MAKING SENSE OF REPRESENTATIVE DEMOCRACY AND THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION IN THE HIGH COURT OF AUSTRALIA
Three possible models

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Introduction

The terms 'democracy', 'representative democracy' and 'representative government' do not appear in the Australian Constitution. Nevertheless, recent decisions of the High Court of Australia have found an implication of representative democracy in the Constitution.[1]

The High Court has only begun to explore this implication, without yet fully explaining it. Consequently, the Court's use of the terms 'representative democracy' and 'representative government' remains perplexing and puzzling. To solve this puzzle, it is necessary to recognise that in finding an implication of representative democracy, a judge must have in mind a conception or a model of democracy.

This paper will examine three models of representative democracy. First, a *protective model* of democracy, in which democracy provides a means to protect individual interests. Secondly, a *participatory model* of democracy, in which participation in democratic decision-making provides a means to enhance the personal development of each individual. Thirdly, an *elite model* of democracy, in which democracy provides a means to produce a small minority or elite leadership who are empowered to make all political decisions.[2] Each model will be used to interpret judicial determinations of constitutional democracy in Australia by examining those decisions of the High Court which have found an implied freedom of political communication

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1 *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106 ('*ACTV*'); *Nationwide News v Wills* (1992) 177 CLR 1 ('*Nationwide News*').

2 The models as I have presented them refer to the results or goods to be achieved by a democracy. For a consideration of the complex and at times confusing debate regarding whether democracy is a means or an end, see JA Schumpeter (1943) *Capitalism, Socialism and Democracy*, Allen & Unwin, p 242; and C Pateman (1970) *Participation and Democratic Theory*, Cambridge University Press, pp 3–4.

based on the principles of representative democracy established in the Constitution.

The recognition in 1992 of an implied freedom of political communication[3] signified a transition in Australian constitutional law. Prior to the High Court's finding of this implication, it had been generally believed that freedom of political communication was not guaranteed by the Constitution but was protected by the common law.[4] A primary reason for this view is that the Constitution of Australia contains no express bill of rights. However, the absence of an express bill of rights was not considered to be a sufficient objection to the establishment of a freedom of political communication based on a conception of representative government[5] implied in the text and structure of the Constitution and in particular sections 7 and 24.[6] Those sections require that elected representatives be directly chosen by the people. It followed that a direct choice required freedom of political communication or discussion.[7]

The freedom of political communication is not absolute and hence can be restricted by a reasonable regulation. Examples of such laws include laws prohibiting conduct which is viewed as criminal or obscene.[8] The applicability

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3 *ACTV* and *Nationwide News*.

4 Up until recently, constitutional protection for freedom of communication was very limited. In *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, Murphy J, at 581–585, *contra* Mason CJ at 579, recognised a limited right to communication in section 92 of the Constitution which guarantees freedom of interstate trade. In *Davis v the Commonwealth* (1988) 166 CLR 79, Mason CJ, Deane J, Gaudron at 100 and Brennan J at 116 held that legislation fell outside the implied 'nationhood power' of the Commonwealth by requiring authorisation for the use of everyday expressions thereby infringing freedom of expression.

5 *ACTV*.

6 7. The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate...

24. The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators...

7 *ACTV*; *Nationwide News*; D Cass, 'Through the Looking Glass: The High Court and the Right to Speech' (1993) 4 *Pub LR* 229, p 233; G Lindell (1996) 'Theophanous and Stephens revisited', Research Paper No 2, Centre for Media, Communications and Information Technology Law, University of Melbourne, p 1. For an elaboration of this implication, see my discussion of *Theophanous* and *Lange* below.

8 *Nationwide News* and *ACTV*: *Nationwide News* at 77 per Deane and Toohey JJ (criminal law); *ACTV* at p 217 per Gaudron J (obscenity and offensive language). See also Lindell (1996) p 1. For an elaboration of this implication, see my discussion of *Theophanous* (*Theophanous v Herald & Weekly Times* (1994) 182 CLR 104) and *Lange* (*Lange v Australian Broadcasting Corporation ('Lange')* (1997) 189 CLR 520) below.

of the freedom of political communication as a limit of the law has gradually been expanded. Initially, this freedom restricted the scope of Commonwealth legislative powers. As a result, both legislation banning political advertising during an election[9] and legislation prohibiting criticism of members of the Industrial Relations Commission[10] were struck down as unconstitutional. Next, the freedom restricted state legislative power that dealt with the private rights and obligations of individuals. The freedom thus limited and modified state defamation laws in their regulation of criticism of a federal and a state politician[11] but would not necessarily extend in effect to criticism of a New Zealand politician.[12] Rather, the common law would provide for such a situation.

The finding of this implied freedom stirred up a great controversy amongst members of the public, the academy and the judiciary. Much of this controversy has focussed on 'judicial activism', and hence has entailed a debate on the legitimacy of judicial review.[13]

While the legitimacy of the Court's finding implied freedoms is obviously a question that deserves attention, it is not crucial to the purpose of this discussion, which is to explore the High Court's conception of the complex relationship between the freedom of political communication and democracy. This is a critical relationship, since the type of democracy envisaged will determine the type of justification used for freedom of political communication.[14]

My examination of this relationship will be developed in three parts. The first describes three models of democracy. The second part of the article presents an analysis of the judges' descriptions of representative government and the implied freedom of political communication. It will try to demonstrate how these descriptions correspond to various conceptions of democratic governance described in the first part. I will use the *Theophanous* and *Lange* decisions as my case studies. Both are cases which focused on representative government, the implied freedom and the law of defamation. Finally, I conclude that the models of democracy may provide a guide for judicial determinations in future cases.

Models of Representative Democracy

I will now outline three models of democracy and their differing conceptions of political freedoms, in particular, freedom of political communication. These three models are typically used to describe the operation of the Westminster

9 *ACTV.*

10 *Nationwide News.*

11 *Theophanous*; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 ('*Stephens*').

12 *Lange* (1997) 189 CLR 520.

13 G Lindell (ed) (1994) *Future Directions in Australian Constitutional Law*, Federation Press; 'Symposium: Constitutional Rights for Australia?' (1994) 16 (2) *Sydney LR* 145; J Goldsworthy, 'The High Court, Implied Rights and Constitutional Change', (1995) 39 *Quadrant* 46; Lindell (1996).

14 Cass (1993) pp 230–1.

system of representative government.[15] Specifically, I explain how each model focuses on certain critical features of democratic governance. Representative democracy may be understood as conforming to either a protective, a participatory or an elite model.

A protective theory of representative democracy

Protective theorists argue that democracy provides an apparatus for ensuring that rulers are held accountable to the ruled.[16] According to this model, such accountability can be achieved only through regular elections held by secret ballot, a universal franchise, a separation of powers and freedoms of the press, of speech and of public association.[17] The role of regular elections is crucial in providing the mechanism by which the electorate may control the elected through their appointment or removal.[18] An elector is assumed to have an opinion about which policy or candidate will be in his or her best interests.[19] The main concern of protective theorists is 'the choice of good representatives (leaders) rather than the formation of the electorate's opinion as such'.[20] For an elector to make a good choice, it is necessary that he or she be informed by exposure to political discussion. In this sense, the operation of the protective model extends to political discussion.

Political discussion takes place among the electors, the elected and the media. For example, electors will discuss various candidates or policies. One elector may seek the advice of another.[21] And a representative will, on occasion, influence his or her constituency with his or her speeches.[22] The formation of an elector's opinion may be critically affected by public opinion which is the product of political discussion. There is, as Bentham pointed out, one important advantage of an elector in a democracy, that is, if a person enters a gathering of people he or she will meet those who, in relation to public opinion, are ready to communicate to him or her whatever they know, have seen or heard or think. The performance of politicians or those who aspire to be so, the role of government and current affairs all find a place in dinner conversations, conversations engaging in discussion of politics interspersed with business, sport and weather inspired by topics generated in the media.[23] The media obviously plays an important role in transmitting and shaping

15 D Held (1987) *Models of Democracy*, Stanford University Press; Pateman (1970).

16 The 'protective' theory refers to a basic form of democracy, in particular preservation of the public interest. It does not refer to speech and discussion rights of citizens being protected from over-regulation by the government or the law.

17 Held (1987) p 67.

18 J Bentham (1962) *The Works of Jeremy Bentham*, ed J Bowring, Russell & Russell, vol 9, pp 155–8.

19 Pateman (1970) p 18.

20 Ibid, p 19.

21 Bentham (1962) p 96.

22 Pateman (1970) p 19.

23 Bentham (1962) p 102.

public opinion. Consequently, freedom of the press is indispensable to the intelligent formation of the electors' opinions because it facilitates the flow and diversity of ideas and information.

The media also provides a necessary check on government by informing citizens of the ongoing activities of the legislature, administration and the judiciary.[24] According to the protective theory, people are expected to be interested in politics because it is in their interest to be so; and in fact protective theorists believe the electorate can be educated to see this.[25]

For proponents of the protective theory, then, the participation of citizens has a narrow function: to ensure good government. Good government is government in the public interest, that is, in the interests of the mass of citizens.[26] This is achieved through the sanction or loss of office.[27] Thus, participation has the purely protective function of ensuring that the interests of citizens will be protected. It does so by promoting government responsive to the interests of the mass of citizens because all groups or classes of citizens elect the government.[28] Hence, protective theorists promote 'participation (voting and discussion) of all the people'.[29] However, they see this form of participation solely in terms of its value to political representation and they have tended to argue that the democratic nature of the political system rests fundamentally on national institutional arrangements. Consequently, such theorists tend to see representative democracy in terms of representative government.

Participatory theorists, on the other hand, argue that participation has a wider function and is central to the creation and preservation of a democratic society.

A participatory theory of representative democracy

Participatory theorists contend that democracy means the maximum participation of all citizens in the activity of political decision-making. Such participation is viewed as a means to further the development of the individual.[30] To a participatory theorist, there are two criteria for establishing good government. The first is whether an elected government protects individual interests by ensuring that those interests are met and enhanced. This protective function is concerned that the material needs, well-being and happiness of all individuals are promoted. According to this view, the virtue of a political system is defined in terms of the nature and quality of governmental decisions.[31] The second criterion is whether an elected government promotes

24 Ibid; F Rosen (1983) *Jeremy Bentham and Representative Democracy*, Oxford University Press, pp 24–6.

25 Pateman (1970) p 19.

26 Held (1987) p 67.

27 Pateman (1970) pp 19–20.

28 J Hamburger, 'James Mill on Universal Suffrage and the Middle Class' (1962) 24 *J Politics* 167, p 172ff; Pateman (1970) p 20.

29 Pateman (1970) p 20.

30 J Lively (1975) *Democracy*, Blackwell, pp 131–2.

31 Ibid, p 132; JS Mill (1975) *Three Essays*, Oxford University Press, p 168.

the personal development of each individual. This developmental function is concerned with the educational aspect of human affairs, that is, the promotion of 'the virtue and intelligence of the people themselves'.[32] According to this view, the virtue of a political system is defined in terms of its effects on the character of its individuals.[33] For participatory theorists, the developmental function of a political system is at least as important as the protective function. This developmental function takes place in the institutions of popular, democratic government.[34] It is only within a context of popular, participatory institutions that the 'public-spirited type of character' or community-minded individual can be fostered.[35] The primary rationale of this form of democracy is not that it will necessarily act in the general interest but that it will have an educative effect.

By education, participatory theorists do not necessarily mean formal, academic education. Rather, they mean learning through the practice of democracy,[36] which has the effect on character of promoting a breadth of vision or largeness of view.[37] As Mill argued, when the private individual is involved in public functions:

> he[sic] is called upon, while so engaged, to weigh interests not his own; to be guided, in case of conflicting claims, by another rule than his private partialities; to apply, at every turn, principles and maxims which have for their reason of existence the common good. He is made to feel himself one of the public, and whatever is for their benefit is to be for his benefit.... Where the school of public spirit does not exist, scarcely any sense is entertained that private persons, in no eminent social situation, owe any duties to society, except to obey the laws and submit to the government.[38]

It followed for Mill that the whole people should participate in government to the greatest practicable extent. But since all cannot participate personally in large portions of the public business, it followed that the ideal type of a good government must be representative.[39] A crucial problem with representative government, however, is in keeping the representatives accountable to the many. The reconciliation of the rule of the people with accountability has been described as the 'grand difficulty in politics'.[40] To a participatory theorist such as Carole Pateman, the reconciliation of this difficulty may come about primarily through maximising the number of opportunities for individuals 'to participate in political decisions so that they

32 Mill (1975) p 167.
33 Lively (1975) p 132.
34 Pateman (1970) p 31; Mill (1975) p 145.
35 Pateman (1970) p 29.
36 Ibid, p 31.
37 Lively (1975) p 140.
38 Mill (1975) pp 197–8.
39 Ibid, p 179.
40 J Hamburger, cited in Pateman (1970) p 32.

may develop the necessary qualities and capacities to enable them to assess the activities of representatives and hold them accountable'.[41] It is clear then that accountability through large-scale participation of the people is a central tenet of a participatory theory of representative democracy.[42]

In order to illuminate the theoretical breadth of the model, it is necessary to consider three arguments for increased political decision-making. The first argues that voting and discussion has a significant educational value for all citizens. Through political discussion, an individual may transcend the routine of daily work to become aware of the relationship between his or her individual circumstances and those of other citizens, thus becoming a member of a community.[43] The promotion of the community-minded citizen through opportunities for voting and discussion is championed principally by liberal theorists.[44] Clearly, this is one means of political education for citizenship but it appears to be overly optimistic to expect that a community-minded or public-spirited citizen would result from voting in elections at infrequent intervals and engaging in political discussion.[45]

A second argument is that, because of the limitations of the two forms of participation mentioned above, there need to be other forms of participation, for example, citizen involvement with social justice issues and in various organisations.[46] Obviously, the opportunities for this form of participation depend upon the size of the organisation. The larger the organisation, the less possible it is for it to make available those forms of participation necessary to the personal development or educative function of democracy.[47] Consequently, these theorists argue for the 'democratisation and politicisation of small-scale associations in which individuals can play a significant role'.[48] Initially, such

41 Pateman (1970) p 31. It is noteworthy that John Stewart Mill did not in practice advocate such an expansive view of democracy. In particular, Pateman (1970) pp 31–3 is critical of Mill's practical proposals for representation. She argues convincingly that they were incompatible with the role he assigned participation in his theory.

42 Widespread participation also forms a central tenet for other political-philosophical traditions, for instance, communitarianism and civic republicanism. However, examination of these theories obviously extends beyond the scope of any discussion of the contemporary conception of participatory democracy.

43 Mill (1975) pp 272–94. For a consideration of weighing the freedom of political communication against other interests, see G Patmore (1997) 'Identifying Rights for the 21st Century' in B Galligan and C Sampford (eds) *Rethinking Human Rights*, Federation Press.

44 See, generally, A Birch (1964) *Representative and Responsible Government*, Allen & Unwin. Modern liberal theory places emphasis on Mill's conception of participation as voting and discussion rather than active involvement in political decision-making. Mill's argument in favour of active involvement is mentioned and noted below.

45 Lively (1975) p 140.

46 Ibid, pp 140–1.

47 Ibid, p 141.

48 Ibid.

theorists identified participation in local self-government[49] and the jury system[50] as the way to increase citizens' involvement in political decision-making. Later theorists nominated the workplace as the most important site of participation by the citizenry, given that work is one of the 'most decisive formative factors in the development of most individuals'.[51] If personal involvement in decision-making is the crucial element of civic education, they argued, 'participation in the decisions most intimately and consistently governing everyday life are likely to be the most crucial'.[52] The exploration of workplace democracy has been largely the domain of socialist and social democratic theorists who argue, not for state ownership, but rather for worker ownership and/or control that is, worker self-management, worker co-operatives or democratic decision making at work.[53]

A third strand of participatory argument, largely the work of feminist writers,[54] focuses on the role of women as subjects in democratic theory and practice. These theorists have argued that if women are to experience the educative effect of democracy, it will be necessary to redress their current exclusion from equal participation in political life. This argument focuses less on the modes of participation and more on the pre-conditions for the meaningful participation of all. Such theorists attribute women's unequal representation in parliament, and their unequal participation in the workforce, to barriers which include the organisation of government and political parties, the inaccessibility and inhospitability of the workplace to women arising from discrimination, sexual harassment and lower pay for women compared to men, the financial dependence of many women on men, the sexual division of labour in the household and the continuance of domestic violence.

In sum, the operation of a participatory democracy at the national level requires the development in individuals of their capacity for democratic decision-making. This focus on individual development is not shared by all theorists of representative democracy, particularly those who have developed the elite theory of democracy which I will now consider.

An elite theory of representative democracy

Elite theorists advocate a narrow conception of democracy as, at best, 'a means of choosing decision-makers and curbing their excesses'.[55] While such a conception is similar in many respects to the theory of protective democracy, it is, however, justified in quite a different way. On the other hand, the elite

49 Mill (1975) ch 15.

50 Ibid, pp 363–80.

51 Lively (1975) p 143.

52 Ibid.

53 See Pateman (1970) pp 22–44; JS Mill (1963) *Essays on Politics and Culture*, Oxford University Press; GDH Cole (1921) *Guild Socialism Restated*, Leonard Parsons.

54 C Pateman(1983) 'Feminism and Democracy' in G Duncan (ed) *Democratic Theory and Practice*, Cambridge University Press; A Phillips (1991) *Engendering Democracy*, Polity Press.

55 Held (1987) p 143.

model differs significantly from the participatory model in its view that political life offers little scope for widespread participation, or for individual and collective development.[56] Hence, the elite model has more in common with a protective rather than a participatory model.

Elite theorists claim that their theory of democracy is empirically based, and therefore is more 'realistic' than other models. Their primary endeavour is explanatory: to reveal how democratic procedures work. Although this objective was not as radical a departure from existing models as they asserted, in that protective theorists – Bentham, for example – had similar objectives, the model elite theorists proposed did revise significantly existing conceptions of democracy.[57] The correspondence between their description and the actual working of liberal democracies had a widespread appeal in the 1950s and 1960s, although many aspects of their description have since been questioned.[58] Nevertheless, the enduring value of the elite theory is that it highlights many of the features of modern Western liberal democracies.[59]

Elite theorists argue that the crucial function of democracy is not to invest citizens with the power to decide political issues but to provide for the selection of representatives.[60] In other words, the role of the people is to 'produce a government'.[61] Accordingly, they define democracy as a political method, that is, an institutional arrangement 'for arriving at political — legislative and administrative — decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote'.[62] It follows from this definition that competition by potential decision-makers is the distinctive feature of democracy.[63] If the democratic procedure simply provides competition for leadership, it must be admitted that, at best, it bears a flimsy relation to the classical definition of democracy: rule by the people. In fact, elite theorists openly acknowledge this point.[64] As Schumpeter said:

> democracy does not mean and cannot mean that the people actually rule in any obvious sense of the terms 'people' and 'rule'. Democracy means only that the people have the opportunity of accepting or refusing the men [sic] who are to rule them.[65]

According to this model, democracy is rule by politicians.

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56 Ibid.

57 Ibid, p 164.

58 Ibid, pp 164, 165, 186ff, 221ff, 243ff.

59 Ibid, p 178.

60 Schumpeter (1943) p 269.

61 Ibid (footnotes omitted).

62 Ibid, pp 242, 269.

63 Pateman (1970) p 3.

64 Held (1987) p 166.

65 Schumpeter (1943) pp 284–5.

> If we wish to face facts squarely, we must recognise that, in modern democracies politics will unavoidably be a career. This in turn spells recognition of a distinct professional interest in the individual politician and of a distinct group interest in the political profession as such. It is essential to insert this factor into our theory. Among other things ... we immediately cease to wonder why it is that politicians so often fail to serve the interest of their class or of the groups with which they are personally connected. Politically speaking, the man is still in the nursery who has not absorbed, so as never to forget, the saying attributed to one of the most successful politicians that ever lived: 'What businessmen do not understand is that exactly as they are dealing in oil so I am dealing in votes'.[66]

As Schumpeter noted, this is not a 'frivolous or cynical' view of politics. On the contrary, recognising that democracy will be in the interests of those in charge does not exclude 'ideals or a sense of duty'.[67] And democracy viewed in this way provides 'the minimum conditions necessary to keep those in charge in check'.[68]

These minimum conditions require that, in order for a candidate to be selected, everyone in principle should be free to compete for leadership in free elections. This competition entails that the usual civil liberties, including a 'considerable amount of freedom of discussion for all and freedom of the press'[69] as well as universal suffrage, are necessary.[70]

The primary function of the electorate is to produce and evict the government. As the electorate does not normally control the elected except by replacing them with alternative leaders at an election, it is necessary to understand the limited nature of democratic control according to this definition of democracy.[71] For there to be effective leadership, the voters outside parliament must accept that, once the political competition is over and a representative has been elected, 'political action is his [sic] business, not theirs'.[72] This means that the people should not instruct their representative by undertaking the usually acceptable activity of 'bombarding' representatives with letters.[73] Thus, the only means of participation available to an elector are voting for leaders and discussion. Discussion provides the requisite flow of information between the electors and the elected to ensure that politicians are not evicted without warning.[74]

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66 Ibid, p 285.

67 Ibid, pp 285–6.

68 Held (1987) p 167.

69 Schumpeter (1943) pp 271–2; Pateman (1970) p 3.

70 Schumpeter (1943) pp 244–5; Pateman (1970) p 4. Schumpeter did not consider that universal suffrage was necessary; he thought that property, sex, race or religious qualifications were all entirely compatible with the democratic method. Cf later theories which did not follow him.

71 Schumpeter (1943) p 272; Pateman (1970) p 4.

72 Ibid, p 295.

73 Ibid.

74 Pateman (1970) p 4.

To an elite theorist, 'participation has no special or central role'.[75] All that is required of citizens is that they 'keep the electoral machinery — the institutional arrangements working satisfactorily'.[76] It is no surprise that the focus of this approach is on the leaders as a small minority or elite who make all political decisions.[77] By contrast, as Schumpeter says, '[t]he electoral mass is incapable of action other than a stampede'.[78] Nonetheless, there is a characteristically democratic element in the elite theory, namely its competition between potential representatives for votes.[79]

Representing Representative Democracy in the High Court

The first part of this paper described three models of representative democracy: namely, protective, participatory and elite. Bearing these models in mind, this discussion will now explore judicial conceptions of representative democracy in the *Theophanous* and *Lange* decisions. As I will show, none of the judges in either *Theophanous* or *Lange* articulate a clear conception of representative democracy. Rather, their understandings of democracy appear intuitive and incomplete. However, this does not mean that their Honours do not display a predisposition or preference for a particular conception of democracy. Because their Honours do not clearly elaborate upon their conception of democracy, we are left to explain their judgments by reference to a word, phrase or idea. Such an inquiry is vital, as the type of democracy envisaged determines the justification, application and limitation of the freedom of political communication.

Theophanous v Herald & Weekly Times

On 8 November 1992, the first defendant, Herald & Weekly Times, published in its newspaper a letter to the editor written by the second defendant, Mr Bruce Ruxton. The letter expressed adverse views about the plaintiff, Mr Andrew Theophanous. It criticised his performance as a member of the Federal Parliament, particularly in his capacity as chairperson of the Joint Parliamentary Standing Committee on Migration Regulations.[80] The plaintiff commenced defamation proceedings in relation to the publication and moved to strike out defences pleaded by the first defendant to the effect that the publication was pursuant to a freedom guaranteed by the Australian Constitution to publish certain political material. The matter was then removed to the High Court. The question before the Court was whether the freedom of political discussion implied by the Constitution restricted and modified State defamation laws in their application to the defamation of a federal parliamentarian. Mason CJ, Toohey and Gaudron JJ delivered a joint

75 Ibid.

76 Ibid.

77 Ibid, p 5.

78 Schumpeter (1943) p 283.

79 Pateman (1970) p 5.

80 At the time, it was publicly anticipated that a federal election would be called in December 1992.

judgment while separate judgments were delivered by Deane, Brennan, Dawson and McHugh JJ.

Mason CJ, Toohey and Gaudron JJ quickly dealt with the precedential point that an implied freedom of political discussion is to be distilled from the principle of representative democracy enshrined in the Constitution.[81] Accordingly, the body of their judgment is devoted to revealing the meaning of this newly found constitutional implication. More specifically, their Honours explained the operation of the freedom in terms of its function, relying little on the text of the Constitution.

To an extent, their Honours expressed a preference for a participatory vision of democracy. However, their judgment was lacking in a well-thought-out philosophical basis for the freedom of political communication. A justification was offered which relied on the concept of democratic participation and informed decision-making.[82] Their Honours linked their concept of democracy to the operation of the freedom in arguing that:

> by protecting the free flow of information, ideas and debate, the Constitution better equips the elected to make decisions and the electors to make choices and thereby enhances the efficacy of representative government.[83]

Such an efficacious argument, although consistent with both an elite and protective view, was in their Honours' reading conditioned by substantial emphasis on widespread participation. In particular, their Honours laid great weight on the concept of participation in their definition of the freedom and its relationship to representative government. Consequently, they maintained that 'the freedom extends to all those who participate in political discussion',[84] and they defined political discussion to include debate relating to the 'various tiers of government'; comment on the legislative, executive or judicial process[85] and discussion of the:

> conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office. The concept also includes discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate e.g. trade union leaders, Aboriginal political leaders, political and economic commentators.[86]

It is clear that their Honours did not regard participation and political discussion as being confined to political representation, Commonwealth or State, but rather as concepts that entail a broader view of political community.

81 *Theophanous* at 120-122.

82 Ibid at 122.

83 Ibid.

84 Ibid at 123.

85 Ibid.

86 Ibid at 124.

In conjunction with their emphasis on participation, this broader view is consistent with a liberal vision of participatory democracy.

The remainder of their Honours' reasoning is less transparent. They left open the crucial question of whether the implication might constitute a source of positive rights, but at the same time stated that they regarded the freedom as an implication.[87] As the purpose of the implication is to protect the efficacious working of the system of representative government, it extends to freedom from restraint imposed by law, whether by statute or the common law.[88] It followed that the freedom protected political discussion against onerous criminal and civil liability. Their Honours' reasoning, however, remains unclear in relation to the precise purpose of the immunity, because their assertion did not explain how freedom of political discussion was conducive to the efficacious working of representative government.[89]

Finally, their Honours considered the question of the limitation of the freedom.[90] They maintained that as the freedom under the Constitution is not absolute, an absolute immunity from action could not be supported.[91] Nor did the concept of representative democracy require an absolute immunity.[92] Again, their Honours asserted but did not explain their argument. Nonetheless, they held that a publisher would be able to preclude the application of State defamation laws only if the publisher established that 'it was unaware of the falsity of the material published', that 'it did not publish the material recklessly' and that 'the publication was reasonable in the circumstances'.[93] In the present case, the relevant criticism of a federal politician clearly fell within the concept of 'political discussion'. Their Honours held that the defence of the implied freedom to a defamatory action was good in law.[94]

Deane J, like Mason CJ, Toohey and Gaudron JJ, quickly dispensed with the precedential point that the Constitution recognised an implied freedom of political communication based on principles of representative democracy.[95] His preference for a participatory vision of democracy is to be gleaned from his description of the role of the citizen and the scope and extent of the freedom. He maintained that the freedom applies to Commonwealth and State legislative powers, legislation and the common law.[96] Furthermore, his Honour saw the freedom as encompassing the legal regulation of the conduct of citizens of the Commonwealth of Australia.[97]

87 Ibid at 126.
88 Ibid at 128.
89 Ibid at 130.
90 Ibid at 133ff.
91 Ibid at 133.
92 Ibid at 134.
93 Ibid at 137.
94 Ibid at 140.
95 Ibid at 163.
96 Ibid at 164.
97 Ibid at 180.

Conceiving the citizen as a member of the political community is one indication of a participatory vision of democracy. A further indication is his Honour's emphasis on freedom of participation as constitutive of freedom of political communication. As he put it, 'freedom of the citizens of the Commonwealth to examine, discuss and criticise' government officials such as parliamentarians, judges and members of the executive, is critical to the working of a democratic system of representative government.[98] He also saw freedom of political communication as a freedom of the citizen to be informed by, and to participate in, public and vigorous discussion and criticism, particularly in the press and other media through which such public discussion and criticism must largely take place.[99] It can thus be inferred that his Honour saw political criticism and discussion as necessary for rational deliberation, which in turn can be understood as necessary for self-development. Hence, Deane J's judgment is compatible with a participatory vision of democracy.

After defining the freedom, his Honour turned to the question of the extent of the freedom, based on considerations of citizen participation.[100] Citizen participation did not entail curtailment of freedom of political communication.[101] Free criticism of the conduct or suitability of a Commonwealth parliamentarian is a special category of speech because it lies at the heart of representative government. Citizens should be free to engage fully in such public discussion without fear of the crushing financial consequences of a defamation action. The fear of a defamation action would, in fact, render this freedom pointless.

As a consequence, his Honour concluded that the 'effect of the constitutional implication is to preclude completely the application of State defamation laws in imposing liability in damages upon' the citizen or publisher 'for the publication of statements about the official conduct or suitability of a member of the Parliament or other holder of high Commonwealth office'.[102] In an addendum, Deane J made it plain that he disagreed with Mason CJ, Toohey and Gaudron JJ on the criteria to establish the freedom to comment on official conduct and suitability for office, in so far as their Honours made the freedom conditional upon the ability of the citizen or other publisher to satisfy a court of matters such as absence of recklessness or reasonableness.[103] Nevertheless, he agreed with their Honours' view that freedom of communication was a valid defence in this case.[104]

While Mason CJ, Toohey, Gaudron and Deane JJ's espousal of participatory arguments expresses a preference for a participatory conception of democracy, Dawson J's and Brennan J's reasoning is, in important respects, predisposed to a protective conception of democracy.

98 Ibid.

99 Ibid at 182-183.

100 Ibid at 181ff.

101 Ibid at 184.

102 Ibid at 185.

103 Ibid at 188.

104 Ibid.

Brennan J (dissenting), like all the other judges, found an implied freedom to discuss government.[105] This freedom was derived from the system of representative government contained in the structure of the Constitution.[106] In interpreting the Constitution, his Honour believed that a court can do no more than 'interpret and apply its text'.[107] However, his Honour's judgment cannot be explained solely in terms of the text and structure of the Australian Constitution. This is apparent from much of his description of the structure of government and the function of the freedom. Brennan J's justification of the freedom is similar to that offered by a protective theorist: the freedom to 'discuss governments and governmental institutions and political matters' protects 'the capacity of, or opportunity for, the Australian people to form political judgments'.[108] Political judgments are required if the people are to influence decisions which affect their life.[109] Like a protective theorist, he saw the role of the implied freedom as a check on government action.[110]

Brennan J's textual analysis reveals that he saw this limitation of government action as being prescribed by the Constitution, in that the Constitution established the system of government and hence circumscribed the scope of the implied freedom.[111] Further, he argued that the freedom is not the subject of an express constitutional guarantee but is a consequence of a limitation on the powers of government.[112] It is not a personal right but a limit on law-making power.[113] As a constitutional limitation, it limited powers of the legislature, executive and judiciary.[114] Accordingly, it could modify statute and the common law. Although the Constitution prevails over the common law, in this case:

> there was no express inconsistency between the Constitution and those rules of common law which govern the rights and liabilities of the individuals inter se. That is because the Constitution does not deal with such rights and liabilities but rather with the structure and powers of organs of government.[115]

In his opinion, the notion that an implication drawn from a constitution which prescribed a structure of government is inconsistent with the common

105 Ibid at 145.

106 Ibid at 146–147.

107 Ibid at 143.

108 Ibid at 147.

109 His Honour referred to his judgment in *Nationwide News*, quoting Lord Simon of Glaisdale in *Attorney-General v Times Newspapers* (1974) AC 273 at 315.

110 *Theophanous* at 147. His Honour referred to his judgment in *Nationwide News*, quoting Cannon J in *Re Alberta Legislation* (1938) SCR 100 at 145–146; (1938) 2 DLR 81 at 119.

111 *Theophanous* at 148–149.

112 Ibid at 148.

113 Ibid at 149.

114 Ibid.

115 Ibid at 153.

law rights and liabilities of individuals is erroneous.[116] However, his Honour's reliance on a constitutional absence of rights does not explain the purpose and extent of the freedom. Specifically, it does not provide a proper basis for limiting the freedom. Consequently, his Honour's vision cannot be explained in terms of the structure of the Constitution.

Furthermore, his Honour argued that:

> [n]o implication from the text or structure of the Constitution is inconsistent with the availability of a cause of action in defamation to members of Parliament, candidates for election or public figures generally.[117]

Similarly, State and Territory legislation prescribing a system of defamation law was not inconsistent with the freedom to discuss government.[118] In any event, the present State laws of defamation could not be said to prevent the people of the Commonwealth from forming or exercising the political judgment required for their participation in the system of representative government.[119]

It is now clear that Brennan J's conception of participation was in terms of its value to political representation, and that he viewed the Constitution as a document which 'prescribes a structure of government' or a set of institutional arrangements. Hence, his Honour is first and foremost a proponent of representative government. From his Honour's perspective of the way representative government is incorporated into the Constitution, he held in this case that there was no defence of freedom of political communication to defamation actions.

Dawson J (dissenting) claimed that a minimal concept of representative government is contained in the text of the Australian Constitution.[120] In interpreting the Constitution, his Honour maintained that implications might properly be drawn only from the express provisions of the Constitution itself.[121] Hence, it was not appropriate to draw an implication from extrinsic sources, especially by reference to some such concept as 'the nature of our society'.[122] However, it is important not to take his Honour's claim at face value. As I shall show, his Honour did draw an implication from the express provisions of the Constitution, but his interpretation of those provisions cannot be explained solely by reference to the text of the Constitution. In this regard, his Honour's description of democratic government is predisposed to a protective conception of democracy in that he regarded political representation as fundamental to the requirements of representative government.

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116 Ibid.

117 Ibid.

118 Ibid at 156–157.

119 Ibid at 157.

120 Ibid at 189.

121 Ibid at 194.

122 Ibid at 193.

For his Honour, the requirements of representative government are contained in sections 7 and 24, which, when read with associated provisions, make it clear that elected representatives shall be directly chosen by an election.[123] An election necessarily means the making of a choice by the casting of a vote.[124] That choice must therefore be an informed choice which requires access to available alternatives.[125] Consequently, Dawson J said that there must be an implication of freedom of communication.[126] Such an implication cannot easily be explained by reference to the text of the Constitution; rather, the implication is evidently shaped by his Honour's own view of democracy.

Furthermore, Dawson J argued that this freedom of communication limits Commonwealth and State legislative powers which interfere with the requirements of free elections in sections 7 and 24.[127] Beyond this minimum requirement, the regulation of the operation of representative government rests with Commonwealth and State Parliaments or the common law. Thus, in a similar vein to the protective theorist, he regarded the democratic nature of government as resting fundamentally on national institutional arrangements.

The limitation of the freedom by the law of defamation also raised issues of democratic perspective. For Dawson J, the operation of representative government might entail curtailment of the freedom by a legislature or by the common law as is considered necessary or desirable, provided it did not represent a denial of representative government in Australia. In this case, his Honour argued that the protection of reputations might be thought to be in the interests of representative government because the number and quality of candidates for membership of Parliament is likely to be appreciably diminished in the absence of such protection.[128] Consequently, his Honour held that the law of defamation did not impede the freedom of communication required by the Constitution.

Dawson J drew a distinction between the implied freedom and a guarantee of freedom of communication,[129] maintaining that, while the Constitution contained an implied freedom of communication, it did not contain a guarantee of freedom of speech or communication, save for section 92, which provides that intercourse between the States must be absolutely free.[130] It was plain to his Honour that the other provisions of the Constitution do not guarantee free speech but provide for representative government.[131] Consequently, he disposed of the case by contending that the Constitution did not guarantee a freedom of political communication and that the defences to the defamation proceedings were bad in law.[132]

123 Ibid at 189.

124 Ibid.

125 Ibid at 189–90.

126 Ibid at 190.

127 Ibid.

128 Ibid at 192.

129 Ibid at 190.

130 Ibid.

131 Ibid.

132 Ibid at 194.

McHugh J (dissenting) contended that freedom of discussion is an indispensable condition of representative government and that representative government is part of the Constitution only to the extent that the text and structure make it so.[133] As such, '[t]here is nothing in the text or structure of the Constitution which makes it necessary to imply that representative government is part of the Constitution independently of the content of ss 1, 7, 24, 30 and 41'.[134] In determining the meaning of the provisions of the Constitution, he believed it to be legitimate to draw on the concept of representative government.[135] Despite the inconsistency between the two preceding points, it is clear that his Honour did not explain his conception of representative government solely in terms of the text and structure of the Constitution. While his Honour makes reference to conceptions of representative government espoused by commentators and the founders,[136] the content of his description cannot be ascribed solely to these sources. Overall, his Honour's description has much in common with an elite concept of democratic government.

Like the elite theorists, McHugh J evinced a restricted view of democratic government. He argued that representative government is a narrower concept than representative democracy,[137] a term commonly used to refer to equality of rights and privileges.[138] Representative government, on the other hand, refers to a system in which the people elect their representatives in free elections to a political chamber which occupies the most powerful position in the political system.[139] Furthermore, it is the manner of the choice of members of the political chamber which is generally taken to be the hallmark of a representative form of government.[140]

McHugh J was quick to point out that even the narrow definition of representative democracy used in Athenian times of 'government by the people' is still probably wider than that contained in the Australian Constitution.[141]

> It is likely that the makers of the Constitution saw representative government as encompassing no more than a system under which the people were governed by representatives elected in free elections by those eligible to vote. The terms of ss 7 and 24 give effect to this view.[142]

Moreover, those sections refer to the Commonwealth and do not deal with the form of government, elections or rights of the States and Territories in

133 Ibid at 195–196.
134 Ibid at 196.
135 Ibid.
136 Ibid at 196–197.
137 Ibid at 199.
138 Ibid.
139 Ibid at 200.
140 Ibid.
141 Ibid at 201.
142 Ibid.

Australia.[143] Further, sections 7 and 24 deal with elections and not with general political rights.[144] To give effect to the purpose of those sections, it is legitimate to imply fundamental freedoms during the course of an election,[145] presumably because these are necessary for the democratic procedure to operate.

Like an elite theorist, McHugh J saw the democratic procedure as being concerned almost entirely with national institutional arrangements. He also seems to assume that it is competition between representatives for votes that is the characteristic element in the political process contained in the terms of the Constitution. Quoting from his earlier judgment in *Australian Capital Television*, he said:

> The words 'directly chosen by the people' in ss. 7 and 24, interpreted against the background of the institutions of representative government and responsible government, are to be read, therefore, as referring to a process — the process which commences when an election is called and ends with the declaration of the poll. The process includes all those steps which are directed to the people electing their representatives — nominating, campaigning, advertising, debating, criticising and voting. In respect of such steps, the people possess the right to participate, the right to associate and the right to communicate.[146]

Accordingly, in his Honour's opinion, the Constitution does not establish a general right of freedom of expression.[147] Instead, it establishes a limited freedom during the election process.[148] As the publication in question was published before the election process contemplated by sections 7 and 24 had commenced, the defendants could not rely on the implied freedom and their action must fail.[149] Consequently, his Honour held that the defence raised by the defendants to the defamation proceedings was bad in law.[150]

It remains to comment that McHugh J's conception of freedom of communication is both broader and narrower than that of the elite theorists: narrower in that he confines the operation of the freedom to the period of an election; broader in that he had no doubt that some rights of freedom of communication were necessarily implied in the constitution. These rights included to 'be allowed to visit the seat of Government, to gain access to

143 Ibid. See Gummow J in *McGinty v State of Western Australia* (1996) 186 CLR 140 at 290–291. His Honour expressed concerns about the effect of the freedom limiting the reach of State legislative power generally.

144 *Theophanous* at 203. See McHugh and Gummow JJ in *McGinty* (1996) 186 CLR 140 at 230–235, 290–291. Gummow J believed that further consideration should be given to relying on the freedom to invalidate laws which deal with private rights and obligations. McHugh J, however, was more critical of such invalidation.

145 *Theophanous* at 203.

146 Ibid at 204.

147 Ibid at 206.

148 Ibid.

149 Ibid at 207.

150 Ibid.

Federal territories, to petition the Federal authorities, to examine the public records of the Federal courts and institutions' and to have a 'right of access through the States for federal purposes'.[151] Consequently, this part of his judgment appears to be based explicitly on constitutional/federal principles rather than on principles of representative government.

In summarising the score for the different conceptions of democracy, the result in *Theophanous* can be tentatively assessed as follows: participatory, four; protective, two; and elite, one. Obviously, the Court in *Theophanous* was predisposed to the participatory model. As a consequence, one would have thought that this model would have informed the development of the freedom in the next case, but this did not eventuate.

Lange v Australian Broadcasting Corporation

On 8 July 1997, the High Court delivered in *Lange v Australian Broadcasting Corporation* a unanimous judgment and one which was apparently based on a protective model of democracy. However, the judgment is in part problematic because of the relationship that it establishes between the implied freedom and the common law.

Lange was a decision in which the Court reconsidered the concept of representative democracy and the implied freedom of political communication established by the Constitution. The vehicle for this reconsideration was another defamation case. David Lange, the former Prime Minister of New Zealand, brought a defamation action in the Supreme Court of New South Wales against the ABC in respect of matters published while he was a member of the New Zealand Parliament.

The ABC replied by relying on the 'constitutional defence' founded on the earlier defamation cases of *Theophanous* and *Stephens*. *Lange* was removed to the High Court because the parties sought to have those earlier cases re-opened based on dicta in *McGinty* and the views expressed by Dawson J during oral argument in *Levy v Victoria* (Lindel).[152]

The Court accepted that the Constitution intended to provide representative and responsible government and a democratic and federal procedure for constitutional amendment. This system of government prescribed by the Constitution is by way of implication drawn from sections 7, 24, 64, 128 and related sections.[153]

The Court also held that freedom of communication on matters of government and politics is an indispensable incident of that system of representative government.[154] It is noteworthy that the term 'representative government' was used, rather than 'representative democracy',[155] perhaps

151 Ibid at 206.

152 Lindell (1996).

153 *Lange* at 557–558.

154 Ibid at 559.

155 G Lindell (1997) 'Expansion or Contraction? Some Reflections about the Recent Judicial Developments on Representative Democracy', unpublished, p 21.

reflecting a preference for the former term expressed by judges in the earlier cases, as well as a narrower protectionist view of democracy.

It was made clear that the Court gives effect to the institution of representative government and the implied freedom only to the extent necessary to give effect to the text and structure of the Constitution.[156] However, the *Lange* judgment cannot be explained solely in these terms. While the Court made reference to conceptions of representative government advocated by commentators and the founders,[157] the content of its description cannot be ascribed only to these sources.

Overall, the Court appears to have explained the existence of the freedom of political communication in institutional terms, similar to the theory of protective democracy, but when the Court turned to consider that freedom's content, its judgment was not so straightforward, as I shall explain.

The Court in *Lange* had regard to the institutions of representative government (ie elections) in founding the existence of the freedom, the implied freedom being necessary to give effect to the notion of direct choice found in sections 7 and 24 of the Constitution. Despite this, the Court restricted the notion of direct choice in sections 7 and 24 to the election of representatives to the national legislature.[158] Their Honours explained the scope of the freedom:

> Communications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government, as it was understood at federation.[159]

Under the system of elections for which the Constitution presently provides, electors were intended to make a free and informed choice. A free choice requires 'freedom of speech and political organisation',[160] and a true choice requires 'an opportunity to gain an appreciation of the available alternatives'.[161] Consequently, the legislature must not be able to absolutely deny the people access to relevant information about the function of government in Australia.[162]

Nor can the freedom be confined to the election period. Most of the information necessary to enable 'the people' to make an 'effective' and 'informed' choice 'will occur during the period between the holding of one, and the calling of the next, election'.[163] Once again, their Honours tied their

156 *Lange* at 556–557.

157 Ibid at 557, 559, referring to Birch (1964).

158 Ibid at 559; Birch (1964) p 17.

159 Ibid at 559.

160 Birch (1964) p 17, quoted in *Lange* at 559.

161 Dawson J in *ACTV* at 187, quoted in *Lange* at 560.

162 Ibid at 560.

163 Ibid at 561.

argument to the text of the Constitution. The freedom to receive and disseminate information outside the election period is necessary if the freedom is to effectively serve the purpose of sections 7 and 24 and related sections.[164] As a consequence, their Honours implicitly rejected McHugh J's earlier reasoning that the implied freedom only operated during the election period, which as I have shown above can be regarded as an elite conception of democracy.

Furthermore, the implied freedom is apparently shaped by their Honours' own views of democracy. Nowhere does the Constitution explicitly refer to a free and informed choice, nor does it clearly explain the relationship between elector and representative.

Another important issue worthy of consideration is the application of the implied freedom to legislation and the common law. According to the Court, sections 7 and 24 and the related sections of the Constitution do not confer private rights and obligations on individuals. Rather, they preclude the curtailment of the protected freedom by the exercise of legislative power. As such, the freedom creates an immunity from legal control.[165]

Furthermore, the common law must conform with the Constitution.[166] Thus, the freedom operates in relation to the common law and statutes which deal with defamation. The significance of the new application of the freedom is that the constitutional defence established in the earlier defamation cases has been removed.[167] Instead, private parties must 'pursue their rights or claim their defences through the common law'.[168] In the case of a defamation action, the relevant common law defence is qualified privilege. In addition, the constitutional freedom of political communication is a limitation on the powers of government actors, legislatures and courts. This limitation provides a floor below which the common law and statute cannot descend.

As their Honours recognised in previous cases, the implied freedom of communication is itself limited. 'The freedom will not invalidate a law enacted to satisfy another legitimate end if the law satisfies two conditions': first, the object of the law is compatible with the maintenance of the constitutionally prescribed system of government; secondly, the law 'is reasonably appropriate and adapted to achieving that legitimate object'.[169]

As a consequence, the Court had to consider the critical issue of whether the contemporary common law of defamation infringed the constitutional implication. The Court noted that the protection of reputation is a purpose that is compatible with the freedom.[170] However, the Court also recognised that the law effectively burdens the freedom of

164 Ibid.

165 Ibid. See also Brennan J in *Cuncliffe v Commonwealth* (1994) 182 CLR 104 at 168.

166 *Lange* at 566.

167 Ibid at 575.

168 Ibid at 562, 567.

169 Ibid at 561–562.

170 Ibid at 568.

political communication in so far as the law of defamation provides remedies (damages and injunctions) against communications concerning government or political matters relating to the Commonwealth.[171]

The Court also accepted that the contemporary common law of defamation was not reasonably appropriate and adapted to the protection of reputation, because it did not provide an appropriate defence for a person who mistakenly but honestly publishes government or political matters to a large audience.[172] Consequently, the Court here recognised that the common law must be brought into conformity with the Constitution.[173]

However, the Court's description of the content of the freedom of political communication was not straightforward, and indeed was derived from the common law rather than the Constitution. The Court noted that as the common law develops in response to changing conditions, it may be modified to protect freedom of discussion. The criterion for the development of common law privilege in relation to freedom of political communication was 'the common convenience and welfare of society'.[174] Similarly, 'the content of the freedom to discuss government and political matters must be ascertained according to what is for the common convenience and welfare of society',[175] which involved striking a balance between absolute freedom of discussion and the protection of reputation.

Their Honours further explained that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion — the giving and receiving of information — about government and political matters. The interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege. Consequently, those categories now must be recognised as protecting a communication made to the public on a government or political matter.[176]

The new qualified privilege was subject to the requirement of reasonableness, which was seen as sufficient to subsume two elements referred to in the earlier defamation cases of *Theophanous* and *Stevens*:[177] namely, that the defendant was unaware of the falsity of the matter published and that the defendant did not publish the matter recklessly. In contrast to the earlier defamation cases, the Court held in *Lange* that malice will only defeat the defence where the communication was for some improper purpose and not for the purpose of communicating government or political information or ideas.[178]

171 Ibid.

172 Ibid at 569.

173 Ibid at 566.

174 *Lange* at 565; *Toogood v Spyring* (1834) 1 CM & R 181 at 193.

175 *Lange* at 565.

176 Ibid at 570.

177 Ibid at 572–573; Lindell (1997) p 25.

178 *Lange* at 573–574.

The Court decided that once this new common law defence was recognised, the New South Wales law of defamation would not infringe the Constitutional freedom.[179] Furthermore, even without the common law extension, section 22 of the *Defamation Act* 2974 (NSW) was valid, since section 22 incorporated a requirement of reasonableness.[180] As the defendant had not pleaded its case by reference to the expanded defence of qualified privilege, the matter was remitted to the Supreme Court of New South Wales for re-consideration.[181]

Finally, their Honours admitted that the common law defence may in some respects go beyond what is necessary for it to be compatible with the freedom. Two examples were mentioned as illustrations of discussion of pertinent matters: the United Nations or other countries; and government or politics at State or Territory level and at local government level.[182] Both of these examples are amenable to protection by the extended category of qualified privilege but not the implied freedom. The Court recognised that political discussion on these issues would not illuminate the choice for electors at the federal/national level of government.[183]

In sum, the Court's preference for viewing the democratic nature of the political system contained in the Constitution as resting fundamentally on national institutional arrangements is indicative of a protective view of democracy. This demonstrates a shift in thinking from the earlier cases, which indicated a majority predisposed to a participatory view — an inconsistency which may in part be due to a continued failure to examine the implied conception of democracy.

The High Court's approach to constitutional interpretation in *Lange* is also troubling due to their Honours' conception of the relationship between the Constitution and the common law. Their Honours considered that the content of the implied freedom and qualified privilege is based on the common law criterion of the 'common convenience and welfare of society'. This seems to flow from the Court's conception of the two notions as reciprocal and facilitative of the same outcome.[184] The problem with this approach is that in reality, the content of the freedom is dependent on the common law and not on the Constitution. Thus, the Constitution cannot operate to limit the scope of the common law.

The Court's subordination of constitutional to common law principles thus renders its judgment internally inconsistent. If the common law is to conform to the principles of the Constitution, including the implied freedom of political communication, then the Court must develop a rationale for the content of the freedom independent of the common law. This has not been done in *Lange*.

179 Ibid at 575.

180 Ibid at 575.

181 Ibid at 576.

182 Ibid at 571–572.

183 Ibid at 571.

184 Ibid at 565.

Conclusion

In conclusion, in both *Lange* and *Theophanous*, the failure of the High Court to clearly explain the relationship between representative democracy and the implied freedom is a significant gap or shortcoming. Quite simply, their Honours have found an implication of freedom of political communication but have not given its content a rationale grounded clearly in democratic theory. This problem is all the more acute because their Honours' particular rationale (whatever it might be) is the key to the proper development of the freedom. The Court will never develop a satisfactory rationale for implied freedoms until it explicitly articulates its vision of democracy.

Several reasons can be offered to explain their Honours' omission to articulate the relationship between representative democracy and the freedom of political communication.

First, traditional methods of constitutional interpretation are not conducive to identifying implied freedoms. While the Constitution clearly appears to incorporate representative democracy, it does not itself give it content in the form of an express conception or model; such a conception cannot be derived easily from the constitutional text and structure, precedent or the views of the founders. The model or conception must therefore be inferred or implied in a manner coherent with our political, philosophical and historical traditions. These traditions are vital tools in the development of a jurisprudence of implied freedoms.

Secondly, there is little evidence that the Court was fully appreciative of the theoretical constructs available to it, given its minimal reliance on secondary sources.[185] This may partially be explained by the nature of advocacy and the culture in which legal argument is traditionally made. However, this is disappointing — and problematic — given the fact that the Court was deciding a case which had at its core a fundamental freedom which is of an inherently political nature. In developing an implication of representative democracy, the Court could and should have drawn on the views of Bentham, Mill, Schumpeter or Pateman. However, the views of these theorists do not appear to be utilised fully by the judges.[186]

It should be noted that even if the Court were to look to these theorists, this would admittedly be a difficult exercise, as the Court would need to grapple with the differing opinions expressed. Given that the history of democracy is 'marked by conflicting conceptions',[187] it is likely that differences of opinion among the judges also would ensue.

In fact, this is clear from my application of the three models to the judgments in *Theophanous* and *Lange*. Even though there was unanimous agreement in *Lange* about the legal principles relating to the implied freedom, the question of identifying the Court's rationale remains open because the Court did not express clearly a conception of democracy.

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185 In *Lange*, the Court referred to only five secondary sources, two of which were extra-judicial statements by judges. No political philosophers were referred to.

186 The only exception to this statement is Gummow J at 376-378, 386 who referred to JS Mill in his judgement in *McGinty*.

187 Held (1992) p 2.

In closing, I wish to consider what the consequences would be if the Court had removed the gap in its reasoning by explaining the connection between democracy and the implied freedoms. Clearly expressing its conception of this relationship would have strengthened the Court's judgment in *Lange*. As it stands, that judgment is clear, concise and carefully worded. It was obviously intended to consolidate the development of implied freedoms, and, to an extent, it has certainly done that. However, I contend that had the judgment in *Lange* rested on a clear conception of democracy in order to give content to the constitutionally prescribed system of representative government, it would carry much greater strength and authority, authority which derives from the articulation of a sound philosophical justification. Reasoning from such a justification would have completed the logical development of the freedom, linking political theory to the practice of constitutional interpretation.

Had the Court explained this relationship, the nature of the responses from commentators and the community would be familiar. For example, if the Court had adopted a protective conception of democracy, the decision might have been uncontroversial and the consolidation undertaken in Lange would have been complete.

Alternatively, such a decision might give rise to controversy. The level of the controversy might vary. The most minor criticism would be that the Court failed to integrate its choice of model into its reasoning. A more deeply felt criticism might take the form of a charge of judicial activism, that is, judges picking and choosing among competing political visions to justify personal predilections. The obvious response to this charge would be that judges making choices is inherent in constitutional adjudication, and that judicial selection of a particular conception of democracy is not, per se, a personal choice if it draws on philosophical and historical conceptions of representative democracy.

The most telling criticism would be simply that the judges chose the wrong model. This allegation would be most likely to arise if the Court adopted a participatory vision of democracy, since the participatory model would have the most far-reaching consequences in terms of transformation of our democratic institutions. However, I would contend that over time, the participatory model is likely to gain most acceptance given that it, above all other models, gives primacy to citizen involvement in democratic decision-making.

Most importantly, the Court's recognition of a participatory model would make a vital contribution to democratic renewal, by provoking a revision of the values, needs and aspirations upon which our democratic institutions are founded. In a climate where our democratic institutions are seen to have failed, such a revision is desperately needed.

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