

What is political speech? *Levy v. Victoria V* Research Note 2 1997-98

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Political participation in Australian democracy is not limited to the casting of votes for parliamentary representatives. For example, members of the community lobby their representatives, join political parties and make donations to pressure groups. From time to time individuals and groups take more direct action. They stage demonstrations and protests to draw attention to their cause, whether it be to stop abortions or to preserve the environment.

In early 1995 Parliament House was blockaded by loggers protesting restrictions placed on the logging of certain forests pending an evaluation of their environmental status. In August 1996 protests about changes to workplace relations law resulted in injury and property damage at Parliament House.

The Joint Standing Committee on the National Capital and External Territories in May 1997 completed a report entitled *A Right to Protest*. The Report noted 'a strong community expectation that a right to protest should be acknowledged as a fundamental principle of Australian society' (p xv). It recommended, amongst other things, that in certain circumstances a permit be obtained where a structure is to be placed on national land as part of a protest (p xx). Does the Commonwealth have the capacity to place such limitations on protests or demonstrations in Australia? Would such restrictions impinge on the guarantee of political communication implied into the Constitution?

In the now well known, but nevertheless, still somewhat controversial decisions, *Australian Capital Television v Commonwealth* [(1992) 177 CLR 106] and *Nationwide News v Wills* [(1992) 177 CLR 1] the High Court in 1992 recognised an implied guarantee of communication on political matters in the Constitution. The guarantee was discussed in relation to defamation law in 1994 in *Theophanous v Herald and Weekly Times Ltd* [(1994) 182 CLR 104], in *Stephens v West Australian Newspapers* [(1994) 182 CLR 211], and earlier this year in *Lange v ABC* [(1997) 145 ALR 96].

In *Levy v Victoria*, handed down on 31 July 1997, the High Court considered the extent to which the implied constitutional freedom of

political communication protects conduct. Does the implied constitutional freedom restrict the Commonwealth's capacity to pass laws limiting political protests?

Levy: *The Facts*

Levy's case involves legislation passed by the Victorian, not the Commonwealth Parliament. Regulations made under the Victorian *Wildlife Act 1975* and the *Conservation, Forests and Lands Act 1987* made it an offence to be within an area set aside for the hunting of game birds at the beginning of the hunting season without a licence. Mr Laurence Levy had for some time opposed duck shooting in Victoria. In early June 1994, at the commencement of the duck shooting season, he was charged with being in a hunting area during a prohibited time without a licence.

Mr Levy claimed he was in the area at the relevant time to collect dead and wounded ducks legally shot, as well as dead and wounded endangered species illegally shot. He also argued that he was attempting to draw the media's attention to the cruelty associated with duck shooting and to influence the Victorian peoples political judgment towards their Government's continued support of duck shooting.

Mr Levy argued that the regulation under which he was charged was invalid as it infringed the implied freedom of political communication. In six separate judgments, all seven members of the High Court rejected Mr Levy's argument and upheld the validity of the regulation.

The Decision

Chief Justice Brennan observed that given speech is often used to convey ideas about political issues, it is natural to consider the implied constitutional freedom of political communication 'as a freedom of speech'. But ideas may be articulated in various ways, by deeds or conduct as well as in words. The constitutional implication, his Honour said:

denies legislative or executive power to restrict the freedom of communication about the government or politics of the Commonwealth, whatever be the form of the communication, unless the restriction is imposed to fulfil a legitimate purpose and the restriction is appropriate and adapted to the fulfilment

of that purpose.

Justices Toohey and Gummow also expressly stated their belief that the implied freedom of political communication 'may extend to conduct where that conduct is a means of communicating a message within the scope of the freedom.' Similarly, Justice McHugh noted the importance of signs, symbols and images in conveying ideas and opinions and hence the implied freedom 'is not limited to verbal utterances.' While mindful of the differences between Australian and United States constitutional law, Justice Kirby usefully summarises the United States jurisprudence on freedom of speech.

The Court made it clear in *Levy*, as it had done in earlier cases, that the implied freedom is not absolute. Chief Justice Brennan, for example, noted that:

non-verbal conduct which is capable of communicating an idea about the government or politics of the Commonwealth and which is intended to do so may be immune from legislative or executive restriction so far as that immunity is needed to preserve the system of representative and responsible government that the Constitution prescribes.

Conduct, even though aimed at expressing ideas about political issues or the government, may in some cases need to be restricted in the public interest. Chief Justice Brennan cites as an example a law that banned bonfires in the interests of safety would not cease to be valid simply because someone sought to burn a political effigy. His Honour stated:

A law which prohibits non-verbal conduct for a legitimate purpose other than the suppressing of its political message is unaffected by the implied freedom if the prohibition is appropriate and adapted to the fulfilment of that purpose. Such a law prohibiting or controlling the non-verbal conduct, if it be reasonable in extent, does not offend the constitutional implication.

Laws which are reasonably appropriate and adapted to achieving some legitimate purpose, such as the protection of life, will not be invalid if they should also detract from the freedom to discuss political matters.

Justice Gaudron stated that whether a law that impinges on the implied freedom is valid depends on the purpose of the law. If the law is aimed directly at restricting communication on political matters, it will only be valid if it is necessary to achieve 'some overriding public purpose.' If it has some other legitimate end and only incidentally infringes the implied freedom, 'it is valid if it is reasonably appropriate and adapted to that other purpose.'

In this case, the Victorian Parliament placed restrictions on who may be present in a duck hunting area at the beginning of the hunting season. As Justice Dawson stated, although the regulation restricted the freedom of communication, it was 'appropriate and adapted to serve the legitimate end of ensuring the safety of persons with conflicting aims' likely to be in the area.

Are State issues protected by the Constitutional implication

In *Lange* the Court adopted a very broad view as to the nature and content of political discussion protected by the implied constitutional freedom. Discussion of State political issues is covered by the implication because of the integration of Australian social and economic life. Significantly in *Levy*, however, Chief Justice Brennan indicated that there may yet be some boundaries to be drawn by the Court. His Honour said that it may be arguable that the shooting of a protected species might trigger Australia's treaty obligations and therefore the subject matter at issue is of direct relevance to the Commonwealth. Chief Justice Brennan said that he would reject such an approach.

Conclusion

The implied constitutional freedom of political communication is not absolute. Laws that may restrict such communication may be valid if they are appropriate and adapted to achieving some legitimate end. What is appropriate will need to be tested in individual cases. The recommendation made in the Joint Standing Committee report, *A Right to Protest*, noted above, would seem to be on safe ground. But would, for example, a law banning environmentalists from entering certain areas of forest for safety reasons be valid? Further, comments made by Chief Justice Brennan as to the content of the freedom will most likely be revisited in later cases.

