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"EXPANSION OR CONTRACTION?": A COMMENT

VOTING RIGHTS

Langer and Compulsory Voting

GEOFF Lindell's paper, in discussing *Langer v Commonwealth*,[1] refers to compulsory voting, and appears to agree with the High Court in its general acceptance of the constitutional validity of compulsory voting.

I disagree. In my view the flaw in *Langer* is the failure of the Court to adequately address this issue, because it is fundamental to the constitutional issue behind the *Langer* case. Mr Langer's argument was essentially that it is contrary to the constitutional provisions requiring that members of parliament be chosen directly by the people for a voter to be compelled to allocate preferences to candidates for whom the voter has no preference or against whom the voter wishes to vote. This involves the elements of *compulsion*, ie the extent to which the voter can be compelled to vote in a formal manner; and the element of "choice", ie the extent to which members of parliament are truly "chosen by the people" if that *choice* does not adequately represent the will of the voter.

On the compulsion issue, the law is not clear.[2] In s245 of the *Commonwealth Electoral Act*, there is a legal obligation upon electors "to vote" at each election. The verb "vote" is not defined. However, other sections refer to the "marking of a vote" on a ballot paper, and a ballot paper being informal if there is no "vote" marked upon it.

Judicial authorities are mixed. In *Lubcke v Little*[3] Crockett J considered that one only needs to obtain a ballot paper to meet the compulsory voting requirements. He took the view that an informal vote is not an offence. The same view was expressed by Hogarth J in *Douglass v Ninnes*.[4] Barwick CJ, however, in *Faderson v Bridger*[5] considered it was also necessary to place the ballot paper in the box. In contrast, Blackburn CJ in *O'Brien v*

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1 (1996) 186 CLR 302.

2 The only jurisdiction in which this matter has been clarified is South Australia where s85(2) of the *Electoral Act* 1985 (SA) now provides that an elector who leaves the ballot paper unmarked but who otherwise observes the formalities of voting does not breach the compulsory voting requirement.

3 [1970] VR 807.

4 (1976) 14 SASR 377.

5 (1971) 126 CLR 271.

Warden[6] concluded that marking a ballot informally does not meet the requirements in the Act on how to vote, and is therefore an offence.

Why is this relevant to Mr Langer? McHugh J noted that Mr Langer did not challenge compulsory voting "in the sense of compelling a voter to attend a polling booth and place a ballot paper in the ballot box".[7] But he did challenge the validity of a legal obligation to record a preference against all candidates, including those which the voter wished to vote against. If a person has a legal right to vote informally, then it cannot be argued that he or she is being legally compelled to vote for people against the voter's will. If, however, the voter is required by law to vote for people and give full preferences, and this may not be the "genuine choice" of the voter, then there is a strong argument that this is contrary to s24 of the Constitution.

Moreover, if the only way to avoid giving preferences to candidates a voter rejects is to vote in the technically formal manner advocated by Mr Langer, then this is a genuine and legal political choice about which voters have the right to be informed, and which a person must have the right to advocate. After all, *Australian Capital Television v Commonwealth*[8] protected political advertising which exhorted people to exercise their genuine choice in certain valid manners. Mr Langer was doing the same thing.

McHugh J noted in *Langer* that the High Court had previously upheld the validity of compulsory voting,[9] but the High Court in *Judd v McKeon*[10] only addressed the form of compulsory voting of requiring a person to collect and deposit the ballot paper, not the form which requires a voter to "vote" in a formal manner, giving preferences to all candidates. The issue has not yet been determined by the High Court.

The counter argument to the above is that, when the Constitution requires voters to exercise a "choice", it is only meant that a voter must be able to choose between the candidates. Brennan CJ stated in *Langer* that "provided the prescribed method of voting permits a free choice among the candidates for election, it is within the legislative power of the Parliament".[11] If taken to the extreme, a political party in control of both Houses of Parliament could enact a law that only members of that party may stand for parliament, and as long as there is a choice between candidates from that party, elections held under this system would be valid. To the extent that principles of representative democracy can be drawn from ss7 and 24 of the Constitution, then something more than mere choice between candidates must be involved. At the very least there must be a right not to choose.

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6 (1981) 37 ACTR 13.
7 (1996) 186 CLR 302 at 338.
8 (1992) 177 CLR 106.
9 (1996) 186 CLR 302 at 341.
10 (1926) 38 CLR 380.
11 (1996) 186 CLR 302 at 317.

It should be remembered that compulsory voting did not exist in Australia at the time of Federation.

The implication of freedom of political communication also supports this view. The need for a voter to be able to make an "informed" vote would be pointless unless what was at issue was the actual representation of the views of the electors and their desire to be represented by that person.

Ultimately, the question in *Langer* was whether it is contrary to the requirement in the Constitution that members of parliament be directly chosen by the people, to compel the people to vote in a manner that gives preferences to candidates they reject. In my view the High Court failed to address this question adequately,[12] and the judgment itself could be used to support laws which completely undermine democracy in this country.

FREEDOM OF POLITICAL COMMUNICATION

Application of Freedom of Political Communication to State and International Matters

Geoff Lindell's paper is critical of the approach taken in *Lange v Australian Broadcasting Corporation*[13] to the application of the freedom of political communication to political matters concerning the States or international political affairs. I am also critical of the way the Court approached this in *Lange*, but take a different point of view.

One of the issues that seemed to provoke Dawson J to encourage counsel in *Levy v Victoria*[14] to apply for the reconsideration of *Theophanous*[15] and *Stephens*[16] was the application of the implied freedom to State laws. Dawson J noted in court that the "indivisibility" argument involves the "proposition that the implication of freedom of speech which one derives from the Commonwealth Constitution operates not only as an inhibition on the legislative power of the Commonwealth, but also extends as a guarantee which operates in the States".[17]

If the constitutional implication of freedom of political communication derives from ss7 and 24 of the Constitution (and perhaps also s128), then it is intended to provide for a genuine choice in Commonwealth (rather than State) elections, and, for the purposes of

12 To be fair to the Court, it should be noted that this case was argued by a litigant in person, and these arguments may not have been adequately addressed for the Court to deal with them appropriately.
13 (1997) 189 CLR 520.
14 (1997) 189 CLR 579.
15 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.
16 *Stephens v Western Australian Newspapers Ltd* (1994) 182 CLR 211.
17 *Levy v Victoria,* transcript of proceedings, 6 August 1996, pp36-37.

doing so, to protect political communications concerning matters that will affect the assessment of voters who will later vote in Commonwealth elections or referenda.

First, therefore, State laws which affect political communications relevant to Commonwealth elections must be affected by the constitutional implication. State laws about advertising in newspapers or on billboards, or State laws about holding political rallies, would be relevant.

Second, State laws affecting political communication about State matters may also be affected by the constitutional implication, to the extent that discussion about State matters impacts upon Federal elections. As noted in Geoff Lindell's paper, a Western Australian Royal Commission investigating a former Western Australian Premier will have an impact upon Federal elections, especially when the former Premier has become a Commonwealth Minister.

What is needed is a test which takes into account the relationship between the political communication and representative government and elections at the Commonwealth level. It is not enough just to say that speech is "indivisible". If there is only a remote or tenuous relationship with political communication then this should be insufficient to found the application of the implied constitutional freedom. The High Court in *Lange* appears to have taken this approach, but it did not articulate any test and the matter has been left rather unclear.

While I recognise the practical difficulties for the courts in making this kind of assessment, the nature of the concept of political communication is such that lines will always have to be drawn around its boundaries. In the United States, recognition has been given to the role of philosophy, science, literature and art in developing political views, and works on such subjects have been considered to fall within the category of political communication. These will always be difficult matters for a court to determine, but that does not mean that they should therefore be ignored.

The Rejection by the High Court of Positive or Individual Rights

The other aspect of Geoff Lindell's consideration of *Lange* with which I disagree is his dismissal of the significance of the High Court's finding that the constitutional implication may only act as a limitation on legislative and executive power rather than as a personal or positive right.

It strikes me that this is the most fundamentally important aspect of *Lange*. It returns the implied freedom back to solid foundations in the Constitution. In *Theophanous* the Court wandered a little away from the constitutional roots of the implication. The majority there concentrated on achieving the object of the implication, rather than the manner in which the implication operates within the Constitution. Accordingly, instead of determining

whether or not defamation laws were invalid because of a limitation on legislative power, the Court established its own "test" which effectively set up a "defence" to defamation actions.

The majority in *Theophanous* transformed the implication into, at the very least, a "personal immunity" from the application of State laws. It could also be characterised as a "personal right" to freedom of political communication, which cannot be abrogated by the law, as long as the right is exercised in an honest and reasonable manner. The significance of pulling back from a personal right is profound. The development of constitutional law over the past decade, especially in Europe, has shown an increasing move towards the interpretation of constitutions as providing personal, and even positive, rights.

One development has been the move away from freedoms to rights. Classically, constitutions confer on individuals "freedom from" the application of state laws restricting freedom of speech etc, rather than a right to freedom of speech that can be exercised not only against the application of the laws of the states, but others. If a person has a "right" to freedom of speech, that right can be exercised against private individuals or bodies, such as clubs, private schools and media organisations.

One way of expanding the application of constitutional freedoms has been to expand the notion of the "state". To the extent that a body receives funding from the government, or is acting pursuant to the authority of the government, then it is argued that the state is responsible for it, and action may be taken against the state to the extent that "rights" have been breached. An example is a finding by the European Court of Justice that the state is responsible for private lawyers who are acting under legal aid programs.[18]

Another major development in Europe has been "drittwirkung". This is the process by which human rights are applied to relations between individuals. It can either be a direct process, by which one individual can seek redress for the violation of his or her rights by another individual or it can be, and is more commonly, indirect. Indirect drittwirkung works by finding the state responsible for the violation of human rights by another individual because the state has established a legislative or administrative regime which allows such a breach to occur. The state may therefore be positively obliged to legislate or undertake other acts to protect the relevant human rights and prevent future breaches.

Examples of cases in which states have been required by courts to enact legislation include Italy, where the Constitutional Court interpreted the right to freedom of expression as requiring legislation granting a right of access to the media[19] and Germany, where in a

18 *Artico*, Judgment 13/5/80, A/37. Referred to in Alkema, "The Third Party Applicability or 'Drittwirkung' of the European Convention on Human Rights" in Matscher (ed), *Protecting Human Rights: The European Dimension* (Heymanns, Koln, 2nd ed 1990) p39.

19 Referred to in Barendt, *Broadcasting Law - A Comparative Study* (Clarendon Press, Oxford 1993) pp149-150.

number of cases concerning television the courts have held that the right to freedom of expression requires the passage of legislation protecting access to and fairness in the media.[20]

In *Lange,* the High Court ruled out progress in these directions. It limited the implied constitutional freedom firmly to a negative limitation on legislative and executive power and rejected the notion that it could be exercised as a personal or positive right. In the scheme of constitutional law, as it is developing across the world, this is an extremely significant development.

20 See for example the *First Broadcasting Case* (1961) 12 BVerfGE 205. See extracts in Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, Durham, NC 1989) p406.