SYMPOSIUM

Foreword

WOJCIECH SADURSKI*

In the concluding chapter of *Freedom of Speech*, Eric Barendt says: "In many of the areas of law considered in this book, we have seen that the law does not protect freedom of speech as fully in Britain as it does in the other jurisdictions discussed. This is for the most part inevitable in the absence of a written constitution or Bill of Rights, which would enable the courts to strike down legislation infringing the freedom".[1] Until late 1992, a similar diagnosis could have been made with regard to the Australian legal system: a constitution, absent any Bill of Rights, had not been seen by courts as a basis for invalidating laws which restrict freedom of speech. But the decisions in *Nationwide News v Wills*[2] and *Australian Capital Television v The Commonwealth*[3] seem to have changed that state of affairs radically. By implying a guarantee of freedom of political speech from the constitutional provisions which establish a system of representative government in Australia, the High Court "discovered" (or, as its critics would say, "invented") a new and potentially powerful constitutional right, not explicit in the text of the Constitution itself. By using this new right to strike down two important pieces of Commonwealth legislation (in *Nationwide News*, a section of the *Industrial Relations Act* 1988 (Cth) which prohibited the bringing of the Australian Industrial Relations Commission into disrepute, and in *Australian Capital Television*, a part of the *Broadcasting Act* 1942 (Cth) aimed at restricting paid political advertising by radio or TV) the Court has been seen to assume a role as a constitutional umpire, sitting in judgment on political choices by legislators which affect citizens' fundamental political rights.

But these decisions have not led — so far as I know — to any dancing in the streets,[4] and the freshly announced "right" has received very mixed reception from lawyers, academics and commentators, while the general public seems to be largely unaware of any new freedom conferred upon it by the highest court of this country. Very few constitutional lawyers would endorse the seemingly unqualified enthusiasm of Professor Detmold's contribution to this Symposium of the *Sydney Law Review*. Detmold opens his article by saying: "We have the good fortune now to have the most creative High Court in our history. And, it follows from this, the one exposed to the widest range of hostile criticism". As it happens, a number of other contributions to this Symposium provide a clear illustration of the second sentence (though, I am sure,

* Editor, *Sydney Law Review*.

1 Barendt, E, *Freedom of Speech* (1985) at 304.

2 (1992) 66 ALJR 658.

3 (1992) 66 ALJR 695.

4 According to Harry Kalven, Alexander Meiklejohn reacted to *New York Times v Sullivan*, 376 U.S 254 (1964), one of the key freedom of speech decisions of the United States Supreme Court, by saying that it was "an occasion for dancing in the streets". See Kalven, H "The New York Times Case: A Note on the 'Central Meaning of the First Amendment'" *Supreme Court Rev* (1964) 191 at 221 n125.

at least some of the authors would dispute the characterization of the criticism as "hostile").

The *Sydney Law Review* approached a number of Australian (and one British) constitutional theorists with a request for their comments on the implications of *Nationwide News* and *Australian Capital Television* for the broader system of protection of civil and political rights in Australia. In particular, we asked them the following questions: Has the High Court entrenched an implied (though partial) Bill of Rights? Does it have a constitutional mandate to do so? What are the implications for an overall system of protection of rights and freedoms, and for the traditional pattern of division and separation of powers? Is there a likelihood of further extension of new constitutional rights (confined, as they currently are, to freedom of political speech) into other areas: freedom of speech *simpliciter* as well as other freedoms (such as freedom of assembly and association, the right of privacy, etc)? More generally, is Australia moving from a "British" to an "American" model of protection of individual rights, and if so, is this a good thing?

These questions do not constitute an exhaustive list of problems to be dealt with in this Symposium, and we did not expect every contributor to answer every question. But we wanted to reflect (and help the readers reflect) upon the significance of a new constitutional jurisprudence of the High Court, while at the same time to avoid rehashing the conventional and rather stale debates about the "merits and demerits of a Bill of Rights" - the debates in which, it seems, everything that could have been said, has been said. Especially since, as some might contend, Australia can now be regarded as having a form of Bill of Rights, even if only partial rather than comprehensive, and only implied rather than explicit.

This is, in any event, the claim of the most enthusiastic supporter of the recent decisions of the Court, Professor Detmold. Indeed, he claims that Australia has the best of both worlds: we have "everything that a written Bill of Rights could give us" plus the advantages of a common law, case-by-case method of arguing about the meaning and limits of constitutional guarantees.

But there is not much fanfare about the Court's discovery of rights elsewhere in this Symposium. By-and-large supportive — though not nearly as excited as Detmold — are Michael Coper and Michael Stokes; the former concerned mainly to defend the Court against charges of a violation of democratic principles; the latter defending the Court against charges of infidelity to the intentions of the Constitution's framers. Both carry out their tasks by showing that the theoretical bases from which the criticisms are formulated are indefensible.

At one point Coper admits that freedom of political speech lends itself easily to further extension into less obviously "political" areas but he does not seem to be troubled by this prospect; if anything, he seems to favour such extensions since many types of speech are "essential to the healthy working of a democratic system of government". This is precisely the point at which Professor Zines would like to draw the line. While generally favourable towards the particular judicial results in *Nationwide News* and *Australian Capital Television*, he issues a word of caution against opening up "a Pandora's box of implied rights and freedoms". The line between those rights which are essential to representative government and those which are based on an individual's freedom and the protection of minorities is "blurred", he says, and he

warns the Court against the temptation of a broad construction of the requirements of a system of representative government.

No doubt, this is easier said than done, in view of the "hard cases" in which the relationship of certain speech to democratic self-government is arguable, though perhaps only indirect. One such example comes from the law of libel, and especially the regime of defamatory statements about politicians. By the time this issue of the *Review* is out, readers will probably know the outcome of litigation before the High Court in two important cases related to defamation,[5] and whether the newly announced constitutional rights have been successful in making inroads into the Australian law of defamation which has up until now proved much more favourable for politician-plaintiffs than American law. Our foreign contributor to this Symposium, Professor Barendt, whilst reluctant to recommend any simple "import" of the American law of the First Amendment into Australia, believes nevertheless that this particular extension of an implied right of freedom of speech is justified. Indeed, he would advocate some further extension along "American" lines, including constitutional protection of speech about religious and moral issues, artistic expression, etc. At the same time, he warns against any zealous import of American doctrines which often do not travel well beyond the United States. One important defect in the American jurisprudence of the First Amendment depicted by Barendt is its refusal to accept virtually any positive steps by the government designed to promote or enhance speech. The characteristically American suspicion of government (suspicion which Barendt dubs "paranoid") is not matched by an analogous suspicion of "private" powers, such as media organisations or wealthy campaign contributors, with their capacity to corrupt the process of political communication.

This last point is identified as one of the reasons for rejection of the Court's understanding of the freedom of political speech by the most vehement critics of the High Court's decisions in this Symposium: David Tucker, and in particular Tom Campbell and Drew Fraser. All three denounce the Court's displacement of the legislative decision that there was a need to restrict paid political advertising as a method of equalizing opportunities to participate in electoral campaigns. Tucker traces this (erroneous, as he believes) step to the Court's deference to the example of the United States' Supreme Court, and to what he regards as the latter Court's confused application of the "representation reinforcing" rationale of the First Amendment.

Tucker's castigation of "an impatient judiciary" attempting to "impose in advance" a Charter of Rights upon Australia, before a national debate has taken place, sounds timid compared to impassioned denunciations of the Court by Campbell and Fraser. Both mobilise an impressive array of objections to the judicial production of implied rights: Campbell has "epistemological, democratic, ideological and positivist" arguments against the Court's reasoning, Fraser discerns "false allegiances, false premises, faulty logic, false promises, false impressions and a false sense of freedom". They both agree, among other things, that the Court's understanding of "freedom" (as in "freedom

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5 *Theophanous v Herald & Weekly Times* and *Stephens v Western Australian Newspapers Ltd* (both argued in September 1993).

of speech") is defective, as it ignores the impact of unequal distribution of wealth upon communicative freedom. Likewise, they both object to what they regard as the Court's usurpation of power which it should not possess in a genuinely democratic community.

A stereotyped view holds that in countries such as the United Kingdom and Australia, conservatives are against the entrenchment of constitutional rights (including through a comprehensive Bill of Rights) while progressives and reformists favour such constitutional reform. This is, in part, because constitutional protection has been considered useful in defending the individual against authoritarian intrusions by the state, and also in defending unpopular, powerless minorities against bigoted, oppressive groups and the state. This Symposium demonstrates that the stereotyped view about who is in favour and who is opposed to constitutional entrenchment of rights does not hold. In whatever way Tucker, Campbell and Fraser would like to characterize their ideological stances (and it is not for me to attach any labels to the positions they hold, nor do I wish to suggest any deeper ideological affinity among these three writers), one thing is for sure — they are *not* reactionary common-law afficionados who celebrate the status quo, and their opposition to judicially announced (and/or judicially enforced) Bills of Rights is *not* the result of a conservative refusal of change. Indeed, it is the conservative and negative vision of rights which they find in the Court's decisions which animates their critiques of the Court.

At the end, a digression. Last year, when we were preparing for publication a Symposium of the *Sydney Law Review* on the *Mabo* decision,[6] we were unsuccessful in offering a broad range of evaluative views about another landmark decision of the High Court. None of our contributors criticised the decision, and the only differences were in the intensity of praise. No such consensus exists this time: views about the implied constitutional right of free political speech range from an enthusiastic and unqualified support (Detmold), through a more moderate support concerned largely with the rebuttal of criticisms (Coper, Stokes), through a support qualified by a warning against further extensions (Zines), up to a critique of the adoption of the American model (Tucker) and, further along this continuum, to a global and passionate critique of the methodology, of substantive end-results, and of institutional and philosophical premises of the Court's judgments (Campbell, Fraser). This range of views is an indication of a healthy diversity in Australian constitutional jurisprudence. Along with the foreign contributor's suggestions about how Australia can benefit from the American and European experiences, and supplemented by the Note aimed to help the reader navigate through the facts and doctrines of *Nationwide News* and *Australian Capital Television*, this special issue of the *Review* is offered as a contribution to the discussion about constitutional reform in Australia. There may be no "dancing in the streets", but at least we have a serious debate.

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6 *Syd LR* 15 (1993) 119.