime, to commit perjury or to be in contempt of court. These widely accepted curbs on free speech still allow a great measure of freedom. There is one consistent thread running through all the Australian cases concerned with freedom of speech.

The only time where free speech has been promoted is where the speaker is attacking an unpopular cause;[58] the times where there has been a resounding rejection of the idea of free speech have been where the speaker has promoted an unpopular cause.[59]

Nonetheless, the High Court has come a long way in recognising the freedom of political communication in the Constitution. No longer is this freedom "overlooked" when the court considers cases in various areas of law such as defamation, sedition and even immigration in which central issue of the action is ultimately concerned with freedom of expression. The court has also recognised that this freedom is not absolute, but that it must be balanced against other public interests. Irrespective of the terms the test is couched in, proportionality is in effect the underlying principle in determining whether a law infringing this freedom is acceptable. Fortunately or unfortunately, this allows a balancing of the rights of the individual against the amorphous "public interest". The right to freedom of political speech or communication in the Australian context is not a trump card, not even for critics of government or other political protesters. While this may result in there being space for the regulation of speech which has the potential to undermine Australian democracy, such as racial vilification, it also must lead us to conclude that the constitutional protection of freedom of speech and communication will only be as strong as the ideological persuasion of the High Court.

Despite the absence of an explicit freedom of expression in our Constitution, and despite the expectation that a differently composed Bench would take another view of implied rights, the acceptance and need for freedom of speech in a democratic society is now entrenched. This brings our law in line with democracies that protect a personal freedom of expression in their Constitutions -- in practice the High Court's position closely resembles the freedoms protected in human rights legislation in various jurisdictions such as Canada and Europe. Similar tests of

proportionality and whether a law is burdensome or reasonably appropriate and adapted to a legitimate end, have been adopted under the limitation clauses in the Canadian Charter and the European Convention. In these jurisdictions the analysis begins with a presumption of a right to freedom of speech, and takes impositions on freedom of speech most seriously. By looking to the jurisprudence of those courts, the High Court has the potential to diffuse the otherwise political decision about what sorts of infringements on free speech are legitimate. By looking to the jurisprudence of Canada and Europe, the High Court may be able to find analogous cases to those presented to it, and may offer a certainty both to government and citizens as to the legitimate limitations on freedom of speech. In this way, the new weaker protection of freedom of speech could amount to a stronger protection of the rights of all Australians.

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[2] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.

[3]Meiklejohn, A.

[4] See for example David Tucker, "Representation-Reinforcing Review: Arguments about political advertising in Australia and the United States" (1994) 16 *Sydney Law Review* 247.

[5] See for example Jones M "Empowering victims of racial hatred by Outlawing Spirit murder" (1994) 1 *Australian Journal of*

Human Rights 229; Akmeenmana S & Jones M "Fighting racial hatred" in Race Relations Commissioner (ed) *The Racial Discrimination Act: A Review* (AGPS Canberra 1996).

[6] Jones *ibid*.

[7] *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96 and *Levy v State of Victoria* (1997) 146 ALR 248.

[8] See generally Gaze E & Jones M *Law Liberty & Australian Democracy* (Law Book Co 1990).

[9] *Australian Communist Party v Commonwealth* (1950-1951) 83 CLR 1.

[10] (1925) 37 CLR 32.

11 *R v Carter; ex parte Kisch* (1934) 52 CLR 221.

[12] *The King v Wilson; ex parte Kisch* (1934) 53 CLR 234.

[13] This, too, gave rise to another episode involving interference with freedom of speech. One media commentator, of Scottish Gaelic descent, was outraged at the High Court's decision and said so in no uncertain terms. The result was the laying of the charge of scandalising the court. See *R v Dunbabin* (1935) 53 CLR 434. See also *R v Fletcher; Ex parte Kisch* (1935) 52 CLR 248.

[14] *Salemi v MacKellar (No. 2)* (1977) 137 CLR 396. Nearly 10 years later the same section of the Migration Act was interpreted to require a hearing: see *Kioa v West* (1985) 159 CLR 550 .

[15] *Salemi v MacKellar (No. 2)* supra. Nearly ten years later the same section of the *Migration Act* was interpreted to require a hearing: see *Kioa v West supra*.

[16] The offence of seditious libel has had an inglorious history in English common law. It has been used ruthlessly by UK authorities in every period of political turmoil (notably 1680-1710, 1792-1845 and 1914-1919) since the time of the Court of the Star Chamber, when it was applied in a desperate attempt to save the absolute monarchy: See Head M (1979) "Sedition -- is the Star Chamber dead?" 3 *Criminal Law Journal* 89.

[17] *R v Burns* (1886) 16 Cox CC 355.

[18] *Burns v Ransley* (1949) 79 CLR 101.

[19] *R v Sharkey* (1949) 79 CLR 121 .

[20] *Ibid*.

[21] (1992) 177 CLR 1.

[22] (1992) 177 CLR 106.

[23] *Nationwide News, supra* above fn 98, at 48-49.

[24] Mason CJ *ACTV* at 597-98. Justice McHugh expressed a similar view.

[25] *Ibid*, at 597.

[26] *Ibid*, at 598.

[27] *Ibid*, see also the judgment of McHugh, J at 669-70.

[28] *Australian Capital Television, supra*,, per Mason CJ at 598; per Brennan J at 603; and per McHugh J at 670.

[29] *Australian Capital Television Pty Ltd v The Commonwealth (No. 2)* (1992) 108 ALR 577, at 656.

[30] Some of the members of the Bench adopted a narrow conception of the implied guarantee. Dawson J stated that the Constitution simply guarantees a minimal requirement of representative government which does not extend to freedom of speech or freedom of communication: in *Theophanous v The Herald & Weekly Times Ltd* (1995) 182 CLR 104, at 191; McHugh J adopted a similar position, arguing that representative government is not part of the Constitution independent of the text, and it is wrong to invalidate laws on the basis of a constitutional immunity: *Theophanous*, at 195. Brennan J accepted the constitutional implication, but insisteds that as it is not a personal right its scope is limited: *Theophanous*, at 149. The retirement from the bench of Mason CJ and Deane J, and the appointment of Gummow J and Kirby J to the High Court, and the nature of the appointment to fill the vacancy on the court may be of significance here.

[31] *Australian Capital Television* (1992) *supra*.

[32] In *Theophanous v The Herald & Weekly Times Ltd supra*, a federal Member of Parliament sued for defamation in relation to comments concerning his actions as a Member of Parliament. The majority of the court, Mason CJ, Toohey and Gaudron JJ, and Deane J, held that the implied constitutional implication of freedom of communication prevented defamation laws from applying to Commonwealth politicians. Brennan J, Dawson J and McHugh J, in dissent, argued that the constitutional implication did not provide personal rights and could not invalidate common law.

[33] In *Stephens v West Australian Newspapers Ltd* (1995) 182 CLR 211, an action for defamation had been brought by members of the Western Australian Legislative Assembly. A series of statements about their suitability for office were made in the context of a State election. The majority of the High Court (Mason CJ, Toohey, Gaudron and Deane JJ), held that the constitutional

guarantee applied to State political activity in addition to Commonwealth political speech. This was found both as a matter of logic and as a matter of

construction of the Commonwealth and Western Australian Constitutions. Brennan, Dawson and McHugh JJ argued were in dissent, arguing that the doctrine could not be extended to catch this type of speech.

[34] In *Cunliffe v The Commonwealth of Australia*, (1995) 182 CLR 272, Toohey J joined Brennan, Dawson, and McHugh JJ in rejecting the extension of the implied constitutional guarantee of freedom of political communication. The case involved a challenge to Part 2A *Migration Act* 1958 (Cth) which introduced the registration of migration agents and limited the right of a nonregistered persons to give advice to would-be migrants. Members of the legal profession argued that this interfered with their freedom of speech, their freedom to communicate words of advice to clients. While the majority did not find the Constitutional guarantee to be breached, Mason CJ, Deane and Gaudron JJ, in dissent, concluded that the legislation was invalid.

[35] *Theophanous supra* per Mason CJ, Toohey and Gaudron JJ at 126 and per Brennan J at 146-147; *Cunliffe supra* per Mason CJ at 299, ; *Cunliffe* per Dawson J at 363; *Cunliffe* and per Toohey J at 379.; *Theophanous* per Brennan J at 146-147.

[36] *Cunliffe supra* per Gaudron J at 388. Deane J at 339-340 characterises this as a law which is "necessary" in the sense of their addressing an existing and pressing social need. *Cunliffe* at 339-340.

[37] *Cunliffe supra* per Deane J at 339.

[38] See *Theophanus supra* per Mason CJ, Toohey and Gaudron JJ *in Theophanus* at 122-3; *Cunliffe supra* per Mason CJ in *Cunliffe*

at 229-300 ;and per Gaudron J in *Cunliffe* at 388-9: It will not be justified "unless it can clearly be seen to be serving some overriding and important public interest". *Cunliffe* per Gaudron J at 388.

[39] *Cunliffe supra* per Deane J at 339.

[40] *Cunliffe supra* per Mason CJ at 300.

[41] *Cunliffe supra* per Toohey J at 384.

[42] *Nationwide News supra* per Deane and Toohey JJ at 76.

[43] *Theophanous supra* at 149.

[44] *Cunliffe supra* per Gaudron J at 388.

[45] (1997) 145 ALR 96.

[46] (1997) 146 ALR 248

[47] *Ibid* at 96.

[48] *Ibid* at 107-8.

[49] *Ibid* at 112.

[50] *Ibid* at 111.

[51] (1997) 146 ALR 248.

[52] *Ibid* at 248.

[53] *Ibid* per Brennan CJ at 251, per Toohey and Gummow JJ at 267, per McHugh J at 274 and per Kirby J at 286.

[54] *Ibid* at 271.

[55] *Ibid* at 292.

[56] *Ibid* at 271.

[57] See fn 24 *supra*.

[58] More often than not the free speech cases have protected attacks on the industrial system or on politicians. The only exception to this could be *ACTV*, but there again Labor Party moves to promote fairness in the electoral process were not popular with any group which would be advantaged by unfairness. This is not to say that we support the legislation which was struck down, but rather that the attempted legislation was a little too radical, and was seen as an attack on established means of electioneering.

[59] Communists and animal liberationists have suffered in this regard.