LIBERAL LAW IN A REPRESSIVE AGE: COMMUNISM AND THE LAW 1920-1950

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> "One such powerful force, helping to shape policy toward the anti-democratic minority, is the tradition of toleration, which in time becomes a moral quality, resting upon an optimistic forecast of the political consequences of freedom. To extend the democratic freedoms to all, including those who would abolish them, implies a large faith in the ability of the democratic system to survive, and ultimately a faith in the people . . . It is a venture which not all democracies are ready for, especially if young or unstable, and so we cannot blame them if in their prudence they bias policy against liberty in favour of security. An older and more stable democracy on the other hand, may be taking little risk in tolerating the intolerant and even subversive party."
>
> (H. B. Mayo)[1]

The anti-democratic minority is a potentially vexed problem for a democratic society. How does such a community deal with a minority whose aims seem totally at variance with those of the rest? The Australian Communist Party provides a good example in our own recent history. By its constitution and propaganda, it apparently advocated the overthrow of established government, by violence if necessary.[2] But did these aims result in action? Doctrinal justification of violence and revolution is one thing; translation of doctrine into action is another. The first may be upheld as a legitimate exercise of free speech; the second may well offend against the laws made by a society for its own protection.

The United States Supreme Court highlighted this distinction in *Schneiderman* v. *U.S.* in 1942

> "There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time—prediction that is not calculated or intended to be presently acted upon, thus leaving opportunity for general discussion and the calm processes of thought and reason."[3]

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1 H. B. Mayo, *An Introduction to Democratic Theory* (New York, 1960) p. 211.

2 *Report of the Royal Commission Inquiry into the origins, aims, objects and funds of the Communist Party in Victoria and other related matters* (1950) p. 24 (hereafter *Report*).

3 *Schneiderman* v. *U.S.* (1942) 320 U.S. 156.

But it is not always easy to draw a dividing line between the point where thoughts and words end and actions begin. As Holmes J. once said "Every idea is an incitement".[4] With the Communist Party the problem is particularly difficult, because at many times in its Australian history it has been harsh and uncompromising in its programme for social and economic change. Without stopping to examine the context of communist doctrine and its relation to the Australian context, it is easy to conclude that communists were actively seeking the immediate violent overthrow of the state. Yet is this a reasonable assumption?

In the extract from *Schneiderman's* case quoted above, the U.S. Supreme Court clearly regarded the element of time as being important in determining whether present communist words or activities reflected their doctrinal assertions. If the use of force is only predicated in the distant future, then it may be that communists are prepared to work within the present constitutional and democratic framework until this hypothetical future arrives.

The purpose of this article is to examine some aspects of the law's reaction to the problem of Australian communism in the period prior to R. G. Menzies' *Communist Party Dissolution Act* of 1950 and his anti-communist referendum of the following year. If those two years represent the high point of the Australian community's concern about communism, the years preceding are an important background for an understanding of this concern. At the time, there seemed good reason for fearing communism both internationally and at home.[5] Yet if the international threat had some basis to it, the domestic fear arguably did not. More troublesome questions therefore arise concerning our political tolerance as a "democratic" community. The legal process is often used as a means of attacking one's political opponent. On various occasions between 1920 and 1950 there were attempts to do this with respect to Australian communists. Parliament and the courts pulled in opposite directions, as the former strove to cut down the political rights of Communists and the latter retarded or even reversed this process. Here, the role of the judiciary was similar to that in the United States, although the methodology and approach were quite different. In most instances, an impartial stance was maintained in an age which was steadily becoming more intolerant and frightened. This process is examined below.

I

Because of their "subversive" appearance, it was clear from the very inception of their party, that communists would at some stage end up in court. The surprising thing was that, up to 1949, these occasions were to

[4] *Gitlow* v. *U.S.* 268 U.S. 673.

[5] Barton J. Bernstein and Allan J. Matusow (ed.) *The Truman Administration: A Documentary History* (New York 1969) also Michael Paul Rogin *The Intellectuals and McCarthy: The Radical Spectre* (Cambridge Mass. 1961) and L. Webb *Communism and Democracy in Australia* (Melbourne, 1954).

be relatively infrequent. In 1920, while repealing the more stringent provisions of the *War Time Precautions Act*,[6] the Commonwealth Government amended the *Crimes Act*[7] by the addition of sections 24A-E. These dealt with sedition as distinct from treason. The following intentions were defined as "seditious"

"24A(1) (a) to bring the Sovereign into hatred and contempt;
(b) to excite disaffection against the Sovereign or the Government or Constitution of the United Kingdom or against either House of the Parliament of the United Kingdom;
(c) to excite disaffection against the Government or Constitution of any of the King's Dominions;
(d) to excite disaffection against the Government or Constitution of the Commonwealth or against either House of the Parliament of the Commonwealth;
(e) to excite disaffection against the connexion of the King's Dominions under the Crown;
(f) to excite His Majesty's subjects to attempt to procure the alteration, otherwise than by lawful means, of any matter in the Commonwealth established by law of the Commonwealth;
(g) to promote feelings of ill-will and hostility between different classes of His Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth."

An enterprise carried out with any of these intentions was punishable upon indictment with three years imprisonment.[8] Section 24C covered persons conspiring, advising or attempting to carry out a "seditious enterprise", while section 24D made the uttering, printing or publishing of any seditious words an offence. Certain safeguards however, were provided: no conviction could be secured upon the uncorroborated testimony of one witness[9] and section 24A(2) set out certain acts and words which did not attract the operation of the sedition provisions. Thus it would be lawful for any person

"24A(2) (a) to endeavour in good faith to show that the Sovereign has been mistaken in any of his counsels;
(b) to point out in good faith errors or defects in the Government of the United Kingdom or of any of the King's Dominions or of the Commonwealth as by law established, or in legislation, or in the administration of justice, with a view to the reformation of such errors or defects;

[6] *War Time Precautions Act* 1914 (Cth).
[7] *Crimes Act* 1901-1920 (Cth).
[8] Ibid. s. 24C.
[9] Ibid. s. 24E.

(c) to excite in good faith His Majesty's subjects to attempt to procure by lawful means the alteration of any matter in the Commonwealth established by law; or

(d) to point out in good faith in order to their removal any matters which are producing or have a tendency to produce feelings of ill-will and hostility between different classes of His Majesty's subjects."

The amendments therefore sought to achieve a distinction between acts and words calling for lawful change and those which went beyond this to foster disaffection against the Sovereign and lawfully constituted government. To this extent, at least, political criticism and opposition did not come within the scope of the new provisions. The only problem of course, was to establish the point at which words and actions became "seditious". Unlike the United States, there was no constitutional guarantee of freedom of speech to help in this determination.

As the date of these amendments coincided with the foundation of the Communist Party in Australia, it is likely that Communists were among the classes of persons at whom they were directed (although there was little express reference to them in the lengthy parliamentary debate).[10] Also, the experience of the I.W.W. revolutionaries during the First World War must still have been fresh in the legislators' minds.[11] The constitutional basis of the amendments was made out, presumably by reading together sections 51(xxxix) and 61 of the Commonwealth Constitution—power to make laws incidental to the protection and maintenance of the existing government and departments and officers of the government in the execution of their powers. It could also be argued that they fell within the scope of the Commonwealth's defence power.[12] Thus, while the Commonwealth Parliament had no power to legislate generally with respect to crime, the constitutional validity of the amendments could probably be upheld under these headings. Nevertheless, they were not used against Communists for some time. In 1925 however, it could be said that there was another legislative move against their party in an amendment to the *Immigration Act*.[13] This enabled the Commonwealth Government to deport any person "not born in Australia", if the minister was satisfied that that person had been concerned in Australia

"in acts directed towards hindering or obstructing to the prejudice of the public, the transport of goods or the conveyance of passengers in relation to trade or commerce with other countries or among the States, or the provision of services by any department or public authority of the Commonwealth, and that the presence of that person in Australia

[10] Webb, *op. cit.*, p. 18.
[11] I. Turner, *Sydney's Burning* (Melbourne, 1967).
[12] S. 51(vi) *Commonwealth Constitution.*
[13] *Immigration Act* 1901-1925 (Cth).

will be injurious to the peace, order or good government of the Commonwealth."[14]

The late 1920's were a period of considerable industrial unrest and Communist unionists were beginning to play a significant part in this.[15] Whilst he did not name them specifically, the Prime Minister, S. M. Bruce, said in Parliament when introducing this amendment that these industrial disturbances were "not caused by the Australian-born, but were due to the doctrines and atmosphere introduced by aliens"[16]—a clear reference to the overseas origins of communist ideology. Pursuant to this new power, his government attempted to deport two foreign-born leaders of the 1925 seamen's strike, both of whom were Communists. An appeal to the High Court defeated the move.[17] This was on the basis that, although the amendment itself could be sustained under the immigration and emigration power, neither men was an "immigrant" within the meaning of the *Act*. As they both had made their permanent homes within the Commonwealth for considerable periods of time, one since 1893 and the other since 1910, this was an eminently reasonable decision. If the Court had held otherwise, the ramifications would have been extremely far-reaching.

Perhaps as a result of this failure, the Government then strengthened the *Crimes Act* by adding Part IIA, sections 30A-R. Among other things, a definition of "unlawful association" was proposed as follows

"s. 30A(i)(a) Any body incorporated or unincorporated which by its constitution or propaganda or otherwise advocates or encourages

(i) the overthrow of the Constitution of the Commonwealth by revolution or sabotage;

(ii) the overthrow by force or violence of the established government of the Commonwealth or of a State or of any other civilised country or of organised government; or

(iii) the destruction or injury of property of the Commonwealth or of property used in trade or commerce with other countries or among the States, or which is, or purports to be, affiliated with any organisation which advocates or encourages any of the doctrines or practices specified in this paragraph;

(b) Any body of persons, incorporated or unincorporated, which by its constitution or propaganda or otherwise advocates or encourages the doing of any act having or purporting to have as an object the carrying out of a seditious intent as defined in section 24A of this Act."

14 S. 8AA(2).
15 K. Tenant, *Evatt: Politics and Justice*, Webb, *op. cit.*, pp. 18, 19.
16 110 *Commonwealth Parliamentary Debates* 460-461 (25 June 1925) (hereafter C.P.D.).
17 *Ex parte Walsh and Johnson, In re Yates* (1925) 37 C.L.R. 32.

Once again, these were undoubtedly directed at communist unionists and their party. Constitutional objections, however, probably prevented the naming of the party specifically as an "unlawful association". Under the Constitution, the Commonwealth Parliament had no power to legislate with respect to communism per se: any such law had to be brought under an existing head of power. In 1925, as with the *Communist Party Dissolution Act* of 1950, the most relevant ones were section 51(vi) (defence) and sections 51(xxxix) and 61 (power to make laws incidental to the maintenance and protection of the Commonwealth). Thus, any successful anti-communist law would have to meet the threshold requirements of these sections: a threat to internal or external security would have to be shown.

The new amendments also provided penalties for persons who were members of an "unlawful association"[18] or who solicited funds for it[19] or who published or distributed information for it.[20] Of most significance was section 30R which stated that

> "the averments of the prosecutor contained in the information or indictment shall be prima facie evidence of the matter or matters averred."

These provisions, however, remained unused until further amendments were made seven years later. They broadened the range of punishable offences and empowered the Attorney-General to apply to the High Court or any State Supreme Court for

> "an order calling upon any body of persons, incorporated or unincorporated, to show cause why it should not be declared to be an unlawful association."[21]

Coming at the height of a world depression and widespread economic misery, such a provision was not surprising. The conservative government of the day saw an increasing threat from "unlawful associations", in particular the Communist Party and its affiliates.

> "In these restless times, when subversive doctrines are being preached and the loyalty of the community and the stability of our institutions are being undermined, the widest power to deal with unlawful associations is essential in the interests of society."[22]

Shortly after these amendments were passed, one Francis Harold Devanny, publisher of the Communist Party newspaper, the *Workers' Weekly* was charged under section 30D with soliciting funds for an unlawful association, namely the Communist Party of Australia.[23] He was convicted and sentenced to six months labor at first instance but on

[18] *Crimes Act* s. 30B (Cth).
[19] Ibid. s. 30D.
[20] Ibid. s. 30F.
[21] Ibid. s. 30AA.
[22] 134 C.P.D. 1141 (per S. M. Bruce) 20 May 1932.
[23] *The King* v. *Hush; ex parte Devanny* (1932) 48 C.L.R. 491.

appeal to the High Court the conviction was quashed for want of proof that the contributions of money were solicited for the Party rather than for an anti-imperialist war demonstration committee consisting of 64 working class organisations of which the Communist Party may or may not have been one.[24] Accordingly, it was not necessary for the Court to consider the further question of whether the Party was in fact an "unlawful association". Four of the justices[25] did not commit themselves to an opinion on this, but the fifth, Evatt J. was doubtful that it was. Only Rich J. (in upholding the conviction) held that it was unlawful and that its object was

> "the overthrow of the Commonwealth Constitution and the existing structure of government, within the meaning of section 30A."[26]

It is noteworthy that three of the justices were very critical of the form of information presented by the prosecution in accordance with section 30R (it was 86 pages, with 61 separate averments, most of them directed at proving the unlawfulness of the Communist Party).[27] They said that it included many matters of evidence which should not have been there and which were "well-calculated to embarrass the trial of the accused".[28] In addition, Evatt J. spent a considerable part of his judgment in assessing communist aims and activities, with a view to determining the danger they then posed to society. His analysis was very similar to that of the U.S. Supreme Court in its later decisions on the *Smith Act* and other similar legislation.

> "The Communists claim that democratic institutions conceal, but do not mitigate, the concentration of political and economic power in the property-owning class, and that, for such dictatorship there should be substituted the open, undisguised dictatorship of the property-less classes. They say that it is extremely probable that a violent upheaval will ensue when the time comes to effect such substitution.
> 'When the time comes.' It is, it would seem from the writings in evidence, the element of time which must be closely examined in determining whether at the present, or in the near, or very far distant, future there is to be any employment of violence and force on the part of the classes for which the Communist Party claims to speak. 'The inevitability of gradualness' as a Socialist and Labor doctrine, the Communists reject. But they believe and advocate that a Socialist State must inevitably emerge from the very nature of capitalist economy. But when? So far as the evidence placed before us goes, there is no answer to this question. So that one possible argument, which may be open to the Communist Party in explaining their references to physical force, is that force and

[24] Ibid.
[25] Gavan Duffy C.J., Starke, Dixon and McTiernan JJ.
[26] *The King* v. *Hush* (1932) 48 C.L.R. 491, 503.
[27] Ibid. 489 ff.
[28] Ibid. 500 per Gavan Duffy C.J. and Starke J.

> the threat of force are far distant from the present or the near future. The history of the attempts and failures of Communism to gain control of other political movements of the working classes may tend, upon closer analysis, to show that, to turn the phrase, Communism illustrates the gradualness, the extreme gradualness, of inevitability."[29]

From this, it may be concluded that Evatt J. regarded the element of time as crucial in determining the unlawfulness of Communist Party aims. Besides this, he also had doubts as to whether the new amendments themselves could be sustained under the Commonwealth's existing powers (although this was purely obiter dictum).[30] It is interesting to note at this stage, however, that in 1949 the High Court did expressly hold them valid, although a year later it declared the *Communist Party Dissolution Act* 1950 (which sought to ban the party outright) ultra vires and unsupportable under sections 51(xxxix) and 61.[31]

Devanny's case is significant as the first legal attack on the Communist Party as such. It must have given little satisfaction to those legislators wishing to make the *Crimes Act* an efficient anti-communist weapon. The question of the party's unlawfulness was left unresolved, and, although it was only Evatt J. who canvassed the general issue of freedom of political action, this notion was implicit in the other majority judgments. The latter were especially critical of the way in which the case against Devanny had been presented and demonstrated a concern not to deprive an individual of his liberty unless the offence alleged was properly proved. The case was lost at the outset, because it was not even shown that the funds were raised for the Communist Party.

Thereafter, the High Court was not called to consider directly the legal position of Communists for another 17 years. The doubts raised in *Devanny's* case may have caused reluctance to use the *Crimes Act*. Problems of proof were great, particularly as Communists were adroit in covering their tracks. Many party activities were closely interrelated with those of non-communist organisations.[32] This was particularly so after 1934, when a change of tactics led the Party to advocate a United Front against Fascism.[33] This in turn may have lessened public criticism with the approach of the Second World War.

The communist issue did, nevertheless, arise as part of an amusing sideshow in the mid 1930's. Once again the *Immigration Act* was used, this time to keep out visiting communists from overseas. The attempts failed, however, when brought to the High Court, which showed a dislike for the sort of administrative manoeuvres employed. The first was the case

[29] Ibid. 517.
[30] Ibid. 510.
[31] See below, pp. 113-118.
[32] *Report, op. cit.*, 57 ff.
[33] Ibid. 36.

of Egon Kisch, a Czech, who came to Australia in 1934 to attend an All-Australia Congress Against War. He was prevented from landing by the master of the ship in which he had travelled to Australia. The master acted pursuant to a declaration made by the Minister of Customs which named Kisch as a "prohibited immigrant" within the meaning of section 3 of the *Act*.[34] Following an application to the High Court by way of habeas corpus, Evatt J. ordered his release from custody on the basis that the declaration was not properly made out.[35] On landing, Kisch was given a dictation test in Scottish Gaelic which he failed. He was then sentenced to six months imprisonment for entering the Commonwealth in contravention of section 3(a) of the *Immigration Act* (failure to pass a dictation test in a "European language"). On appeal, the High Court held that Scottish Gaelic was not a "European language" within the meaning of section 3(1) and Kisch's conviction was quashed.[36] Thus, without directly posing the issue of individual freedom, the Court used statutory interpretation to uphold individual freedom against a rather absurd administrative action (although its decision not unnaturally, aroused a great outcry from Scottish nationalists).[37]

A similar case arose with respect to a New Zealand Communist, Gerald Griffin, who sought to enter the country for the same anti-war Conference. He was required to submit to a dictation test in Dutch (which he failed) and was sent back to New Zealand. Subsequently, he entered Australia and was arrested. He was then declared a "prohibited immigrant" under section 5(3) of the *Immigration Act* and sentenced to six months imprisonment under section 7 of the same *Act*. On application to the High Court, the conviction was quashed on a procedural ground: the evidentiary provisions of section 5(3) applied only to offences created under sections 5(1) and (2) and thus no case had been made out for a conviction under section 7.[38]

It is noteworthy that in most of the cases considered above, convictions had been obtained in lower courts, but on appeal the High Court quashed them or held that the particular administrative action taken was improper. To a convinced anti-communist, the decisions may have appeared highly technical. But civil libertarians would argue that, in the absence of a general bill of rights, the Court was doing no more than adhering to well-established judicial policies. Individual liberty in a common law system depends more on detailed forms and procedures and the time-honoured

[34] *Immigration Act* 1901-1930 s. 3(g), (h) (Cth).
[35] *The King* v. *Carter; Ex parte Kisch* (1934) 52 C.L.R. 228.
[36] *The King* v. *Wilson & Anor; Ex parte Kisch* (1934) 52 C.L.R. 237.
[37] *The King* v. *Fletcher; Ex parte Kisch* (1934) 52 C.L.R. 248. This was an application to punish the editor and proprietor of the *Sydney Morning Herald* for contempt of court for publishing letters and articles critical of the High Court's decision. The application failed.
[38] *Griffin* v. *Wilson* (1934) 52 C.L.R. 267.

canons of statutory interpretation, than on general statements of rights (although these may be the unspoken rationale for the detailed rules). In each of these cases, the High Court was only discharging its usual obligation to defendants, ensuring that they were properly proceeded against and that they were not treated differently from other persons alleged to have broken the law. The fact that they were communists was irrelevant to the question of legal guilt.

II

When the Second World War broke out, the Australian Communist Party found itself in an invidious position. Russia had just signed its Non-Aggression Pact with Germany and this meant that the Party had suddenly to reverse its earlier policy of a United Front.[39] In this context it began to assume a "treasonable" hue with its opposition to the war effort.[40] On the 17th June 1940, it was banned by the Commonwealth Government under the *National Security Regulations*.[41] Despite the ban, it appears that the Party continued to operate underground and that membership even rose during this period.[42] Under different names, communist officials continued to hold trade union office and communist candidates polled record votes in the federal elections of September 1940.[43] The ban was not strictly enforced, particularly in its last six months, and on the 18th December 1942 it was revoked as Russia was by then an ally and communist policy had undergone another sudden change.[44]

At this stage, it is interesting to note a striking continuity in the personalities involved on the occasions when communist activities came under legislative and judicial review. H. V. Evatt acted as counsel to Walsh and Johnson, the two leaders of the 1925 seamen's strike, and was on the High Court when the *Devanny, Kisch* and *Griffin* cases were decided. As Attorney-General he revoked the war-time ban, although he warned that it would be reimposed if the communists broke their undertaking to assist in the war effort.[45] On the other hand, J. G. Latham was Attorney-General at the time the 1932 amendments to the *Crimes Act* were made and was to be on the High Court when the *Burns* and *Sharkey* sedition cases which will be discussed below, were decided. Again, R. G. Menzies was Attorney-General when the *Kisch* and *Griffin* cases arose, and was Prime Minister of the government which banned the Party in 1940. As Leader of the Opposition in 1949, he was to campaign vigorously against the Party and

39 *Report, op. cit.*
40 Webb, *op. cit.*, 17, 19.
41 *Report, op. cit.*
42 Webb, *op. cit.*, 7-8.
43 Ibid.
44 Attorney-General Evatt's statement revoking the ban in the *Sydney Morning Herald*, 19 December 1942.
45 Ibid.

then as Prime Minister in 1950 and 1951 he was to seek to ban the Party altogether. On the two later occasions, Evatt was to be his main opponent.[46]

It is wrong, however, to deduce from all this that the attitudes of Menzies and Evatt, particularly the latter, remained constant throughout this period. As Attorney-General, Evatt sponsored legislation to protect the experimental rocket range at Woomera from black bans by communist-led unions which strongly opposed the project.[47] Again, he was a member of the government which used troops to break a communist-led coal-miners strike in N.S.W. in 1949,[48] and which passed stiff anti-strike legislation to hasten the end of the stoppage.[49] Furthermore, the *Burns* and *Sharkey* sedition cases were prosecuted when he was still Attorney-General.

On the other hand, in 1946, Menzies stated he was opposed to banning the Communist Party as

> "we must not let it be thought that they are such a force in political philosophy that we cannot meet them."

Thus the best method was to bring communism into the open and expose its false arguments. The ordinary criminal law would suffice in dealing with communists when they stepped outside the law.[50] Menzies' Country Party colleagues, by contrast, had no such scruples about civil liberties and from mid 1946 A. W. Fadden, their federal leader, regularly advocated an immediate ban at his election meetings.[51]

By 1949, however, Menzies had changed his mind and had begun to argue for an immediate ban, justifying it on the grounds of the Communist Party's industrial activities and its international affiliations. In his view, these gave rise to the distinct possibility that it would act as a fifth column if Australia was involved in any confrontation with Russia.[52]

Menzies' change in policy reflected the atmosphere of the times. Communist power was on the increase in Europe and Asia. Furthermore, since the mid 1930's, Communists had gained influential positions in many trade unions, particularly in the transport, maritime, coal-mining, stevedoring and metal industries.[53] The power of such officials seemed disproportionate to the small membership of the Party and the manoeuvrings of Communists within the A.C.T.U. and State Trades Hall Councils were viewed with increasing suspicion.[54] Victoria, in particular, had suffered a series of severe strikes in public utilities and essential service industries since the

46 Webb, *op. cit.*, ch. 1.
47 *Approved Defence Projects Protection Act* 1947 (Cth).
48 Webb, *op. cit.*, 13-14; L. F. Crisp. *Ben Chifley* (Longmans 1960) 361. Also see *Herald*, 12 July 1949, 8, one of a series of advertisements inserted by the Prime Minister urging the miners to return to work and repudiate the Communist leadership of their union.
49 *National Emergency (Coal Strike) Act* 1949 (Cth), passed 29 June 1949.
50 *Sydney Morning Herald*, 16 February 1946.
51 Webb, *op. cit.*, 12.
52 *Herald*, 18 January 1949, 1.
53 Webb, *op. cit.*, 10.

end of the war, the most serious of which occurred in 1946 and 1948.[55] In N.S.W. in 1949, the coal-miners' strike required the use of troops by the Commonwealth Government to end it.

In the midst of this general post-war industrial unrest, communist power seemed all-pervasive and threatening. It was easy to picture anonymous hard-faced men sitting in darkened rooms, orchestrating wide-scale industrial sabotage in response to orders from their "Moscow Masters".[56] The prevalence of strikes seemed to indicate some deep plot to disrupt production and thereby bring democratic institutions into disrepute. Communist propaganda tended to reinforce this suspicion. Furthermore, by its championing of the Soviet Union, the Party appeared to have foreign loyalties which were increasingly unpalatable in a period of Cold War.[57]

Accordingly, calls to ban the Communist Party increased in volume. From the beginning of 1949, both federal opposition parties agreed to make this part of their election policy for the end of the year campaign.[58] Against this, the position of the Chifley Labor government appeared ambiguous. Whilst prepared to take strong anti-communist action on occasion, it refused to countenance complete suppression. This was partly because of a concern for civil liberties and partly because the communist threat arose most directly in the trade unions. The government was reluctant to alienate its most important power base by interfering with internal union affairs. Furthermore, both Chifley and Evatt doubted the efficacy on a ban in fighting communism. They believed that the real solution lay in "improving the conditions of the people, because bad conditions are the soil in which it thrives".[59] Whilst the Australian Labor Party sought specifically to disassociate itself from the Communist Party, Chifley was determined to leave the matter alone and to use the law only where the latter stepped outside it.[60] These attempts to play the issue down however, were not very effective. In the 1949 election campaign, the opposition parties adopted a highly successful (if unscrupulous) advertising campaign, which linked the A.L.P. with the Communist Party.[61] This played some part, at least, in the subsequent defeat of the Chifley government.

As anti-communist hysteria grew after 1945, communists again came

[54] Ibid.; also E. Hogan *What's Wrong with Australia*? (Melbourne 1952) and a pamphlet entitled *True Facts of the Attacks on the Trade Union Movement*, published by the Melbourne Trades Hall Council early in 1949.

[55] S. Ricketson *The 1949 Victorian Royal Commission into Communism* Unpublished B.A. Hons. Thesis 1972, held in History Department, University of Melbourne.

[56] *Herald* 22 April 1949.

[57] See generally the editorials in the *Herald*, 16 April 1949 and 21 April 1949 for examples of this kind of thinking.

[58] Webb, *op. cit.*, 12.

[59] Crisp, *op. cit.*, 358.

[60] Ibid. 359.

[61] Early L.C.P. advertisements in the *Herald* carried such slogans as "Labor's Socialist Steps to the Communist State". Ibid. 16 September 1949, 2 and "A Socialist Victory is a Soviet Victory!" Ibid. 6 December 1949, 6.

before the courts. This time the attacks were more successful and as such were a prelude to the all-out attempts to ban the Party in 1950 and 1951.

III

On the 18th September 1948, a debate was held between two representatives of the Queensland Peoples' Party and two representatives of the Australian Communist Party in the Brisbane Temperance Hall. 200 people were present and at the end of the debate questions were invited from the floor. The speakers included Gilbert Burns, a member of the Queensland State Committee of the Communist Party. One of the questions addressed to him was as follows

> "We all know that we could become embroiled in a third world war in the immediate future between the Western powers and Soviet Russia. In the event of such a war what would be the attitude and actions of the Communist Party in Australia?"

Burns replied

> "If Australia was involved in such a war, it would be between Soviet Russia and America and British Imperialism. It would be a counter-revolutionary War. We would oppose that war. It would be a reactionary war."

When the questioner demanded a "direct answer" to his question, Burns said "loudly and emphatically"

> "We would oppose that war: we would fight on the side of Soviet Russia. That is a direct answer."

Burns was then prosecuted on a charge of uttering words with a seditious intent. The magistrate at first instance found the charge proven: Burns' reply to the above question was expressive of a seditious intention to excite disaffection against the Sovereign and the Commonwealth Government. Under sections 24A(1)(b) and (d) of the *Crimes Act* (1914-1946). He was convicted and sentenced to six months imprisonment.[62] On appeal to the High Court, the four justices were equally divided on the question of intent and accordingly the conviction stood.[63] Latham C.J. said that the hypothetical element in the words used by Burns did not exclude them from the category of seditious words. Any statement which referred to the future could be shown to have such a hypothetical element. Burns was presenting the view of the Communist Party when he said that the Party would support Soviet Russia in the event of a war between that country and the British Sovereign. He presented it as a policy to be approved and put into present practice. Thus, in Latham's opinion, there was no doubt

[62] *Burns* v. *Ransley* (1949) 79 C.L.R. 101, 103.
[63] *Judiciary Act* 1903-1950 s. 30(b) (Cth).

that Burns was "exciting disaffection" because he was arousing in the minds of his listeners the view that the Sovereign and government should not be supported, but, in the case of war, opposed. This went beyond "political criticism" which was protected by section 24A(2). It was directed at encouraging internal disloyalty at a time when the country was defending itself against hostile attack. Thus Burns could not take refuge in the argument that he was merely voicing a political criticism: it was clearly "seditious" under section 24A(1). Furthermore, this section was a valid exercise of power under sections 51(xxxix) and 61 of the Constitution.[64]

Rich J., in agreeing with the Chief Justice, also drew the distinction between "mere criticism of a political nature" (which was not attacked by section 24A(1)) and statements which were designed to "inspire or kindle hostility against the Sovereign and Government of the Commonwealth". The hypothetical nature of Burns' statement did not affect its seditious intent. He was trying to make a favourable impression on his audience in order to convert them to the policy of his party.[65]

Both judgments raised serious questions as to the parameters of political tolerance. Most worrying was the way in which both justices dismissed the contention that the words used by Burns were merely hypothetical and had no present intent to effect a seditious purpose. Whilst they expressly raised the distinction between "mere political criticism" and "seditious intent", one is nevertheless tempted to conclude that in doing so they were endeavouring to rationalise a decision which was dubious on its facts. Was Burns speaking for the Party or was he simply giving a personal opinion on the spur of the moment? Again, if one is speaking hypothetically with respect to future events that depend on certain contingencies, is one stating a present policy? May not other events intervene between the speaking of the words and the occurrence of the event in question? Such intervening events may well change the tentative policy enunciated in previous statements. What Burns may have been saying in reality was, that while there was no existing war between Australia and the Soviet Union, the present policy (of Communists) was to use the intervening period of peace to persuade the Commonwealth Government (by lawful means) to be more favourably disposed towards the Soviet Union. In that event, a future war might well be averted. If a war did occur, only then would Australian Communists take sides.

Another troublesome question raised by the judgments of Latham C.J. and Rich J. was their readiness to accept that war between Russia and Australia was an imminent possibility. This clearly gave content to Burns' seditious intent, but it also posed the general problem of judicial notice, a point that was examined in some detail in several of the judgments in the

[64] *Burns* v. *Ransley, op. cit.*, 106 ff.
[65] Ibid. 111 ff.

Communist Party Dissolution case, a year later.[66] Although that case is beyond the scope of the present paper, it is of interest to note there that the court was reluctant to take notice of the state of "ostensible peace" which existed at the time as a basis for extending the use of the defence power to ban the Communist Party. While such an extension may be justified in time of war, in time of peace such action was ultra vires the Commonwealth Constitution. It could not be supported either under the defence power or by reading together sections 51(xxxix) and 61 of the Constitution, although the proscribing of certain activities (as in the *Crimes Act*) was undoubtedly sustainable under these provisions.[67] In short, it was not the court's function to determine the quality of "peace". To this extent, Latham C.J. and Rich J. were treading on uncertain ground in *Burns'* case (and in *Sharkey's* case). Unconsciously perhaps, they were involving the court in delicate questions of foreign policy not within its competence. It was unfortunate that none of the judges in *Burns* and *Sharkey* adverted to this danger, although it was an important consideration in the later *Communist Party Dissolution* case. It is interesting to note, however, that by the time the latter was decided, the composition of the court had changed considerably; Rich J. had retired, two new justices had been appointed and Latham C.J., whose view as Chief Justice had been decisive in the evenly divided court in *Burns*, was the sole dissenter in the *Communist Party Dissolution* case.

The two dissenting judges in *Burns'* case (Dixon and McTiernan JJ.) concerned themselves mainly with the question of intent. In their view, the words uttered by Burns had to evince a real, present intention on the part of the speaker to excite or produce a disattachment from or a disaffection against the Sovereign and established institutions of government. There was no evidence that Burns had done anything more than state his own sentiments without reserve. There was no indication of any desire to persuade his audience of anything but his own conviction about what course his party would take if a war with Russia occurred. Whilst the Communist Party might commonly be thought seditious and Burns' statement hypothetically treasonable, in the absence of further proof this did not constitute an actual, present intention to excite disaffection.[68]

Both judgments revealed a more balanced approach to the concept of seditious intent, and, more generally, to the problem of political tolerance. Taken this way, they represented a continuance of the flexible line adopted in earlier decisions like *Walsh and Johnson, Devanny, Kisch* and *Griffin*. In their emphasis on the need for a present intent to disaffect as opposed to mere statements of opinion, they also bore a close resemblance to the reasoning in some of the *Smith Act* cases in the United States

[66] *Australian Communist Party* v. *The Commonwealth* (1950-1951) 83 C.L.R. 196 ff. (per Dixon J.) 264 ff. (per Fullagar J.).
[67] Ibid.
[68] *Burns* v. *Ransley* (1949) 79 C.L.R. 101, 112 ff (Dixon J.), 118 (McTiernan J.).

> "The essential distinction is that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something."[69]

At the same time that *Burns'* case was decided, so was another with very similar facts. Laurence Louis Sharkey, General Secretary of the Communist Party, was prosecuted for uttering seditious words, as contained in the following press statement

> "If Soviet Forces in pursuit of aggressors entered Australia, Australian workers would welcome them. Australian workers would welcome Soviet Forces pursuing aggressors as the workers welcomed them throughout Europe when the Red troops liberated the people from the power of the Nazis. I support the statements made by the French Communist leader Maurice Thorez. Invasion of Australia by forces of the Soviet Union seems very remote and hypothetical to me. I believe the Soviet Union will go to war only if she is attacked and if she is attacked I cannot see Australia being invaded by Soviet troops. The job of Communists is to struggle to prevent war and to educate the mass of people against the idea of war. The Communist Party also wants to bring the working class to power but if Fascists in Australia use force to prevent the workers gaining that power Communists will advise the workers to meet force with force."[70]

The evidence was that a reporter on the *Daily Telegraph* had spoken to Sharkey by telephone, asking him to make a statement for publication regarding "Communist Policy in Australia in the event of the invasion of Australia by Communist forces". He had also asked for Sharkey's reaction to a similar statement by Maurice Thorez, a French Communist leader, with respect to French Communists. Sharkey said he was able to speak for the Party as its General Secretary, but would prefer to make a prepared statement the following day. After discussion with the reporter, the latter typed out a precis of Sharkey's views. He read it over 10 or 11 times to Sharkey, who changed some paragraphs and deleted others, finally saying he was satisfied with the statement. It appeared in the *Telegraph* the next day (5th March, 1949) and other evidence was brought to show that Sharkey was satisfied that this was a correct report of his views.[71]

Upon trial by indictment before Dwyer J., he was found guilty but the judge postponed judgment and sentence and stated a case under section 72 of the *Judiciary Act* 1903-1948 to the High Court. In considering this, the High Court decisively rejected submissions that sections 24A, 24B and 24D of the Commonwealth *Crimes Act* were ultra vires. It also held that there was evidence that Sharkey had uttered the words alleged and that there was corroborating evidence to that effect in accordance with the

[69] *Yates* v. *U.S.* 354 U.S. 1379.
[70] *The King* v. *Sharkey* (1949) 79 C.L.R. 121.
[71] (1949) 79 C.L.R. 121, 124-125.

Crimes Act provisions. Finally, it held that the words had been uttered with seditious intent.[72]

As in *Burns'* case, the statement here was based on hypothetical considerations, on contingencies which the speaker himself considered to be very remote. Yet, in a step away from the dissenting judgments of Dixon and McTiernan JJ. in *Burns'* case, the High Court held by a five to one majority that there was seditious intent. Latham C.J. put this on the basis that the words as uttered were not a statement of abstract theoretical opinion, but an "official statement" of party policy (as Sharkey had admitted he could speak for the party). Thus it was a statement intended to effect a purpose, and a seditious one at that, namely that it proposed that Australian workers should welcome a Russian invasion with non-resistance, because any resistance would amount to "aggression". Such a policy would invite acceptance of conquest by a foreign power and thus would involve repudiation of the existing legal and political organisation of the Commonwealth. This amounted to a "seditious intention" within the meanings of each of paragraphs (b), (c), (d), (g) of section 24A(1) and there was clear evidence on which a jury could find that the words were uttered with a seditious intent. Latham C.J. also held that the constitutional validity of the sections was sustained under sections 51(xxxix) and 61, namely, that they were directed at the maintenance of the Constitution and government.[73]

Webb, Williams, McTiernan and Rich JJ. supported the Chief Justice's reasoning on all these points.[74] As regards their characterization of what was "seditious intent", the comments made above with respect to *Burns'* case apply with equal force. Once again the hypothetical nature of Sharkey's statement was not considered as being relevant to the offence and there was no appraisal of the possible time span in which his words might have effect. The sole dissenting Judge (Dixon J.) did not direct his attention to this point.

Nevertheless, the circumstances of *Sharkey's* case explain in part the decisive majority among the justices. Sharkey made a considered statement, while Burns arguably did not. The former also professed to speak on behalf of the party, while it is debatable whether Burns did so. Finally, Sharkey was proceeded against by indictment, while Burns was not, and the Court was clearly unwilling to overturn the jury's verdict on the basis that there was insufficient evidence for it to find a "seditious intent".

In partial dissent, Dixon J. held that the conviction should be quashed and a new trial ordered. But this was not on the same grounds as his judgment in *Burns'* case, namely the lack of intent, but on the constitutional

[72] Ibid. 122-123.
[73] Ibid. 133 ff.
[74] Ibid. 145 ff. (Rich J.), 157 ff. (McTiernan J.), 159 ff. (Williams J.) and 161 ff. (Webb J.).

validity of section 24A(1)(g), under which the case against Sharkey had been mainly presented to the jury. His reasoning was that while the Commonwealth had power to safeguard and protect the Constitution and established government of the Commonwealth, the creation of feelings of hostility and ill-will among different classes of His Majesty's subjects was not a matter upon which the Commonwealth Parliament had power to legislate. Such feelings or relations among people formed a matter of internal order and fell within the province of the States. The connection of such matters to the protection of the federal Constitution and government seemed remote. It was impossible to see precisely in what way the creation of feelings of ill-will and hostility could be connected with "the peace, order and good government of the Commonwealth", as the Commonwealth had no general power to legislate with respect to crime. Whilst Dixon J. felt that the charge against Sharkey might be sustained as disclosing an intention to disaffect people against the Crown, Constitution and government under any of sections 24(a)(i), (b), (c) and (d), because the jury were encouraged to found their verdict on paragraph (g), the conviction should be set aside and a new trial ordered.[75]

In retrospect, the decisions in *Burns* and *Sharkey* seem harsh on their facts.[76] Although they finally settled any doubts remaining over the constitutional validity of the *Crimes Act* sedition provisions, they placed an unduly restrictive interpretation on the meaning of "seditious intent". The effect of this, obviously, was to severely curtail the freedom of speech and action by communists and other groups opposed to established government. It is only in the dissenting judgments in *Burns* that any reference to fundamental democratic values can be found. Yet neither case decided that Communism per se was unlawful and only a year later the same court was to find that there was no power in the Commonwealth Constitution to proscribe communists outright.

It is now appropriate to conclude, for the moment, our consideration of the High Court and to turn to the findings of several Victorian judges who, at the same time, were wrestling with the problem of political tolerance for communists. At first, however, a little background history will be necessary.

IV

At least one State government before 1949 had entertained plans for the complete suppression of the Communist Party. In April 1948, the Country Party Chief Secretary in the Victorian Liberal Country Party Government presented to Cabinet a draft bill to outlaw "subversive associations".[77]

[75] Ibid. 146 ff.

[76] It is of interest to note here another case (unreported) which occurred at the same time. A West Australian Communist (K. M. Healy) was acquitted at first instance on a charge of using seditious words similar to those used by Burns and Sharkey. It appeared here that seditious intent was not shown. Webb, *op. cit.*, 20.

[77] Draft of the *Subversive Associations Bill* 1948, held at the LaTrobe Library Archives, uncatalogued (hereafter *Draft Bill*).

There were no constitutional fetters on State powers to ban the Communist Party directly and thus it was specifically defined as a "subversive association".[78] The Party's doctrines were similarly defined as "subversive".[79] Severe penalties were proposed for being a member of such an association. In absence of proof to the contrary, evidence that a person had attended a meeting of such an association, had spoken publicly in support of its doctrines or distributed or published literature for it was sufficient to make out the offence of being a member.[80]

Separate penalties were also to be imposed on persons publishing or broadcasting subversive doctrines,[81] convening meetings for the purpose of advocating such doctrines[82] and letting premises to,[83] or soliciting funds for, subversive assocations.[84] Their members, officers and representatives were to be disqualified from holding certain types of employment, including offices in the public service, universities, schools, trade unions and companies.[85] They were not to be eligible for jury service or for any pension or superannuating entitlement.[86] Persons convicted of other offences against the Bill were to be similarly disqualified: to act in defiance of any such disqualification was also to be an offence.[87] The penalties proposed for all offences were severe, generally up to £1,000 fine, two years imprisonment or both. Trial could be either summary or by way of indictment.[88] The most drastic sanction, however, was that in addition to any other penalty imposed, a person convicted of an offence under sections 3 or 4 of the *Bill* (being a member or publishing, distributing or broadcasting) could be declared an outlaw by the minister. That person could then be arrested at any time by any member of the police force without warrant and committed to prison without further trial to be held during the King's pleasure.[89]

The proposed Bill was never enacted and, in fact, never got beyond the

[78] *Draft Bill, op. cit.*, s. 2—"Subversive Association" means—
(a) the association known as the Communist Party of Australia.
(b) Any association or body specified for the purposes of this Act by proclamation of the Governor-in-Council published in the Government Gazette.

[79] S. 2—"Subversive doctrine" means the doctrines of communism or any doctrine or principle advocating
(a) the overthrow by force, violence or extra-parliamentary means of established constitutional government.
(b) the subversion of law and order.
(c) the use of force or violence to attain any social, economic or political end, or
(d) the sabotage of any essential service within the meaning of the *Essential Services Act* 1948 or of any industry or of any premises, plant or equipment used in connexion with any such service or industry.

[80] S. 3(1) and (2).
[81] Ibid. s. 4(a) and (b).
[82] Ibid. s. 5.
[83] Ibid. s. 6.
[84] Ibid. s. 7.
[85] Ibid. s. 8(1).
[86] Ibid.
[87] Ibid.
[88] Ibid. s. 9.
[89] S. 10.

Victorian Cabinet. This was probably because the Liberal ministers felt it was too extreme a measure[90]—federal Liberal policy at the time being opposed to a ban.[91] Nevertheless, a year later and after the Country Party had left the coalition,[92] the Liberal Government undertook an unprecedented inquiry: a Royal Commission was appointed to investigate the Victorian Communist Party.[93] The proximate cause was a series of articles in the Melbourne *Herald* by a former member of the State Executive of the Party, C. H. Sharpley. He alleged Communists were guilty of extensive malpractices, particularly in the trade unions.[94] He claimed they were rigging union ballots to ensure the election of their candidates, as well as using intimidation, fraud and defamatory attacks on opponents to achieve their ends.[95] These charges were echoed by a number of A.L.P. Industrial Groupers at the Annual State Conference of the A.L.P. held at about the same time.[96]

The Victorian Royal Commission on Communism takes a central role in any consideration of judicial reactions to communism in the pre-Menzies period. Its appointment was in part politically motivated: it answered criticisms that the Victorian Liberal Government was doing nothing about communism,[97] and, because of the extensive publicity surrounding it, provided a useful propaganda weapon in a federal election year when both opposition parties were trying to brand the Chifley government with the communist label.[98] It was also ironical that, while it was postulated as an attempt to find out the truth about communist aims and activities so that appropriate policies might be formulated[99] (of which suppression might be only one of a number of options), events rapidly overtook the commission. By the time it was appointed, the federal Liberals were already advocating an immediate ban.[100] By the time it had finished, its state liberal progenitors had adopted the same policy.[101]

Yet, for all this, the Royal Commission represents a carefully balanced

90 Per Sir Albert Dunstan V.P.D. Vol. 229, 936 (11 May 1949).
91 Supra 111.
92 *Herald*, 1 December 1948, 1. P. Blazey, *Bolte* Melbourne 1973, 41 ff.
93 *Age*, 21 April 1949, 1, *Herald*, 21 April 1949, 1.
94 *Herald*, 16 April 1949, 1 and 2; 18 April, 1 and 2; 20 April, 1 and 2; 21 April, 1 and 2; 22 April, 1 and 2.
95 Ibid.
96 *Age*, 20 April 1949, 3—report of allegations of Communist ballot rigging made at the annual A.L.P. State conference that weekend.
97 See, for example, the speech by J. G. B. McDonald (Leader of the Country Party, V.P.D. Vol. 229, 16 (29 March 1949) and also Sir Albert Dunstan, *op. cit.*, 936 (11 May 1949).
98 See, S. Ricketson, *op. cit.*, ch. 4. "The Role of the Press".
99 V.P.D. Vol. 229, 836 and 839 (11 May 1949) Speech by the Hon. T. T. Hollway (Premier) introducing the *Royal Commission (Communist Party) Bill.*
100 Supra 112.
101 In the State elections of May 1950, Premier Hollway (Liberal) made suppression of the Communist Party one of his election policies, even after he had received Lowe's report. *Herald*, 13 April 1959, 1. Even before this, he had promised to back up Menzies' proposed legislation on a State level. Ibid. 6 December 1949, 4.

and fair investigation into the Communist Party. Its terms of reference were far-reaching, requiring the commissioner

> "to inquire into and report upon the following matters namely: The origins aims objects and funds of the Communist Party in Victoria and the activities and operations in Victoria of that party and of members thereof and of organizations and persons associated therewith."[102]

In particular, he was asked to ascertain whether the party advocated or encouraged the overthrow by force or violence of established government and furthermore whether its activities were directed towards the disruption of democratic institutions, the subversion of law and order, the dislocation of production or the attainment of "social, economic, industrial or political ends by force, violence, intimidation or fraudulent practices".[103]

The Royal Commission was also unusual in that it was set up by a special Act of Parliament, which expressly provided for the appointment of a Supreme Court judge as Commissioner.[104] He was given wide powers, including authority to punish contempt directly.[105] If any doubt as to his judicial status remained, this was removed by a Supreme Court ruling later that year that Parliament intended by its enabling Act that the proceedings of the Commission be treated "as part of the general administration of justice".[106] Sir Charles Lowe, a senior Supreme Court judge and former Commonwealth Royal Commissioner, was appointed to head the inquiry.[107] It was to take him nearly a year to complete. During this time, he heard 159 witnesses and received numerous exhibits (including books, documents and pamphlets) in evidence. The transcript of proceedings alone ran into 9,791 pages in 36 volumes.[108] He also received the assistance of three counsel whose function it was to bring evidence before him.[109]

Despite an inordinate amount of press coverage in its initial stages,[110] Lowe J.'s Commission remained singularly unaffected by the anti-communist feeling of the times. Although from the outset he stressed the inquisitorial nature of his inquiry,[111] he soon made a number of procedural rulings which subtly altered this. The Communist Party was given leave to be represented throughout the whole inquiry and was allowed similar rights to those of a defence counsel in normal adversary proceedings.[112] Lowe J. permitted this on the basis that the Communist Party was really

102 *Royal Commission (Communist Party) Act* 1949, s. 2.
103 Ibid.
104 Ibid. s. 3(1).
105 Ibid. s. 3(2).
106 *R.* v. *Arrowsmith, R.* v. *Miller, R.* v. *Little* (1950) V.L.R. 78 (per Dean J.).
107 *Age*, 20 May 1949. Lowe had also served on a number of Royal Commissions for the Commonwealth during World War II. See Newman Rosenthal, *Sir Charles Lowe* Melbourne 1968, 89 ff.
108 *Report, op. cit.*, 6, see also Appendices A, B and C.
109 R. Sholl K.C., S. Lewis K.C., M. McInerney—*Report, op. cit.*, 1.
110 Ricketson, *op. cit.*, 31 ff.
111 *Transcript Royal Commission on Communism*, 1950, 691 (hereafter *Transcript*).
112 Ibid. 1 and 2.

the subject of the inquiry. He also gave various trade unions and union officials accused of malpractice similar (although more limited) rights on the same basis.[113] He was not prepared, however, to grant leave for persons to appear simply to support or duplicate evidence already led by counsel assisting the Commission.[114]

Naturally, many witnesses who gave evidence before him made damaging allegations against certain individuals and organizations—either that they were Communists or Communist affiliates or had participated in alleged Communist misdoings.[115] Lowe J. gave leave to such persons or organizations to appear before him to rebut such allegations on oath. They were also allowed to cross-examine their accuser, but no more.[116] As such, this was an admirably fair procedure within the confines of the inquiry, as the Commissioner's task was to investigate his subjects of inquiry, not to make a series of findings concerning individuals. Yet, as can be readily appreciated the result of this was unfortunate with respect to newspaper reports, sensational allegations made in front of the Commissioner usually received extensive coverage, whilst a later denial or rebuttal was often lost in the small print or not reported at all.[117]

What did Lowe J.'s final report reveal about the aims and activities of Victorian Communists? It was a detailed document which carefully sifted a vast body of evidence, both oral and written. It began with an account of the history and development of the Australian Communist Party between 1920 and 1950, as the Commissioner recognized that this was an important background to an understanding of the nature of Australian communism.[118] He also analysed Marxist ideology at considerable length, paying particular attention to the time span in which communist objectives would come to fruition.[119]

His principal findings of fact came at the end and were as follows: the Communist Party was aiming at the overthrow of the capitalist state, establishing in its place the dictatorship of the proletariat and introducing

113 Ibid. 1626-1627.

114 Ibid. 8-10—where Reynolds K.C. made an application to appear on behalf of the Herald and Weekly Times Ltd. and Sharpley, on the basis that these two parties were practically in the position of "accusers" before the Commission. Lowe J. rejected the *Herald's* application, saying it was not a party to the proceedings and deferred that of Sharpley until such time as he was called by counsel assisting the Commission. Ibid. 971-972.

115 Sharpley, for instance, made sweeping allegations against various persons in prominent positions. These persons were often connected with the A.L.P. or other left-liberal groups, e.g. allegations against Brian Fitzpatrick, ibid. 927, Rev. A. A. Hughes, ibid. 1657 and John Rodgers, ibid. 2349. Organizations he alleged were sympathetic to Communists included the Council of Civil Liberties and Australia-Soviet House. Ibid. 927 and ibid. 2349.

116 Generally see ibid. 1060.

117 Ibid. 927—see comments by P. D. Phillips K.C. about the effect of press reporting on witnesses etc. See generally, Ricketson, *op. cit.*

118 *Report, op. cit.*, 9 ff.

119 Ibid. 12 ff. and 22-28.

socialism, and ultimately, communism by expropriating the present ownership of the means of production and distribution.[120] If the present possessors of power did not abdicate it voluntarily, then they would be overthrown violently.[121] With regard to the Party's international affiliations, he found no evidence of direction from abroad or of overseas financial aid since 1943, although party policy was generally in harmony with that of the Cominform.[122]

These findings related generally to matters of ideological concern, although it would be arguable from the majority judgments in *Burns* and *Sharkey* that to advocate such doctrines, without more, would still be seditious. Of more significance to the question of whether the Communist Party was actively seeking these goals or was prepared to accept democratic and constitutional methods to advance them, were the following findings

"10. The Communist Party is prepared to use any means to achieve what it thinks to be a desirable object, so long as it regards the means as fitting and the result as not on the whole disadvantageous.

20. The Australian Communist Party is prepared to carry on its work under all conditions, both when its operations are hampered by the law and when they are not.

29. The Communist Party regards existing law and order as that which is created by, and is used to support, the existing system. It does not hold itself bound to obey laws which it regards as oppressive, or restrictive of its efforts to overthrow the existing system."[123]

Whilst these findings indicated that Communists would have their cake and eat it too, Lowe J. warned that they must be read in the context of the whole report. There was evidence that Communists did work effectively within the "system" and claimed they would do so for the foreseeable future until such time as the "revolution" came.[124] Just when this would be, Lowe J. was unable to ascertain from the evidence.[125] His tentative conclusion was that it was in the indefinite future and furthermore that indefiniteness of time seemed inherent in the authoritative exposition of revolutionary crisis by Lenin himself.[126]

What did Communists do in the meantime? Were they actively working to hasten the revolutionary crisis or were they content to simply spread their views by lawful means? There was evidence that they regularly ran candidates for Parliament and for office in the trade unions (the latter with considerable success).[127] Regarding the allegations that they used

[120] Ibid. 104 Finding 5.
[121] Ibid. 104 Finding 6.
[122] Ibid. 36-40, 105.
[123] Ibid. 104-106.
[124] Ibid. 63 ff.
[125] Ibid. 24-30.
[126] Ibid. 24.
[127] Ibid. 63 ff. and 92 ff.

fraud and violence to achieve their ends, there was some evidence of this, but the instances were relatively trivial, had often occurred in the distant past and were usually confined to individual members.[128] Lowe J. simply enumerated them without comment, leaving open the question of whether such activities reflected party policy as a whole or were generally approved by the Party.[129] He found only one of the eleven charges of union ballot-rigging proved, although he had doubts about several others.[130] But even if ballot-rigging had occurred, Lowe J. indicated this did not necessarily show that Communists had instigated it or taken part. Again, while Communists might have behaved furtively, this did not of itself indicate wrongdoing.[131]

With regard to the more general allegations that Communists were disrupting industry, Lowe J. found various instances where Communist union officials had been directly involved with strikes and stoppages.[132] But he qualified this by saying that the officials concerned had argued that they were acting for the benefit of their members and in many cases there was evidence that this had in fact happened.[133] Evidence by rank and file unionists at the Commission showed that they did not support Communist officials so much because of their ideology, but because of their industrial militancy in advancing the interests of their members.[134] Thus, most Communist union officials were efficient in their jobs and the label of 'industrial saboteurs' became harder to substantiate.

Although it did not contain a startling series of revelations about communist activities, Lowe J.'s Report was nevertheless susceptible to differing interpretations. He made no recommendations about any desirable course of action to be taken with respect to his findings, as this lay outside his original terms of reference. Parts of his report, therefore, could be taken to support a policy of complete suppression of the Party, but, read as a whole (as Lowe said it should be) the evidence for this became less convincing. In fact, it tended to support the careful approach of Evatt J. in *Devanny*. It is interesting to note that in the highly-charged debates of 1950 and 1951, the report was seldom mentioned by either side although it was clearly the most exhaustive official examination of Communist objectives ever carried out in Australia. One reason suggested for this, was that the Commissioner was "too fair",[135] but a more likely one was that the evidence presented by him was too blurred and ambiguous for use in public debate. While it showed that Communists believed in the overthrow of the existing state, it did not clearly reveal how far their activities went beyond mere advocacy of an unpopular point of view towards the practical

128 Ibid. 75 ff.
129 Ibid.
130 Ibid. 81-91.
131 Ibid. 67-71.
132 Ibid. 91-97 and 107 Findings 32 and 33.
133 Ibid. 97.
134 Transcript, *op. cit.*, 9016 ff.
135 R. S. Gibson *My Years in the Communist Party*.

implementation of policy. The inherent difficulty of the last question becomes more apparent when it is realized that the Lowe Commission found evidence that Communists engaged in quite lawful activities, in the trade unions for instance, with the avowed aim of spreading their beliefs. Do such activities become a threat to society when used as a vehicle for such a purpose?

The main significance of the Victorian Royal Commission on Communism, however, lies in the factual material it so painstakingly assembled. A careful reading of the report dispels notions of a large scale subversive plot. Nevertheless, as stated above, many questions were still left unresolved. While Communists were guilty of individual acts of fraud or violence, were these implicitly sanctioned by their revolutionary aims? Did these misfeasances make them any worse than other political parties of the period? Furthermore, in the unions it appeared that Communist officials were often very efficient at the jobs they were elected to perform. In the light of all this, did suppression offer the best democratic means of combatting a hostile political ideology?

V

Unfortunately, newspapers and politicians did not stop to think about what Lowe's report had said or the conclusions that might reasonably be drawn from it. Before attempting some tentative ones of our own, it is useful to look at two further cases in which the Supreme Court of Victoria had to consider the question of tolerance for communists. Both cases involved a careful examination of the scope of judicial contempt powers and were related to the Royal Commission discussed above. In both, the defendants were associated with the Communist Party newspaper, the *Guardian.*

The Act setting up the Royal Commission on Communism gave the Commissioner the same powers and status as a Supreme Court judge.[136] In particular, he was empowered to deal with contempt of the Commission or disobedience to any order or summons made or issued by him.[137] This power went beyond that normally possessed by a Royal Commissioner who usually is appointed by Letters Patent made by the Governor in Council, not by Act of Parliament, and derives his procedural powers from the *Evidence Act.*[138] Lowe J., however, was reluctant to use his special powers, as to do so would interfere with his already lengthy investigation. The Victorian Parliament, therefore, passed an amending Act, enabling any other Supreme Court judge to try charges of contempt committed with respect to the Royal Commission.[139] The new Act was made retrospective to the date when the original *Royal Commission (Communist Party) Act*

136 *Royal Commission (Communist Party) Act* 1949, s. 3.
137 Ibid.
138 Ss. 17-21 *Evidence Act* 1928.
139 *Royal Commission (Communist Party) Amendment Act* 1949.

came into effect[140] and was clearly prompted by various articles appearing in the *Guardian.*

The alleged contempt in the first case arose out of a series of reports appearing over a period of two months.[141] The heading of one was "Royal Commissioner stops K.C. reading exposure of Collins House". It went on to say that Lowe J. was a close associate of the Collins House group of businessmen and this explained his refusal to let an "exposure" of that group's activities be read out to the Commission. Further issues repeatedly stated that Lowe J. was a shareholder in the *Herald* newspaper and in a Collins House Company.[142] In pressing its contempt charges, the prosecution argued that these articles imputed bias to Lowe J. This argument proceeded on the basis, firstly, that articles in the *Herald* were the immediate cause of the Commission's appointment and, secondly, that the *Guardian* had continually argued that the Commission was an attempt by both the *Herald* and the "Collins House monopolists" to discredit the Communist Party and the labor movement in general.[143] Further charges of contempt were founded on articles in the *Guardian* which depicted Sharpley (the writer of the original *Herald* articles) as a "rat" and which set out a number of statements alleged to have been made by him at the Royal Commission, together with an assertion that they contradicted his published articles.[144]

The case came up for trial before Dean J. on the 7th November 1949. Throughout his judgment, Dean J. was at pains to establish a dividing line between legitimate comment on the one hand, and comment which amounted to contempt on the other. The latter were actions which had the effect of "scandalising the court itself", "abusing parties before the court" and "prejudging mankind against persons, before the case is heard".[145]

With respect to contempt of the Commissioner, Dean J. held that this must be treated as contempt of court on the basis that Parliament intended by the *Royal Commission (Communist Party) Acts* that the proceedings of the Commission be treated as part of the general administration of justice.[146] Thus "scandalising a court or a judge" consisted of any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority.[147] But this was not a restriction of the right to criticise courts and judges. As Lord Atkin had stated

140 Ibid. s. 1(2).

141 *R.* v. *Arrowsmith* (1950) V.L.R. 78, 86 ff. (Set out in the judgment of Dean J.). The Collins House Group was a collection of Anglo-Australian companies associated with mining and industrial ventures. Their office was a building in Little Collins Street.

142 Ibid.

143 Ibid. 79.

144 Ibid. 89 ff.

145 Ibid. 81 quotation by Dean J. from Lord Hardwicke in *Roach* v. *Garvin* (1740) 2 Atk. 468.

146 Ibid. 85 ff.

147 Ibid. 82.

> "But whether the authority and position of an individual judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith, in private or public, the public act done in the seat of justice. The path or criticism is a public way, the wrongheaded are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and are not acting in malice or attempting to impair the administration of justice they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."[148]

With respect to attacks on witnesses, Dean J. said these would often be contempts as they might not only deter persons coming forward to give evidence on one side, but induce witnesses to give evidence on the other side alone. But obviously, if the witness was a person of some public importance or involved in public controversy (as Sharpley was), this hardly made him immune from public criticism. The question then became one of whether the attack was in reality in respect of him as a witness or in some other capacity.[149]

With respect to statements about matters which were the subject of judicial proceedings, Dean J. said it was proper that no public discussion of the issues should occur so that the decision be not prejudged by the public. But again, the exercise of summary judicial contempt powers in such matters would depend on the circumstances of each case.[150] Finally, he stated that it may be contempt to publish "unfair, grossly inaccurate, partisan accounts of proceedings in Court".[151] Thus Dean J. was clear in his concern that a defined area be left in which fair and public criticism of judges, witnesses and court proceedings could be made, even by communists. But while Parliament envisaged the Royal Commission as part of the general administration of justice, it was not sensible to apply contempt powers to such proceedings as strictly as might be the case in other judicial proceedings.

> "The inquiry is into a matter of great public interest. In political circles, in religious circles, in industrial circles and generally throughout the community, the matters referred to the Royal Commission are under discussion. Public debate ranges repeatedly over the whole of these matters. Some of those who are prominent in such debates have appeared or will appear as witnesses before the Royal Commission. This court should not seek at all costs to protect the Royal Commmission or the proceedings before it by its arbitrary jurisdiction. It would be a grave

148 Per Lord Atkin, *Ambard* v. *A.G. for Trinidad and Tobago* (1936) A.C. 32, 335.
149 *R.* v. *Arrowsmith* (1950) V.L.R. 78.
150 Ibid. 84.
151 Ibid.

> interference with our tradition of freedom of discussion upon matters of public interest if such matters had to be withdrawn from the area of public comment during the pendency of the Commission. The public interest involved in maintaining such freedom must far outweigh the public interest involved in preserving our judicial system from all possible interference. It can hardly be supposed that the learned Commissioner will be influenced in the slightest degree by what is published outside. If witnesses are defamed, they have their remedies in the Courts. . . In the present case, the problem is to reconcile the right of free comment upon matters of public concern with the right to have the inquiry conducted without interference. The latter right is less important than the former and only in cases of gross interference such as where the publication is not genuinely an exercise of the right of public comment but is really directed at the Commission or witnesses should the Court interpose."[152]

In accordance with these principles, Dean J. held that the statements in the *Guardian* newspaper concerning the Commissioner constituted contempt in that they imputed to him improper motives and want of impartiality. Similarly, the *Guardian's* statements with respect to Sharpley constituted contempt, in that they attacked him in his character as a witness before the Commission.[153] As such, Dean J.'s judgment revealed a fine appreciation of the line between contempt of court and legitimate comment and criticism. His concern was not with the defendants as Communists, but as individual citizens who might have stepped over this fine line in their newspaper comment. Furthermore, the penalties he imposed on then were very moderate: £100 fine to be shared between the three defendants and a printed apology.

It is necessary, also, to look at his judgment against the background of the Royal Commission. Its proceedings received extensive publicity in the newspapers, particularly in the *Guardian* and the *Herald*.[154] Both papers saw the appointment of the Commission as a tremendously significant event, although from completely opposing viewpoints. This led both to extravagant exercises in hyperbole and rhetoric, although the *Guardian* took first place for colourful, vituperative journalism. Nevertheless, this was the only case of contempt directly arising out of the Royal Commission, although possible contempts were committed by other persons and journals. It was thus easy for the *Guardian* to see itself as a "special victim", earmarked for prosecution because of its political allegiance.[155]

The second case of contempt[156] concerning Communists came before O'Bryan J. in March 1950 and is a nice postscript to the liberal approach of

152 Ibid. 92.
153 Ibid. 93.
154 Ricketson, *op. cit.*
155 *Guardian*, 3 June 1949, 1, 11 October 1949, 3.
156 *R.* v. *Brett* (1950) V.L.R. 220.

Dean J. in the previous case. In January 1950, Mr R. R. Sholl K.C. was elevated to the Supreme Court Bench by the Hollway Liberal government. Sholl had been one of the counsel assisting Lowe J. in his communist inquiry. On the 27 January 1950, the *Guardian* published an article entitled "Mr Justice Sholl: Die-Hard Tory". It went on to portray his appointment as directing attention to the character of the Victorian Bench. It claimed his elevation was out of gratitude for his services to the government as counsel in the abortive *Essential Services Act* prosecutions in 1948[157] and the Lowe Commission in 1949. It also stated he was a die-hard Tory and that his legal practice had been confined to litigation over huge estates, corporate affairs and the like. Furthermore, it stated his whole life had been a sheltered one, his main mission being to defend the positions of power and privilege of the wealthy. Thus, his knowledge of real life was nil. The article asserted he would be called upon to preside in the Criminal Court (the only Court where even a semblance of the problems of the people arose) where he had had little practical experience. Such an appointment therefore cast a clear light on the nature of the repressive machinery of justice.[158]

This time, the inherent summary jurisdiction of the court to punish for contempt was invoked. The publisher of the *Guardian* argued that no contempt was intended as the article was a *bona fide* criticism of one particular judicial appointment and, generally, of the method of judicial appointment in Victoria. In publishing the article he did not consider or advert to the fact that it might be read as a suggestion that the present occupants of the Bench, for some reason or another, were unfitted for their office.[159]

In dismissing the charge, O'Bryan J. paid careful consideration to the statement of Lord Atkin set out above. Even imputations of want of impartiality in a judge need not amount to contempt, for instance, where extra-judicial comments of a judge were such as to impair the confidence of the public or of any suitors in the impartiality of the Court. If such criticisms were fair, they would be upheld as being for the public benefit and not regarded as contempt.[160]

Because of the extreme nature of the summary contempt power, O'Bryan J. said it must be abundantly clear that the purpose of the article was calculated to impair public confidence in the Court's judgments or to lower the authority of the Court as a whole or that of its judges or to impute bias to them.[161] As the comments on Sholl's background (and that of his

[157] These were prosecutions launched against communist union leaders during the *Essential Services Act* stoppage of November 1948. The prosecutions were withdrawn by the Government as part of a strike settlement.
[158] *R.* v. *Brett* (1950) V.L.R. 226, set out in judgment of O'Bryan J. at 227.
[159] Ibid. 230 ff.
[160] Ibid. 229.
[161] Ibid. 231.

colleagues) could not be clearly said to do this, they should not be the subject of summary proceedings. The proper approach was by way of criminal information. Even though the real "sting" of the article was in its characterization of the court as "repressive", this was again vague. Whilst the author intended perhaps to say something more, he was not courageous enough to state his real meaning more specifically. Thus, although the article "sailed close to the wind", no case for summary conviction could be maintained.[162]

The above case is significant for its cautious interpretation of a very potent judicial power. Also, it shows a careful concern not to cast doubt on the defendants' case because they were Communists. It is interesting, perhaps, that here Communists should have received the protection of the law, when only a month later the Commonwealth government was to move to outlaw them completely.

VI

In conclusion, what can be said about the attitudes of the law to communism in the period under review? On one hand we are confronted with a series of legislative moves to restrict Communist activity, culminating in Menzies' *Communist Party Dissolution Act of* 1950. On the other hand, when the question came before the courts in one guise or other, the judges were generally reluctant to consider Communists as anything but ordinary law-breakers. In particular, the High Court was careful to ensure that every legislative measure had a basis under the Commonwealth Constitution. While the latter gave the Commonwealth Parliament power to protect itself against external and internal threats, there was no power to legislate with respect to Communists per se. The latter could only be attacked when their words and activities came within the purview of a recognized head of power.

Cases like *Walsh* and *Johnson, Devanny, Kisch* and *Griffin* also reveal a judicial concern to ensure that the offences alleged were properly made out and that they were not stretched to absurd lengths. Thus, the immigration power did not extend to foreign-born persons who had made their permanent homes in Australia for a number of years. Similarly, in the two Victorian cases discussed above, both Dean and O'Bryan JJ. were at pains to ensure that a proper balance was kept between the contempt power and legitimate comment. The only aberrations from this general trend were *Burns* and *Sharkey* and even so, individual judges in those cases attempted to place limits on the scope of the sedition provisions.

Nevertheless, during 1950 and 1951, Australians were to witness two concerted attempts to ban the Communist Party altogether. The first was Menzies' *Communist Party Dissolution Act*, which was declared ultra vires

[162] Ibid. 232-233.

by the High Court. Unlike the majorities in *Burns* and *Sharkey*, the Court was not ready to take judicial notice of a state of international affairs which might have conceivably provided a constitutional basis for the *Act* under section 51(iv) or sections 51(xxxix) and 61 of the Constitution. Despite the *Act's* long preamble, which described the internal and external threat posed by communist activities, parliament could not "recite itself into a field the gates of which are locked against by superior law".[163] Menzies' second effort to ban the Party, by means of referendum in 1951, was also defeated, although only by a narrow majority.

Liberal law in a repressive age? The title does not seem misconceived, even if Australian judges do not often state their fundamental assumptions as clearly as their American counterparts. Legal process is a convenient way to attack political opponents and clearly most, if not all, of the cases considered above were politically motivated. It was largely a feeling that the law was not adequately dealing with Communists that led to Menzies' attempts to outlaw the Party. This may be an indirect reflection both on judges and the law. On the other hand, it may be more a reflection of the hysteria of the age, as well as a failure to analyse more closely the danger that the community faced from domestic communism.

As a minority group, Communists posed difficult problems for a community professing democratic ideals. Does such a community have to tolerate those who do not tolerate it in return? After all, it is often said that the essence of democracy is majority rule. On the other hand, does a democratic majority in suppressing the undemocratic minority thereby undermine its own basic precepts, for instance freedom of speech, action and association? In a practical sense, the answer will depend very much on the maturity and stability of the particular society (as the quote from Mayo at the start of this paper suggests). Where there is a long tradition of freedom, there may be little harm in allowing the undemocratic minority to continue advocating its views. Thus the U.S. Supreme Court, in expounding the First Amendment, has generally drawn a careful distinction between "words" and "words leading to action which endangers society".[164] Another way of looking at this is to distinguish between words and activities which constitute a future danger (if followed through to their logical extreme) and those which are an imminent threat.[165] Even so, one must be aware that the exercise of democratic rights in itself can often be the cause of violence and a community will often have to make a deliberate choice between freedom and the prevention of internecine strife.

The U.S. cases nevertheless, suggest a possible approach to the whole problem, one that is also supported by the findings of the Lowe Report. If

[163] *Australian Communist Party* v. *The Commonwealth* (1950-1951) 83 C.L.R. 266 (per Fullagar J.).
[164] *Yates* v. *U.S.* 354 U.S. 1379.
[165] *De Jonge* v. *Oregon* 299 U.S. 353.

a democratic community is to survive, it must strive to maintain the values of free speech and political action for everyone. As suggested above, the only basis for curtailing the exercise of these rights by individuals or groups should be the risk that their activities pose to the freedom of other members of that society. Thus, the sedition provisions of the *Crimes Act* may be justified in so far as they are directed at punishing words and enterprises which actively disaffect persons against the Constitution and government, as it may be said that the latter are essential for the protection of general rights. But, in the absence of clear proof that Communist activities are endangering society, they should be given the benefit of the doubt, particularly in a more established democracy. Otherwise, as Brandeis J. once said, "witch-burning" may too readily result

> "To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practised. There must be reasonable grounds to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. . . . But even advocacy of violation (of the law), however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted upon. . . . Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society."[166]

The nature of the threat will obviously depend on the character of the minority group: the Weathermen in the U.S., the Angry Brigade in Britain and the Baader-Meinhof gang in Germany make the Australian Communists of the late 1940's look quite harmless by comparison. Yet, each of these more recent groups has raised real problems of political tolerance in its own country. In West Germany, for instance, the Baader-Meinhof terrorists for a long time were able to command a wide spectrum of liberal support as well as a high degree of official lenience, although their activities were extremely violent and their beliefs anything but democratic.[167] Australian Communists were not urban guerillas, but by contrast they received much harsher treatment and more public vilification than did the Baader-Meinhofers. Even if communist ideas were seen to be ultimately inimical to the continued existence of society in its present form, a viable democracy must be open to change and possess flexible means to ensure that this can take place. Obviously, as argued above, there must be limits to the way in which change is advocated and effected, but, in the case of Australian Communists, the Lowe Report did not reveal convincing

[166] *Whitney* v. *California* (1926) 274 U.S. 376-377.
[167] Melvin J. Lasky "Ulrike Meinhof and the Baader-Meinhof Gang" *Encounter* June 1975.

evidence that their activities were generally disruptive, even if individual members were often guilty of minor malfeasances.

Viewed in this kind of framework, the efforts of Australian law-makers between 1920 and 1950 can be seen as increasingly repressive, demonstrating a clear failure to analyse more precisely the implications of their measures. On the other hand, judicial attitudes were generally more tolerant and democratic, showing a concern not to treat Communists as anything but ordinary law-breakers.

Perhaps the last words on the subject best come from that arch-conservative, Alexander Hamilton

> "Nothing is more common than for a free people in times of heat and violence, to gratify momentary passions, by letting into government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disfranchisement, and banishment by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or an oligarchy; if it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common-sense."[168]

[168] *The Federalist*, No. 44, p. 351 (Hamilton ed. 1880).