THE RIGHT TO PROTEST

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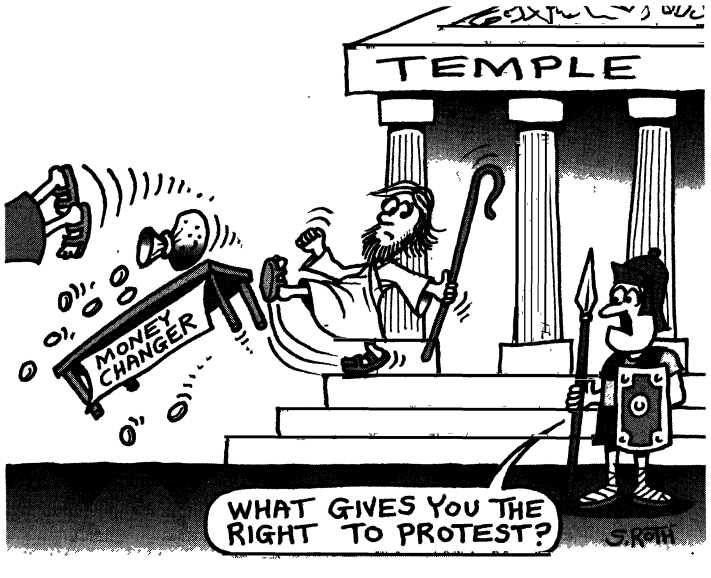
> That Mr Neal was an 'agitator' or stirrer in the magistrate's view obviously contributed to the severe penalty. If he is an agitator, he is in good company. Many of the great religious and political figures of history have been agitators, and human progress owes much to the efforts of these and the many who are unknown. As Wilde aptly pointed out in *The Soul of Man under Socialism*, 'Agitators are a set of interfering, meddling people, who come down to some perfectly contented class of the community and sow the seeds of discontent amongst them. That is the reason why agitators are so absolutely necessary. Without them, in our incomplete state, there would be no advance towards civilisation.' Mr Neal is entitled to be an agitator.[1]

Justice Murphy's robust affirmation of Mr Neal's entitlement to be an 'agitator' is full of the rhetorical flourish that has an immediate appeal for lawyers. It was not, however, the reason why the case was decided in favour of Mr Neal. The Court held that where the Court of Criminal Appeal had increased a sentenced imposed below it, it should have first formally granted the accused leave to appeal so that he had the opportunity to abandon the appeal. In other words, Mr Neal won on a technicality. The High Court did not share Murphy J's enthusiasm for Mr Neal's choice of vocation.

While it is often said that there is a right to protest, the existence of such a right at law is less clear. There is no right to protest traditionally recognised by the common law. It is not to be found in legislation nor is there any specific provision for the right to protest in the *Australian Constitution*. It is a concept that has come to be accepted by the courts on occasion because it has increasingly come to be held by the community that such a right exists as part of our democratic system of government. This is not the strongest basis for a legal right, and has potentially become all the more fraught with the introduction of anti-terrorist laws.



This article examines the right to protest to the extent that it presently exists in Australian law. It does not deal with laws that proscribe the right such as trespass, nuisance or besetting. Nor does it look at the right to protest in the context of industrial disputes.[2] Rather, it looks first at the right itself and in doing so argues that there is little that resembles a positive guarantee of a right to protest. While recognising that, as a consequence of the decision of *Coleman v Power*,[3] there may be a variety of different forms of communication protected by the implied constitutional freedom of political communication, this stops short of guaranteeing a right to protest. Indeed, if such a right exists at all it as a consequence of less well known developments dating back to the 1970s which in themselves afford only limited protection of our right to voice political dissent.

A right to protest?

In their book *Law, Liberty and Australian Democracy*, Gaze and Jones suggest that the right to protest is ancillary to the right of public assembly. They argue, however, that its value goes deeper than this:

> Public assemblies are essential to the proper functioning of democracy, in situations ranging from elections and political party meetings to demonstrations organised to protest about government policies or other issues. The right of assembly is significant not only for political reasons, but also as an important aspect of respect for individual autonomy, because without the right to express views in public and to call public assemblies for this purpose, the right of the individual to self expression is very limited.[4]

This passage follows an even more dramatic statement by Frank Brennan:

> If constitutional democracies are to be more than elected dictatorships, they must maintain legal and protected means for citizens' expression of political discontent. It is facile to claim that the vote, access to a local member, and the availability of a free press are sufficient means. There are some political issues that prompt feelings of moral outrage in the citizenry. The legal and protected means must include means for communication of such outrage. The most usual means for such communication are the public procession and assembly. A person's physical presence at a place or an event is the most powerful means of expression for one

REFERENCES

1. *Neal v The Queen* (1982) 149 CLR 305, 316–17.

2. Industrial disputes do provide interesting cases concerning the right to protest. For example, in *Australian Tramways Employees Association v Prahran and Malvern Tramway Trust* (1913) 17 CLR 680, it was found that the employees' desire to wear a union badge at work in order to demonstrate allegiance to the union could legitimately form part of an industrial dispute with their employer. This could be said to be recognition of a limited right to a form of silent protest in the context of industrial action or dispute.

3. (2004) 209 ALR 182.

4. Beth Gaze and Melinda Jones, *Law Liberty and Australian Democracy* (1990) 115.

There is no express provision of the right to protest in the Constitution. There is no right to protest at common law.

believing in or committed to a particular cause, person, or collection of persons. In society, a public gathering of persons is the most powerful means for expression of solidarity to the group and witness to those outside the group. It is to be expected that in relation to important political issues about which people feel moral outrage or concern they will want to use the best and most usual form of expression and communication of that outrage or concern.

The United States Supreme Court has stated:

> The right of the people peacefully to assemble for lawful purposes ... is, and always has been, one of the attributes of citizenship under a free government. It 'derives its source ... from those laws whose authority is acknowledged by civilised man throughout the world'. It is found wherever civilisation exists: *United States v Cruikshank* 92 US 552 (1876).

It must be assumed that the public protest will always be a possibility, and often an actuality, in a constitutional democracy. Thus the public assembly and political procession must be accorded recognised places in the constitutional machinery.[5]

The fact is, however, that in Australia the public assembly and political procession are not 'accorded recognised places in the constitutional machinery'. There is no express provision of the right to protest in the *Constitution*. There is no right to protest at common law. At best, peaceful assemblies, processions and associations are not unlawful. Provided that an assembly is peaceful, in good order and is conducted without threats, incitement to violence or obstruction of traffic, it is not prohibited. This has been said to constitute a common law right or freedom in negative form.[6] To some extent, this does afford protection of the right to protest. Courts have been prepared, for example, to hold that a procession is not unlawful if there is no intention to carry out an unlawful act, even if it could reasonably be expected that a breach of the peace might be committed by those opposed to it.[7] But this falls far short of recognising a positive right to protest. What it effectively amounts to is, as Lord Hewart CJ put it, 'nothing more than a view taken by the court of the individual liberty of the subject'.[8]

The courts have traditionally maintained that, for there to be an actual right to protest in Australia, there needs to be specific provision for it in legislation. As Zelling J of the South Australian Supreme Court stated:

> I do not know of any such juristic rights as a right to protest, save where the subject is petitioning Parliament — a right given by a House of Commons' resolution in 1619 which has become part of our law by section 38 of the *Constitution Act 1934* (SA) and its predecessors. The only other exception known to me is that contained in the *Public Assemblies Act 1972* (SA), which provides for a proper assertion of the right to go in procession in the public streets and inferentially to exercise a form of public protest. I accept that there is a general democratic right to protest against unwelcome political decisions. What I do not accept is that there is a juristic right to use the street for that purpose unless said by law to do so in the case of an order under the *Public Assemblies Act*.[9]

There is provision for a right to peaceful assembly and association at international law. The *International Covenant on Civil and Political Rights*, for example, provides:

> Article 21
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> The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.
>
> Article 22
>
> 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his or her interests;
> 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and the police in their exercise of this right.

International treaties, however, do not form part of the domestic law even when Australia is a party to them unless they are given effect by statute. This has not happened with respect to the rights of assembly and general association.[10]

A democratic right

Curiously, despite the lack of support for a right to protest at law, the courts have in recent time begun to recognise the right to protest as one of our democratic rights.[11] Conduct such as carrying placards[12] and flag burning[13] has been held to be legitimate exercises of this right. While this is does not represent a departure from the position at common law, it does represent an increasing acceptance of the role of protests as part of democratic system of government.

5. Ibid.

6. Butterworths, *Halsbury's Laws of Australia*, 80 Civil and Political Rights, 'III Political Rights' [80–2200].

7. *Beatty v Gillbanks* (1882) 9 QBD 308.

8. *Duncan v Jones* [1936] 1 KB 218, 222.

9. *Campbell v Samuels* (1980) 23 SASR 389.

10. International treaties are relevant to the interpretation of Australian statutes (*Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309) and the development of the common law (*Deitrich v R* (1992) 177 CLR 292; *Mabo v Queensland (No 2)* (1992) 175 CLR 1). Nevertheless, this has not yet been a basis on which the courts have sought to recognise a right to protest.

11. *Redel v Toppin* [1993] (Unreported, Supreme Court of Victoria, Eames J, 1 April 1993).

12. Ibid.

13. *Watson v Trenerry* (1998) 100 A Crim R 408.

This shift can be traced back to the 19th century case of *Beatty v Gillbanks*.[14] In that case, a local authority had prevented a march by the appellant and others who were members of the Salvation Army because on a previous occasion their peaceful procession encountered violent opposition from a group calling itself the 'Skeleton Army'. The Court held that the violence of the 'Skeleton Army' should not interfere with the Salvation Army's freedom of assembly. The court held that:

> what has happened here is that an unlawful organisation has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices [of the lower court] amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition.[15]

It was only in the mid 1970s, however, that the right to protest began to be considered by the courts as a freestanding concept. The basis for this was a report prepared by Lord Scarman in response to a request made by the British government. Scarman was asked to examine the adequacy of law to maintain public order in the face of the increasing number of popular demonstrations taking place in England at the time. His report advocated that there should be a place for the right of peaceful assembly and public protest, although this recognition was qualified. The report emphasised the priority of the right to passage, a right Scarman maintained to be antithetical and superior to the right to protest.[16]

Shortly after the release of Lord Scarman's report, his approach received endorsement in the decision of the English Court of Appeal, *Hubbard v Pitt*.[17] *Hubbard v Pitt* concerned an injunction to restrain protesters from assembling on the footpath outside a real estate firm. This firm was allegedly responsible for pressuring poor families to leave their homes during a period of redevelopment in the London suburb of Islington. The Court of Appeal upheld the injunction. The case nevertheless is significant for the dissent of Lord Denning. Relying on Lord Scarman's report and an earlier decision of *Nagy v Weston*,[18] Denning advocated a positive right to freedom of assembly. He maintained that a 'reasonable use' of the highway included a right to protest on matters of public concern and that the limited picketing involved in this protest was neither an unreasonable use of the street nor a common law nuisance. It was time, he argued, that the courts recognised a right to demonstrate.[19]

As a dissenting judgment Lord Denning's position is of limited application. Indeed, Lord Denning himself insisted that the 'right to demonstrate' was secondary to the need for good order and the passage of traffic. Further he conjectured that 'passage' was an activity inconsistent with protest. Still, Lord Denning's judgment can be seen to reflect a growing acceptance of protesting as a normal feature of the wider political landscape.

The 1987 decision of the Divisional Court, *Hirst and Agu v Chief Constable of West Yorkshire*,[20] took this acceptance one step further. Lorrain Agu and Malcolm Hirst were animal rights activists in Bradford who had been convicted for picketing a fur store. The case revolved around the question as to what was an unreasonable obstruction of the highway. The Divisional Court was critical of the original decision of the Crown Court for failing to consider whether the protesters had a lawful excuse. The Court was prepared to consider whether the protest was reasonable and could therefore amount to a lawful excuse.[21]

Coleman v Power

In *Coleman v Power*,[22] the High Court considered the implied constitutional freedom to discuss government and political matters recognised in *Lange v Australian Broadcasting Corporation*.[23] It could be argued that *Coleman v Power* extends the implied constitutional freedom such that it affords some protection to the right to protest. It is important to recognise, however, that it stopped short of guaranteeing a positive right.

Patrick Coleman had attracted the attention of local police when he tried to distribute a pamphlet in Townsville which, among other things, made allegations of corruption against a number of police members. He was arrested for using insulting words contrary to s 7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) (the *Vagrants Act*) and charges pertaining to resisting arrest. He was later convicted by a magistrate, appealed unsuccessfully (on that point) both to the District Court of Queensland and the Queensland Court of Appeal. Mr Coleman then appealed to the High Court, arguing the police action was unconstitutional in that it contravened his freedom of political communication as identified in *Lange*.

The basic principle espoused in *Lange* is that there exists a freedom of political communication implied in the system of representative government provided by the *Constitution*. This freedom involves a two-limbed test. First, to be found unlawful or to be read down in light of the freedom, a law must be found to infringe the freedom. Second, the law in question must not be 'reasonably appropriate and adapted to' a legitimate end compatible with the system of representative government provided.[24]

In the end, however, a majority of the court found that it did not need to apply *Lange*. Gummow, Hayne and Kirby JJ allowed the appeal in part by holding that s 7(1)(d) was valid but finding, as a matter of construction, the conviction was unlawful being beyond the power conferred by the *Vagrants Act;* that is, they found that the words Mr Coleman used were not insulting. Gleeson CJ, Callinan and Heydon JJ dismissed the appeal. McHugh J alone allowed the appeal by finding the section infringed the implied constitutional freedom.

Coleman v Power cannot be said to lend positive support to a right to protest. It is authority for the proposition that the words used by Mr Coleman did not contravene the *Vagrants Act*. The decision

14. (1882) 9 QBD 308.

15. Ibid 318.

16. See generally Rachel Vorspan, '"Freedom of Assembly" and the Right to Passage in Modern English History' (1997) 34 *San Diego Law Review* 921, 1014–15.

17. [1974] 1 QB 142.

18. [1965] 1 All ER 78.

19. Vorspan, above n 16, 1017.

20. (1987) 85 Crim App R 143.

21. Vorspan, above n 16, 1022.

22. (2004) 209 ALR 182.

23. (1997) 175 CLR 520.

24. See discussion in Graham Hryce, '*Coleman v Power* [2004] HCA 39, Lange Revisited: Deep Divisions Appear in the High Court', *Corrs Media and Defamation Newsletter* (September 2004).

The basic principle espoused in Lange is that there exists a freedom of political communication implied in the system of representative government provided by the Constitution.

discussed the types of communication protected by the decision in *Lange* but in doing so it did not guarantee a right to protest.[25] Indeed the discussion, as some commentators have pointed out, demonstrated deep-seated differences of opinion on the High Court. Justice Callinan openly doubted the validity of *Lange*, while Gleeson CJ and Heydon J appear to be lukewarm supporters. Justices Gummow and Hayne seemed to reduce it to a 'canon of statutory construction'.[26] While McHugh and Kirby JJ are both strong supporters of the implied freedom of political communication, McHugh J will retire during 2005, perhaps leaving Kirby J a lone voice on this issue.[27]

Anti-terrorism laws and other legal developments[28]

Since the attack on the World Trade Center in New York on 11 September 2001, a vast array of legislation has been passed aimed at terrorism and organised crime. This legislation may impact on the right to protest. The *Criminal Code Act 1995* (Cth), ss 101–101.6, for example, provides a broad definition of a terrorist act. A terrorist act occurs when:

1. a person commits an act with the intention to advance a political, ideological or religious cause; and
2. by doing the act they intend to coerce the government or intimidate the public; and
3. the act causes death, or serious physical harm to a person, endangers life (other than the life of the person doing the action), creates a serious health and safety risk to the public (or a section of the public), causes serious damage to property, or interferes with, disrupts or destroys an electronic system.

Advocacy, protesting, dissent and industrial action is excluded from this definition under s 100.1 3(b) provided it is not intended:

(i) to cause serious harm that is physical harm to a person; or
(ii) to cause a person's death; or
(iii) to endanger the life of a person, other than the person taking the action; or
(iv) to create a serious risk to the health or safety of the public or a section of the public.

Nevertheless, the University of Technology, Sydney Community Law Centre (UTSCLC) has suggested a number of interesting scenarios in its information kit *Be Informed: ASIO and Anti-Terrorism Laws*.

> Mary is a Roman Catholic and does not believe that abortion should be legal. She goes to her local abortion clinic every Friday with some friends to try and stop women getting into the clinic. A friend, Susan, issues a press release threatening to close down the clinic till 'no more babies are killed in that clinic.' Mary is sad that closing the clinic will hurt the women, but she believes she had to put her religious beliefs first. The protesters succeed in closing down the clinic for a whole afternoon. As a result, the patients have to re-schedule their appointments.[29]

Perhaps not the most sympathetic group of protesters, but as the UTSCLC publication points out:

> According to the law, it would appear that Mary and the other protesters have committed an act of terrorism because they have engaged in a protest for a religious cause, and they did this by trying to intimidate a section of the public from entering the abortion clinic, and this caused a serious health and safety risk. The defence that Mary and the protesters were engaged in a 'protest' does not count because the purpose of the protest was to shut down the clinic and create a serious health and safety risk.[30]

This is a starting point for further discussion. One can speculate as to scenarios involving other forms of protest such as industrial disputes, student and community demonstrations. This becomes all the more fraught if we consider what could constitute a serious health and safety risk to the public or a section of the public, what causes serious damage to property, or interferes with, disrupts or destroys an electronic system.[31]

Conclusion

To date, the right to protest exists in Australian law, if it exists at all, as a relatively weak right. In effect, it is little more than that described by Lord Hewart in 1936, namely, 'a view taken by the court of the individual liberty of the subject'.[32] While there has been some recognition of a wider democratic right to protest, this does not possess great legal force. Presently, protests are permitted so long as they are not unlawful. Protest will continue to be subject to various offences that may render such activity unlawful, be it besetting premises or some other breach of the law. It would seem that this includes recent laws designed to counter terrorism, which, ironically, curb one of the very freedoms these laws are supposedly designed to protect.

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25. In *Mulholland v AEC* (2004) 209 ALR 582 the Court emphasised that the implied freedom recognised in *Lange* is a freedom from interference in pre-existing rights and that it did not create positive rights of itself. Given the uncertainty concerning the right to protest this raises further questions with respect to the implied freedom of political communication and its effect upon the right to protest. See Belinda Thompson and Jonathan de Ridder, 'Background: Lange', September 2004 *Focus* 1.

26. Hryce, above n 24.

27 Ibid

28 This article was written before the advent of the Anti-Terrorism Bill 2005 (Cth) which will expand considerably powers aimed at dealing with terrorism. This will have significant ramifications for the right to protest. An example is the crime of sedition which, according to s 80.2 of Schedule 7 of the Stanhope draft, extends to recklessly causing 'force or violence' that 'would threaten the peace and good government of the Commonwealth'. This includes urging another to act in such a manner. A court determining whether such a person was entitled to the defence of acting in good faith under s 80.3 is able to consider whether he or she had intended to cause violence or create a 'public disorder or a public disturbance'.

29. University of Technology, Sydney Community Law Centre, *Be Informed: ASIO and Anti-Terrorism Laws* (2005) 3.

30. Ibid.

31. Would an electronic system include public transport, for example?

32. *Duncan v Jones* [1936] 1 KB 218, 222.