

## Freedom of Expression: European and Australian Perspectives

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### **Abstract**

*This article explores the legal frameworks supporting the right to freedom of expression in Europe and Australia. Whereas in Europe there are overlapping protections of this right embedded within highly visible, legally binding instruments, the Australian protection rests on a judicial constitutional implication. Despite fundamental differences in salience, visibility and scope, it appears that neither jurisdiction is averse to limiting the right to free speech in certain circumstances, for instance when expressions are deemed gratuitously offensive. It is evident that the limits imposed on the freedom of expression both in Europe and in Australia determine the nature of the right. Whether or not the multiple layers of legal protection in Europe provide a bulwark against the erosion of the right to speech in Europe, this article reveals the comparative fragility of the constitutional implication in Australia.*

**Key words:** Australia, Europe, freedom of expression, judiciary, legal protections, limitations

### **Introduction**

Europe's bloody history and the social, economic and political devastation following its experiences with fascism in the first half of the 20<sup>th</sup> Century have compelled post war Europeans to be vigilant against abuses of human rights. At the same time, a growing awareness of the necessary interdependence of European States has conditioned European elites to accept supranational regulation and monitoring of many aspects of life as a legitimate object of European integration. Against this backdrop, it comes as no surprise that Europeans have a plethora of overlapping legal instruments available to them in the field of human rights protection. The freedom of expression and other rights are generously protected by international and European legal instruments and by domestic constitutional provision. By contrast, Australia has very few

constitutionally embedded rights.<sup>1</sup> Moreover, these rights have generally been interpreted narrowly by the High Court of Australia. On the other hand, the High Court has recognised that the text and structure of the Australian Constitution may give rise to a number of implied freedoms, including a rather modest implied freedom of speech to discuss political affairs. First articulated in 1992,<sup>2</sup> the implied freedom has been developed, stretched and qualified in constitutional judgments spanning two decades. However, despite significant judicial attention, uncertainties remain as to its scope and the degree to which it may be intruded upon.

While the proliferation of formal legal protections may not guarantee observance, it is the limits imposed on that freedom which determine the nature of the right. A consideration of the application of the freedom of expression in Australia and Europe will reveal that there are limits to the freedom in both jurisdictions and that the public interest provides a basis for the determination of questions concerning free speech. Yet, there is currently a degree of uncertainty in Australia as to how the law concerning the implied constitutional freedom will evolve in respect of highly offensive speech, the freedom of expression having become increasingly unclear and fraught in recent times. Anxiety over this question is undoubtedly not confined to Australia. Notwithstanding a clear articulation of the right to freedom of expression in Europe through a plethora of overlapping legal instruments, the European Court of Human Rights has recently been subject to criticism for enforcing politically correct restrictions on what Europeans are allowed to say.<sup>3</sup> Thus, while it appears that both the freedom and its limitations are more thoroughly articulated in Europe than in Australia – which ostensibly makes the reality of exercising this freedom much more dependent on the case law of Australian courts – occasional controversy nonetheless also surrounds European jurisprudence.

## Instruments of Protection from the European Perspective

In European countries the current situation of freedom of expression is influenced both by the long tradition of thinking about freedom of speech (as this human right used to be called in the time of Enlightenment by such philosophers as Defoe<sup>4</sup> or Voltaire<sup>5</sup>) and by the more current experience of totalitarian or authoritarian regimes causing manifold violations of this freedom behind a curtain of its formal legal protection. It thus comes as no surprise that freedom of expression was formally protected in Portugal in the era of Salazar in Article 13 of the Salazarian Constitution of 1933<sup>6</sup>, while being violated on a regular basis with a rationale provided by Antonio de Oliveira Salazar himself: ‘Newspapers are the spiritual food of the people, and, like all foods,

<sup>1</sup> The right to vote (s 41); acquisition of property on just terms (s 51 (xxxii)); trial by jury (s 80); freedom of religion (s 116); and immunity from out-of-state residence discrimination (s 117).

<sup>2</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australin Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

<sup>3</sup> On 9 February 2012, the European Court of Human Rights decided in case *Vejdeland v. Sweden*, app. no. 1813/07, that Sweden did not violate freedom of expression by convicting four people for distributing leaflets with homophobic content. See J. Mchangama, *The European Court of Human Rights versus freedom of expression*, 21 February 2012, <[http://www.thecommentator.com/article/919/the\\_european\\_court\\_of\\_human\\_rights\\_versus\\_freedom\\_of\\_expression](http://www.thecommentator.com/article/919/the_european_court_of_human_rights_versus_freedom_of_expression)>, accessed 12 June 2013.

<sup>4</sup> D. Defoe, *Essay on the regulation of the Press. London 1704*, (reprinted in D. Berkowitz and S. Thorne, *Classics of English legal history in the Modern Era*, New York & London, Garland Publishing, 1978.

<sup>5</sup> With the famous quote attributed to him: ‘I disapprove of what you say, but I will defend to the death your right to say it.’

<sup>6</sup> See P. Ferreira da Cunha, *Da Constituição do Estado Novo Português (1933) Historia Constitucional* (revista electrónica), n. 7, 2006. <<http://hc.rediris.es/07/index.html>>, accessed 12 June 2013.

must be controlled.’<sup>7</sup> The same holds true for the Soviet Union where in the Stalin era freedom of press was formally guaranteed by Article 125 of the USSR Constitution of 1936, but it was applied only to those authors who were writing ‘good books’ as explained by Maxim Gorkij, who reminded his colleagues during a speech made at the USSR Union of Writers assembly in 1936 that the Party and the Government gave to the writers everything and took away from them only one thing: the right to write bad books.

Bearing in mind this ambiguous historical experience, it is not surprising that freedom of expression of any European individual (which for this text means any citizen of the European Union) is guaranteed on no less than four overlapping levels (in the case of European countries that are not EU Member States<sup>8</sup> there are at least three levels). Firstly, we have to mention the universal level, covering Europe, as well as Australia. The two basic provisions protecting freedom of expression at the universal level are Article 19 of the Universal Declaration of Human Rights (1948)<sup>9</sup> and Article 19 of the International Covenant on Civil and Political Rights (1966).<sup>10</sup> Their basic common feature is that freedom of expression is only ‘hidden’ somewhere in the middle of both these catalogues. This sharply contrasts with some previous domestic human rights bills, the best example being the USA Bill of Rights adopted in 1791 where freedom of speech was situated as a ‘flagship’ of all human rights, being included in the famous Amendment I<sup>11</sup> to the USA Constitution.

The second instrument protecting freedom of speech of all individuals on the European continent (from Lisbon to Vladivostok) is the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ‘European Convention’), i.e. a regional human rights treaty drafted in 1950 by the then newly formed Council of Europe and now applicable in its 47 Member States. Freedom of speech is guaranteed in Article 10 of the European Convention<sup>12</sup> which has a traditional structure of substantive rights articles: paragraph 1 defines the basic scope of the right, while paragraph 2 depicts its limits. Thanks to the innovative jurisprudence of the European Court of Human Rights

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<sup>7</sup> *Salazar says...*Lisbon, SPN Books, p. 28. [n.d.]

<sup>8</sup> For example, Russia.

<sup>9</sup> ‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.’

<sup>10</sup> ‘Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.’

<sup>11</sup> ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.’

<sup>12</sup> ‘Article 10 Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’

(hereinafter ‘ECHR’), the content of this Article has been kept up to date during the last 60 years; its text has not been changed at all.

The last sentence of paragraph 1 authorising the states to require a licensing of broadcasting, television or cinema enterprises was obviously drafted in the era of state media monopolies and therefore sharply contrasts with the third instrument to be mentioned – the Charter of Fundamental Rights of the European Union (hereinafter ‘EU Charter’) – solemnly proclaimed at the 2000 Nice summit and made legally binding by the Lisbon Treaty in 2009. The EU Charter claims allegiance to the opposite of media monopolies when it guarantees a pluralism of the media in Article 11(2).<sup>13</sup> The brevity of this article is made possible by the strong link of the EU Charter to the European Convention including ECHR case-law which is enabled by the fact that all EU Members States are at the same time signatories of the European Convention. Therefore the EU Charter does not have to repeat legal obligations already binding on these states.

The final level of protection of freedom of expression at the domestic level is the most traditional; freedom of expression is regularly included in constitutional bills of rights or in other domestic instruments of human rights protection.<sup>14</sup> The main consequence of this multifaceted and well articulated legal right is that the content of the right of expression is sufficiently intelligible not only to lawyers in Europe, but also to its customary beneficiaries, including artists and journalists.

## Content and Forms of Expression

Despite the differences in style of the provisions protecting freedom of expression, their basic content is similar. The freedom covers three negative freedoms and one positive right. The first is the freedom to hold opinions. On one hand it is rather difficult to imagine a situation, in which this freedom would be violated (although the concepts of Orwellian ‘newspeak’ and ‘crimethink’ show us that there is a potential threat of such violation), on the other hand, without holding opinions it would be inconceivable for an individual to exercise the second part of freedom of expression and impart information and ideas.

The third part of freedom of expression is the right to receive information and ideas, a right being exercised by the reader of this article at this very moment, while we, as authors, are exercising our corresponding freedom to impart information. This was classified as part of freedom of expression both by the ECHR for example in *Open Door and Dublin Well Woman v. Ireland*<sup>15</sup> and by the European Court of Justice (hereinafter ‘ECJ’) in *Grogan*.<sup>16</sup> Surprisingly, each court came to an opposite judgement, despite the fact that they were dealing with similar situations of Irish students’ associations being prohibited from (or being prosecuted for) dissemination of information amongst Irish

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<sup>13</sup> ‘Article 11 Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.’

<sup>14</sup> See Art. 25 Belgian Constitution; Art. 39 Bulgarian Constitution; Art. 17 Czech Charter of Basic Rights and Fundamental Freedoms; Art. 20 Spanish Constitution; Art. 12 Finnish Constitution; Art. 14 Greek Constitution; Art. 40 Irish Constitution; Art. 21 Italian Constitution; or Art. 54 Polish Constitution.

<sup>15</sup> ECHR judgment of 29 October 1992, *Open Door and Dublin Well Woman v. Ireland*, app. no. 14234/88; 14235/88.

<sup>16</sup> ECJ judgment of 4 October 1991 in Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan*.

female students about the possibility of getting an abortion at British hospitals. Distributing leaflets with information about this possibility was a way to bypass the Irish constitutional prohibition of abortions. The ECHR classified prosecution of students' associations as a violation of freedom of expression, primarily the perspective of precluding the pregnant female students from obtaining access to this information, because this limit to freedom of expression was too strict and absolute. In contrast, the ECJ Advocate General Van Gerven classified this limitation of freedom of expression as proportional to the legitimate aim of protecting unborn life, which was regarded in Ireland as fundamental. The ECJ in its judgment refrained from answering this question by stating that the case was not regulated by EC law at all, because the students' associations were not covered by the protection of the free movement of services in the European Community. One might wonder why not, as their leaflets were a valuable means of publicising the abortion services in British hospitals amongst the Irish female students. The ECJ's response was rather cynical: the associations were not part of the chain of free movement of services because they were not paid by the British hospitals; they were disseminating their leaflets only out of charity.

The fourth part of freedom of expression is the right to request information from public authorities, which represents a positive counterpart (a right 'to') of this generally negative freedom (a freedom 'from'). This right is guaranteed in several European domestic human rights bills,<sup>17</sup> while it has not yet been recognised by the ECHR as an implicit right hidden in the European Convention, be it in the scope of Article 10 or of any other right. The argument that a right to obtain information about a chemical factory operating in the applicants' neighbourhood could be derived from the right to privacy (which should cover limits on emissions 'entering' individual's private home) guaranteed by Article 8<sup>18</sup> of the European Convention was rejected by the ECHR in *Guerra and others v. Italy*.<sup>19</sup>

As regards to the forms of expression covered by the discussed freedom, it would no longer be suitable to use the more traditional label of freedom of speech, because the notion of expression is currently much wider. It covers not only speech *stricto sensu*, i.e. the written and spoken word, but many different forms through which a person (be it a natural or a legal person) can express himself or herself. While browsing through the ECHR case-law under Article 10 we would encounter decisions embracing such forms of expression as TV programmes,<sup>20</sup> radio broadcasting,<sup>21</sup> movies,<sup>22</sup> paintings,<sup>23</sup> clothes,<sup>24</sup> nonverbal acts of protest,<sup>25</sup> or symbols.<sup>26</sup>

<sup>17</sup> A good example is Art. 17(5) of the Czech Charter of Basic Rights and Fundamental Freedoms: 'Organs of the State and of local self-government shall provide in appropriate manner information on their activity. The conditions and the form of implementation of this duty shall be set by law.'

<sup>18</sup> 'Article 8 Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

<sup>19</sup> ECHR judgment of 19 February 1998, *Guerra and others v. Italy*, app. no. 116/1996/735 /932.

<sup>20</sup> ECHR judgment of 15 July 1988, *Hodgson, Woof Productions and National Union of Journalists a Channel Four Television v. U.K.*, app. no. 11553 /85; č. 11658/85.

<sup>21</sup> ECHR judgment of 22 May 1990, *Autronic AG v. Switzerland*, app. no. 12726/87.

<sup>22</sup> ECHR judgment of 25 November 1996, *Wingrove v. U.K.*, app. no. 19/1995/525/611.

<sup>23</sup> ECHR judgment of 24 May 1988, *Müller and others v. Switzerland*, app. no. 10737/84.

<sup>24</sup> ECHR judgment of 3 March 1986, *Stevens v. U.K.*, app. no. 11674/85.

<sup>25</sup> ECHR judgment of 23 September 1998, *Steel v. U.K.*, app. no. 67/1997/851/1058.

<sup>26</sup> ECHR judgment of 25 August 1993, *Chorherr v Austria*, app. no. 133 08/87.

Symbols were the form of expression which ignited one of the most complicated ECHR decisions of recent years, where the ECHR had to criticise the ways in which different post-communist countries catch up with their non-democratic past. In *Vajnai v. Hungary*<sup>27</sup> the applicant, a Vice-President of the Workers' Party (Munkáspárt) – a registered left-wing political party – was speaking at a lawful demonstration in Budapest. On his jacket, the applicant wore a five-pointed red star as a symbol of the international workers' movement. In application of section 269/B (1)<sup>28</sup> of the Criminal Code, a police patrol called on the applicant to remove the star, which he did. Nevertheless, subsequently, criminal proceedings were instituted against him for having worn a totalitarian symbol in public and finally he was convicted, while the Hungarian court refrained from imposing a sanction for a probationary period of one year. During the criminal proceedings he made an attempt to refer a preliminary question to the ECJ, but the ECJ declared<sup>29</sup> that it had no jurisdiction to answer the question referred by the Hungarian Court because the applicant's situation was not connected in any way with any of the situations contemplated by the provisions of the treaties and the Hungarian provisions invoked in the main proceedings were outside the scope of EU law.

The ECHR had no doubt that the public display of a symbol is covered by Article 10 of the European Convention and there was no doubt that the freedom guaranteed by this provision had been interfered with by the criminal prosecution. The crucial question was whether this limitation was proportional to the aims suggested by the Hungarian government, i.e. protection of the restored Hungarian democracy against any risk of Communist subversion and respect towards the victims of Soviet occupation of Hungary in 1956 who perceived a five-pointed red star more as a symbol of Soviet oppression and bloodshed in the streets of Budapest than a symbol of any workers' movement. The ECHR expressed some sympathy for the intended criminalisation of a public display of this ambiguous symbol, yet in a wonderful 'Solomonic' decision it classified its prohibition as disproportionate:

The Court is of course aware that the systematic terror applied to consolidate Communist rule in several countries, including Hungary, remains a serious scar in the mind and heart of Europe. It accepts that the display of a symbol which was ubiquitous during the reign of those regimes may create uneasiness amongst past victims and their relatives, who may rightly find such displays disrespectful. It nevertheless considers that such sentiments, however understandable, cannot set the limits of freedom of expression on their own. Given the well-known assurances which the Republic of Hungary provided legally, morally and materially to the victims of Communism, such emotions cannot be regarded as rational fears. In the Court's view, a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgement. To

<sup>27</sup> ECHR judgment of 8 July 2008, *Vajnai v. Hungary*, app. no. 33629/06.

<sup>28</sup> '(1) A person who (a) disseminates, (b) uses in public or (c) exhibits a swastika, an SS-badge, an arrow-cross, a symbol of the sickle and hammer or a red star, or a symbol depicting any of them, commits a misdemeanour – unless a more serious crime is committed – and shall be sentenced to a criminal fine (pénzbüntetés).

(2) The conduct proscribed under paragraph (1) is not punishable, if it is done for the purposes of education, science, art or in order to provide information about history or contemporary events.

(3) Paragraphs (1) and (2) do not apply to the insignia of States which are in force.'

<sup>29</sup> See ECJ order of 6 October 2005 In Case C-328/04, reference for a preliminary ruling from the Fővárosi Bíróság (Hungary) in the criminal proceedings against Attila Vajnai.

hold otherwise would mean that freedom of speech and opinion is subjected to the heckler's veto.<sup>30</sup>

How does this reluctance to accept criminalisation of a publicly worn five-pointed red star conform with an acceptance of a similar prohibition directed to the swastika, prevalent in several European countries? The answer is hidden in the question. We suppose that what makes the difference between these two symbols with a bloody totalitarian record is the fact that criminal prohibition of the swastika is supported by several European legal orders, whereas Hungary was alone in prohibiting five-pointed red stars. The ECHR could sense a European 'consensus' around the acceptability of the latter symbol.

## Limits of Freedom of Expression

The case of *Vajnai v. Hungary* reveals the conditions that must be fulfilled to make a limitation of the discussed freedom compatible with the European Convention. In the Universal Declaration of Human Rights and in the EU Charter there are no specific provisions defining these limits, supposedly because of their (originally) declaratory character. The limitations in Article 19(3) of the International Covenant on Civil and Political Rights follow a structure similar (apart from the condition of 'necessity in a democratic society') to the construction of limitations included in Article 10(2) of the European Convention.

The latter provision requires three conditions to be satisfied simultaneously if a state intends to limit the freedom of expression. First, any restriction has to be 'prescribed by law.' This is usually not problematic in civil law countries. On the contrary, the UK had to accept that, if prisoners' correspondence with their friends outside prison is limited by a prison regulation, such a regulation cannot be regarded as 'a law.'<sup>31</sup>

On the other hand, the ECHR accepted that the case-law – even ambiguous case-law – of the House of Lords can be regarded as 'a law,' despite the fact that for continental European lawyers this is a rather counter-intuitive attitude. The House of Lords case-law was accepted as 'a law' for example in the case of *Sunday Times v. U.K. (No. 1)*,<sup>32</sup> where the ECHR defined what makes a limitation of freedom of expression 'necessary in a democratic society':

To assess whether the interference complained of was based on "sufficient" reasons which rendered it "necessary in a democratic society," account must thus be taken of any public interest aspect of the case.... It is not sufficient that the interference involved belongs to that class of the exceptions listed in Article 10 (2) which has been invoked; neither is it sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms: the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it.<sup>33</sup>

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<sup>30</sup> Ibid, p. 57.

<sup>31</sup> ECHR judgment of 25 March 1983, *Silver and others v. U.K.*, app. no. 947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75.

<sup>32</sup> ECHR judgment of 26 April 1979, *Sunday Times v. U.K. (No. 1)*, app. no. 6538/74.

<sup>33</sup> Ibid, p. 65.

Thirdly, the ‘necessary’ limitation ‘prescribed by law’ has to fulfil one of the legitimate aims listed in the final part of Article 10(2). Each of these legitimate aims should best be analysed in a separate paper; here we can only distinguish them and refer to some of the milestone ECHR cases illustrating their interpretation. These six legitimate aims are: national security, territorial integrity and public safety;<sup>34</sup> prevention of disorder or crime;<sup>35</sup> protection of health or morals;<sup>36</sup> protection of the reputation or rights of others;<sup>37</sup> prevention of a disclosure of information received in confidence;<sup>38</sup> and maintaining the authority and impartiality of the judiciary.<sup>39</sup>

## Australian Perspective

Unlike the overlapping protections afforded by international, regional and domestic legal instruments in Europe, freedom of speech is somewhat fragile and limited in Australia. There is no explicit constitutional protection for freedom of speech along the lines of Article 10 of the European Convention on Human Rights. Australia has neither a strong tradition of thinking about freedom of speech, nor a predisposition to adopting international formulations of this right, among others, in domestic law.<sup>40</sup> Though ratified, Australia has not enacted the ICCPR into federal law, but has scheduled it to the Australian Human Rights Commission Act 1986. This has not proved effective in enforcing ICCPR rights.<sup>41</sup> Some rights protected by the ICCPR have a ‘small and almost random presence’<sup>42</sup> in Victoria’s Charter of Rights and Responsibilities 2006<sup>43</sup> and the ACT’s Human Rights Act 2004. However, these Acts represent a so-called dialogue model; they aim to facilitate dialogue between the three arms of government – the executive, the parliament and the judiciary – and are a far cry from the USA, or typical European, model of constitutionally embedded rights.

Australia remains the only Western democracy not to have a Bill of Rights. Consequently, the approach to the protection of fundamental rights in Australia has been called a patchwork approach<sup>44</sup> – an eclectic collection of constitutional provision, common law, legislation and policy across Commonwealth and state levels. Despite traditional support for this model from former prime ministers<sup>45</sup>, scholars and others

<sup>34</sup> See for example ECHR judgment of 26 November 1991, *Observer and Guardian v U. K.* 1991, app. no. 135 85/88.

<sup>35</sup> See for example ECHR judgment of 21 January 1999, *Janowski v Poland*, app. no. 25716/94.

<sup>36</sup> See for example ECHR judgment of 25 November 1996, *Wingrove v. U.K.*, app. no. 19/1995/525/611.

<sup>37</sup> See for example ECHR judgment of 8 July 1986, *Lingens v. Austria*, app. no. 9815/82.

<sup>38</sup> See for example ECHR judgment of 27 March 1996, *Goodwin v. U.K.*, app. no. 16/1994/463/544.

<sup>39</sup> See for example ECHR judgment of 26 April 1979, *Sunday Times v. U.K.* (No. 1), app. no. 6538/74.

<sup>40</sup> Even today judicial decisions in Australia make little reference to international human rights law. Furthermore, governments have not always responded well to criticism from UN bodies. For example, the reluctance on the part of the Howard government to intervene to override mandatory sentencing laws in Western Australia and the Northern Territory provoked a negative report and censure by the UN Committee on the Elimination of Racial Discrimination (CERD). The UN’s censure of Australia was in turn condemned by the Australian government, which viewed the UN’s stance as an intrusion on Australia’s domestic political affairs. See further: M. Longo, ‘Hostile Receptions: Dilemmas of Democracy, Legitimacy and Supranational Law,’ *Australian Journal of Politics and History*, Vol. 50, No. 2, 2004, p.218.

<sup>41</sup> A. McBeth, J. Nolan and S. Rice, *The International Law of Human Rights*, Melbourne, Oxford University Press, 2011, p. 356.

<sup>42</sup> *Ibid.*

<sup>43</sup> While the *Victorian Charter of Rights* gives some recognition to widely accepted civil and political rights derived from the ICCPR, including freedom of expression, the human rights set out in the Victorian law are not absolute. Critics of the Charter have argued that it delivers vague and open-ended powers into the hands of judges, undermines Parliamentary democracy, is costly and bureaucratic and fails to provide effective remedies for citizens. Furthermore, the *Charter* does not itself create new causes of action (section 39), though it recognizes that existing causes of action - especially administrative review and injunctive relief - are possible.

<sup>44</sup> McBeth et al, op. cit., p. 343.

<sup>45</sup> E.g. Prime Ministers Menzies and Howard were avid supporters of this approach.



it has become increasingly evident that '[t]he common law is not as invincible a safeguard against violations of fundamental rights as it was once thought to be.'<sup>46</sup>

## Implied Constitutional Right

There are very few express rights guaranteed by the Australian Constitution. However, the High Court has recognised that the text and structure of the Constitution may give rise to implied freedoms that go beyond the rights expressly guaranteed in the Constitution. The implied freedom to discuss political affairs is the leading example. *Australian Capital Television Pty Ltd v Commonwealth*<sup>47</sup> recognised that the right to free political communication was implicit in the representative parliamentary democracy established by the Constitution. This freedom provided a constraint against legislative power.<sup>48</sup> It did not confer a broad, multi-faceted freedom of speech, as in many other Western democracies, but rather a freedom whose only purpose was to protect political free speech. Underpinning the theory of democracy, the freedom is thought to be essential to its proper functioning in that it facilitates public participation in decision-making. The argument is that citizens cannot exercise their right to vote effectively or contribute to public decision-making if access to information and ideas is not readily available or if they are unable to express their views freely.

The High Court's reliance upon underlying constitutional concepts such as representative government or representative democracy in support of the implication gave rise to uncertainty as to the scope of the implied freedom, which was explored in *Theophanous v Herald & Weekly Times Ltd*.<sup>49</sup> The case concerned the question of whether the implied freedom affected the scope or content of the common law protection against defamation, the High Court majority recognising a constitutional defence to defamation and appearing to conceptualise the implied freedom somewhat broadly on the understanding that the Constitution was based on principles of representative democracy which gave rise to any implications 'necessary' to sustain such a democracy. In *Theophanous*, the majority therefore purported to supplement existing common law defences to defamation with constitutional defences applicable in cases concerning political communication (e.g. defamation regarding a politician's political performance). This decision was not embraced by all. It seemed to confer a new personal right to free speech. It pointed to a period of judicial activism in the development of implied constitutional rights, which, however, proved to be short lived as considerable backtracking has ensued.

The reasoning upon which the decision in *Theophanous* was based was doubted in *Lange v Australian Broadcasting Corporation*.<sup>50</sup> Lange, a former Prime Minister of New Zealand, brought an action for defamation against the defendant, the ABC, in respect of comments made during a Four Corners television broadcast. The ABC relied on the *Theophanous* 'constitutional defence', pleading that the broadcast was protected by the implied constitutional protection of political communication. The High Court unanimously rejected the proposition that the implied freedom of political

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<sup>46</sup> Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience,' *Federal Law Review*, Vol. 16, No.1, 1986, pp.1-28, p.12. Australia's 21<sup>st</sup> Century experience with regard to anti-terrorism laws and the mandatory detention of asylum seekers may further illustrate this proposition.

<sup>47</sup> (1992) 177 CLR 106.

<sup>48</sup> *Lange* (1997) 189 CLR 520; *Monis* [2013] HCA 4.

<sup>49</sup> (1994) 182 CLR 104.

<sup>50</sup> (1997) 189 CLR 520.

communication created a constitutional defence to common law defamation. While the Constitution protects the freedom of political communication, the nature of the implied freedom was not that of a personal or individual right capable of conferring private rights in common law defamation actions. Accordingly, the protection was not absolute.

In reaching this decision the Court confirmed its commitment to an implied freedom of political communication drawn from the terms and structure of the Constitution. The terms and structure of the Constitution imposed clear limits on the Court's capacity to develop implied freedoms from Australia's system of representative government.<sup>51</sup> Without this freedom, citizens could not be informed about their political representatives and representatives could not in turn be responsible to the people.<sup>52</sup>

Despite significant differences between the Australian and European approaches in terms of the breadth of the protections in Europe, there are similarities in principle between the test enunciated in *Lange* and the requirements of Article 10(2) of the European Convention. Of the six legitimate aims set out in Article 10(2), the protection of public safety, the prevention of disorder and the protection of the reputation or rights of others resonate most clearly in Australia. In application, however, the implied freedom is beset by uncertainty.

## The Lange Test

The unanimous judgment<sup>53</sup> in *Lange* yielded the Australian test to determine when the implied freedom will invalidate a law. If the law burdens the freedom of communication and is not reasonably appropriate and adapted to serve a legitimate end [in a manner]<sup>54</sup> compatible with the constitutionally prescribed system of representative and responsible government and s 128, the law will be invalid.<sup>55</sup>

In its application the Lange test has elicited considerable confusion. As the implied freedom is not absolute, it is uncertain how far the protection granted by political communication extends. The scope of the freedom has remained unclear due to interpretative divergence,<sup>56</sup> most recently in *Monis v The Queen*<sup>57</sup> and *Rundle Street Mall*.<sup>58</sup> With every new judicial appointment comes potential change in the application of the test – an uncertainty the Europeans (at least those with a civil law tradition) do not have to contend with. The cases demonstrate the relative fragility of the implied common law right to political communication.

## Monis Case

<sup>51</sup> Ibid pp. 566-567. The source of the freedom lies in the specific terms of the Constitution in ss 7, 24, 64 and 128 not from the notion of representative or responsible government as a concept. The freedom ensures the functioning of a democratic system of government featuring open discussion on political and governmental matters.

<sup>52</sup> E. Arcioni, 'Developments in free speech in Australia: Coleman and Mulholland,' *Federal Law Review*, Vol. 33, No. 2, 2005, p. 334.

<sup>53</sup> Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

<sup>54</sup> Modifications made in *Coleman*. Originally suggested by Kirby J in *Levy v Victoria* (1997) 189 CLR 579. See: *Coleman v Power* (2004) 220 CLR 1, 51, 78, 82.

<sup>55</sup> *Lange* (1997) 189 CLR 520, 567.

<sup>56</sup> See e.g. D. Sedgwick, 'The implied freedom of political communication: an empty promise?', *University of Western Sydney Law Review*, Vol. 7, 2003, p35-51, p. 36. Sedgwick decries the shortlived unanimity of the court, with interpretational difference in the *Lange* test becoming evident mere weeks after its inception.

<sup>57</sup> [2013] HCA 4.

<sup>58</sup> *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3.

Monis was charged under section 471.12 of the Criminal Code<sup>59</sup> with using the postal service in an offensive manner after sending hate mail to families of fallen Australian soldiers in which he discussed Australia's military involvement in Afghanistan. Monis argued that the law impinged on his implied right to political communication.<sup>60</sup> All six judges (unusually, there were six judges sitting rather than the usual seven) accepted that the letters amounted to political communication, but the Court split 3:3 on whether the offences were a reasonable burden on the freedom of political communication. As the Court was evenly split, the decision of the lower court allowing the prosecution against Monis stood. While the courts have been preoccupied over more than two decades with setting appropriate boundaries to frame the freedom of expression, those boundaries are currently blurred.

Chief Justice French, and Justices Hayne and Heydon found section 471.12 invalid because it impermissibly burdened freedom of communication about government or political matters, putting it at odds with the Constitution. French CJ found no legitimate end served by section 471.12 as the purpose of the provision – prevention of uses of postal or similar services which reasonable persons would regard as offensive – was too broad to be compatible with the maintenance of the freedom of communication necessary for the system of representative government.<sup>61</sup> Justice Hayne elaborated on French CJ's reasoning in relation to the illegitimate object of section 471.12. He found the purpose of section 471.12 related to penalising and preventing offence in relation to the postal service, not to protect from harm.<sup>62</sup> Therefore, section 471.12 did no more than regulate the 'civility of discourse.'<sup>63</sup> As 'abuse and invective are an inevitable part of political discourse,'<sup>64</sup> the restriction of such communications in this way would radically alter the conduct of political discourse and contravene the notion of responsible government.<sup>65</sup> Heydon J agreed with French CJ's interpretation of the Lange test, holding that it is beyond the legislative power of the Commonwealth to prohibit and punish such conduct.<sup>66</sup> Thus, the offensiveness of political communications cannot constitute a sufficient reason to impinge on the freedom of political communication.

On the other side, Crennan, Kiefel and Bell JJ found the law to be valid. Viewing the purpose of the offence as '[protecting] people from the intrusion of offensive material into their personal domain',<sup>67</sup> these justices found the law to be proportionate to the end it served<sup>68</sup>, as the protective purpose of section 471.12 went no further than necessary to achieve its aim and did not impose too great a burden on the implied freedom.<sup>69</sup> They considered representative government through the necessity of the postal service in facilitating communication. For the maintenance of public confidence in the postal service, they argued that the provision was necessary to prevent unsolicited, seriously offensive material.<sup>70</sup> Thus, a law which sought to protect the

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<sup>59</sup> *Criminal Code 1995* (Cth), s 471.12 renders it an offence for a person to use a postal or similar service 'in a way...that reasonable persons would regard as being, in all the circumstances...offensive.'

<sup>60</sup> *Monis* [2013] HCA 4, [7].

<sup>61</sup> *Ibid* [74].

<sup>62</sup> *Ibid* [178].

<sup>63</sup> *Coleman v Power* (2004) 220 CLR 1, 199. Civility of discourse is not a legitimate object or end.

<sup>64</sup> *Monis* [2013] HCA 4, [220].

<sup>65</sup> *Ibid*.

<sup>66</sup> *Ibid* [236].

<sup>67</sup> *Ibid* [324].

<sup>68</sup> In terms of the second limb of the *Lange* test.

<sup>69</sup> *Monis* [2013] HCA 4, [335-347].

<sup>70</sup> *Ibid* [320-321].

public from receiving extremely offensive or insulting material through the mail into their homes was legitimate. This judgment arguably moderates an absolute freedom, preventing it from becoming pernicious. Nonetheless, it may alternatively be viewed as an attack on the freedom of expression. The judgment can be contrasted with the decision in *Vajnai v. Hungary*.

## **Rundle Street Mall Case**

This case concerned the constitutionality of By-law No. 4, passed by the Adelaide City Council. The By-law was designed to prevent the obstruction of traffic and the safe and convenient use of roads. The facts of the case were set out by French CJ. Samuel and Caleb Corneloup, founders of an incorporated association known as ‘Street Church’, commenced preaching their religious and associated political beliefs in the Rundle Street Mall, Adelaide’s central shopping district. They had done so without permission from the City of Adelaide, as required by By-law No 4. The Council had sought an injunction in the Supreme Court to restrain the defendants from preaching, canvassing, haranguing or distributing printed material within the area of the City, unless they held a permit to do so. This proceeding was adjourned pending the outcome of the High Court case concerning the constitutional validity of By-law No. 4. The High Court case was on appeal from a decision of the Full Court of the Supreme Court which had decided that the relevant provisions of the By-law infringed the implied freedom of political communication.

In a majority decision, the High Court overturned the Full Court’s ruling that the By-law was unconstitutional. It held the By-law ‘effectively burdened’ political communication but did not unreasonably impinge upon the implied constitutional right to freedom of speech. Although the By-law restricted free speech, the Council was entitled to legislate to maintain public safety and order. The decision confirms once again that the freedom is not absolute and that the Court is disposed to tolerating a significant degree of intrusion onto the freedom. While, the High Court’s reasoning and methodology in subjecting the restriction to a test of proportionality may sound quite familiar to a European lawyer, the outcome may well have been different in a European jurisdiction or in the USA. We can suppose that in some post-communist European countries (like Poland, Slovakia or the Czech Republic) with their historic record of religious oppressions by the Communist regime, the courts would (and should) be rather reluctant to accept limits to the exercise of freedom of expression connected with freedom of religion. In the ECHR the big question would be whether the risks to ‘public safety and order’ are specified and important enough for the measure to stand the proportionality test. In most European jurisdictions and particularly in countries influenced by the German legal tradition, the courts (especially the constitutional courts) would not countenance a limitation of the freedom of expression by a By-law.

## **The Balancing Act**

While there are doubts about the degree of tolerance for highly offensive speech in Australia, the proposition that the right is not absolute is advanced by many in a modern democracy based on the rule of law, pluralism and respect for human dignity.

The decision by Bromberg J in *Eatock v Bolt*<sup>71</sup> that Andrew Bolt, well-known Herald Sun columnist, had breached the Racial Discrimination Act 1975 (Cth) in his articles about the self-identification as indigenous of prominent ‘fair skinned’ Aboriginal Australians, is not necessarily viewed as an illegitimate attack on free speech. Bromberg J carefully described the process of balancing the right to free speech against the rights of persons who might be offended by Bolt’s words:

[The columns] will have been read by persons inclined to regard Mr Bolt as speaking with authority and knowledge. They will likely have been read by some persons susceptible to racial stereotyping and the formation of racially prejudicial views. I have no doubt ... that racially prejudiced views have been “reinforced, encouraged or emboldened.” I have taken into account the value of freedom of expression and the silencing consequences of a finding of contravention... Given the seriousness of the conduct involved, the silencing consequence appears to me to be justified.<sup>72</sup>

Central to Bromberg J’s reasoning was the consideration that Bolt should not be able to get away with errors of fact, distortions of the truth and inflammatory language.<sup>73</sup> Sarah Joseph notes that Bromberg J was clearly influenced by principles of defamation law.<sup>74</sup> Bromberg J remarked that ‘[t]he intrusion into freedom of expression is of no greater magnitude than that which would have been imposed by the law of defamation if the conduct in question and its impact upon the reputations of many of the identified individuals had been tested against its compliance with that law.’<sup>75</sup> Arguably, an unintended consequence of this decision was the deactivation of a probable wide-ranging debate on the value of free speech and the risks posed to society in failing to nurture it. It is likely that public feelings towards Bolt – a polarising figure – had a debate-distorting effect.

Certainly, the Bolt case, fanned by media attention, has further politicised the right to expression in Australia. Nonetheless, there is no question that the judicial divergence on the nature and scope of the implied constitutional freedom of political communication reflects the wider societal uncertainty about the appropriateness and desirability of an absolute or unfettered constitutional right to free speech. It may be appropriate that there be continual questioning of the parameters of the freedom when the destructive power of words is so readily understood. The question whether there are acceptable limits to freedom of expression is pertinent in every society which recognises the right to free speech, whether or not the legal instruments which give rise to the right are robust (as in Europe) or fragile (as in Australia).

Legal restraints on the freedom – the product of judicial judgment in Australia – rightly operate in concert with social norms, which change over time. Social norms currently point to the need to balance the freedom against the damage that an unfettered exercise of expression may cause to the values of truth, reputation, personal safety, social cohesion, privacy and the respectful treatment of others. Be this as it may, there are consequences for the freedom of expression. There is much at stake, and as such, careful examination is warranted.

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<sup>71</sup> [2011] FCA 1103.

<sup>72</sup> *Eatock v Bolt* [2011] FCA 1103, [421], [423].

<sup>73</sup> G. Barns, ‘Even Bolt’s freedom of speech isn’t an absolute right,’ *The Drum*, 29 September 2011, <<http://www.abc.net.au/unleashed/3035386.html>>, accessed 12 June 2013>.

<sup>74</sup> A. Bolt, Free Speech, and Racial Intolerance, Castan Centre for Human Rights Law, The Official Blog, 29 September 2011 <<http://castancentre.com/2011/09/29/andrew-bolt-free-speech-and-racial-intolerance>>, accessed 12 June 2013

<sup>75</sup> *Eatock v Bolt* [2011] FCA 1103 [423].

## Conclusion

Following the *Monis* decision it is unclear how the law concerning the implied constitutional freedom will evolve in respect of highly offensive speech. New judicial appointments to the High Court have not yet pronounced on the issue. The freedom of expression has become increasingly politicised<sup>76</sup> and uncertain in Australia. A recent Federal Court decision in *Bolt* and proposals for new media laws and reforms to existing laws have thrust the freedom onto centre stage. High Court decisions in the *Monis* and *Rundle Street Mall* cases have raised doubts as to the extent to which the right is currently protected in Australia. A review of these cases makes it clear that the prevailing approach is to achieve a balancing between the implied freedom of political communication and the public interest,<sup>77</sup> but the public interest in preserving freedom of expression is sometimes downplayed. The way in which Australia conceives of, and construes, the freedom of expression differs greatly from other jurisdictions in Europe and elsewhere. While in Australia, freedom of political speech is (only) an implication of democracy, and therefore subject to judicial curtailment, in Europe freedom of speech of all kinds is ‘an end in itself,’ deserving of judicial protection. Indeed, the ECHR and the ECJ are fully fledged guardians of the rights set out expressly and progressively in legally binding instruments including the European Convention and the EU Charter. Thus, under the European Convention, political speech, as a necessary precondition for a functioning democratic discourse, deserves strong protection.<sup>78</sup> Despite the implication of a constitutional right to free political communication, not all political speech appears to be protected in Australia and several laws criminalise forms of speech that would possibly be protected in other democratic countries. The absence of an express right to free speech means that the High Court can ultimately rule against the existence of such a right or further limit the right.

However contested or divisive this issue may be, most societies acknowledge that there are limits to the freedom of expression, at least when that expression impedes the fulfilment and enjoyment of other rights. Though this discourse is apparent in Europe as in Australia, the European position is distinguished from the Australian by the plethora of legal safeguards to free speech and the high salience and visibility of the issue – unsurprising given Europe’s history. While the freedom of speech may be prone to limitation and erosion everywhere, the right is subject to an additional fundamental risk in Australia, as the limits of constitutional implications become increasingly apparent and community deliberation on the issue waxes and wanes.<sup>79</sup>

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<sup>76</sup> Claiming that the freedom of speech is under attack, then Opposition legal affairs spokesman George Brandis accused the previous Gillard government of ‘a conscious, systematic attempt to change the culture so that freedom of speech and expression is degraded among our public values in place of other newly imagined rights, whose very vagueness conceals an ideological agenda as illiberal as anything this country has seen in the political mainstream’: C. Kerr, ‘Freedom of speech deserted, says George Brandis,’ *The Australian*, 7 May 2013 <<http://www.theaustralian.com.au/national-affairs/freedom-of-speech-deserted-says-george-brandis/story-fn59niix-1226636376014>>. Senator Brandis, now Attorney-General, has proposed a reform of s 18C of the *Racial Discrimination Act* that would loosen constraints on racial insults.

<sup>77</sup> See: E. Arcioni, ‘Politics, police and proportionality: an opportunity to explore the Lange test: *Coleman v Power*,’ *Sydney Law Review*, Vol. 25, No. 3, 2003, pp. 379-90; R. Greenwood, ‘A progressive court and a balancing test: *Rowe v Electoral Commissioner* [2010] HCA 46,’ *University of Western Sydney Law Review*, Vol. 14, 2010, p. 119-137.

<sup>78</sup> ECHR judgment of 23 April 1992, *Castells v. Spain*, app. no. 11798/85.

<sup>79</sup> There is renewed interest in the issue following the Abbott government’s proposals for the amendment of the provision in s 18C of the *Racial Discrimination Act*.