13th LUCINDA LECTURE

HOW FRAGILE ARE THE COURTS?

FREEDOM OF SPEECH AND CRITICISM OF THE JUDICIARY

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Freedom of Speech as a Fundamental Value

Australia's constitutional arrangements are now 'peculiar and virtually unique'[1] among liberal democracies by reason of their failure to incorporate an express guarantee of freedom of speech. Australian courts therefore cannot rely solely on the explicit text of the *Constitution* to accord freedom of expression the status of a fundamental value, to be respected and preserved against legislative or executive intrusion.

Nevertheless, independently of strictly constitutional considerations, the English and Australian courts have repeatedly reaffirmed the centrality of freedom of expression in a democratic society. In *Attorney-General v Times Newspapers*,[2] Lord Simon of Glaisdale said that the:

> *'first public interest involved is that of freedom of discussion in democratic society. People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact-finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument'*.[3]

In a similar vein, Mason J observed a few years later that:

> *'[i]t is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action'*.[4]

The guarantee of freedom of speech in the First Amendment to the *United States Constitution* is couched in absolute language which has no counterpart in the common law world.[5] Even so, the values underlying the First Amendment, as articulated by the Supreme Court of the United States, have universal resonance. The classic formulation of Brandeis J transcends the specifics of the American experience:[6]

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[1] *Coleman v Power* (2004) 209 ALR 182, [208], per Kirby J; cf *Human Rights Act 2004 (ACT)*, s 16(2).
[2] [1974] AC 273.
[3] *Id*, 315.
[4] *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 52. This observation and that of Lord Simon in *Attorney-General v Times Newspapers* were cited by Mason CJ in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 31. Interestingly enough, in both *Commonwealth v John Fairfax* and *Attorney-General v Times Newspapers* freedom of speech did not prevail.
[5] The First Amendment provides that: 'Congress shall make no law … abridging the freedom of speech, or of the press …' Most constitutional guarantees are qualified, for example by allowing the legislature to impose 'such reasonable limits … as can be demonstrably justified in a free and democratic society': *Canadian Charter of Rights and Freedoms*, s 1; see text at notes 58-66 below.
[6] *Whitney v California* 274 US 357, 375-376 (1927). .

> *'Those who won our independence believed … that public discussion is a political duty … They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form.'*

A commitment to the value of free speech carries with it a recognition that protection cannot be limited exclusively to speech which is factually accurate. The United States Supreme Court, in one of its seminal decisions,[7] interpreted the First Amendment as reflecting:

> *'a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials'*.[8]

For this reason, the Court refused to accept a test of truth as the touchstone for determining whether criticism of a public official was protected by the First Amendment.

Not all other nations necessarily have the same 'profound commitment' to uninhibited debate as the United States. Certainly Australia has not had the same commitment. Yet the High Court has acknowledged the importance of protecting even some forms of erroneous speech. Thus in *Gallagher v Durack*,[9] the majority judgment identified as a principle of 'cardinal importance' that:

> *'speech should be free, so that everyone has the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrong-headed'*.[10]

As this statement implies, unless there is a significant margin for error, a guarantee of freedom of expression may prove to be a hollow entitlement.

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[7] *New York Times Co v Sullivan* 376 US 254 (1964).
[8] *Id*, 270, per Brennan J.
[9] (1983) 152 CLR 238.
[10] *Id*, 243. This, too, was a case in which freedom of speech gave way to other values. See text at notes 18-23, below.

A Dilemma

Obviously enough, the courts have a central role to play in determining the proper scope and limits of free speech. As the Australian experience shows, even without an express Bill of Rights the courts may find it necessary, by a process of implications drawn from the *Constitution,* to formulate and apply principles protecting fundamental rights and freedoms against legislative or executive intrusion. The courts must struggle to reconcile, or at least balance, the competing values of freedom of expression and preservation of reputation reflected in the law of defamation. They must also decide the limits that should be imposed on the media to comment on or prejudge pending criminal cases in order to ensure that the accused can have a fair trial.

At a more prosaic level, courts must at some stage confront the dilemma of what, if anything, to do about vehement criticism or scurrilous accusations levelled at them or at particular judicial officers. Similarly a court may have to rule on a civil claim by a serving judicial officer in the same hierarchy that he or she has been defamed by hostile and inaccurate media comment.[11] In part, the dilemma arises out of the fact that the court itself may be the object of criticism, yet at the same time is responsible for determining whether the over-enthusiastic critic should be exposed, for example, to criminal sanctions for contempt.[12] For an institution which is necessarily much concerned with the appearance of impartiality and fairness, there is an obvious danger that a judgment unfavourable to the critic will be taken as some by evidence that the court has placed the protection of its own interests ahead of the public good.

The dilemma is rendered more acute by the potential for cases of this kind to present a stark choice between competing values. Just as the courts have stressed the fundamental importance of freedom of expression in other contexts, so have they affirmed that the freedom applies to criticism of the courts. In *Nationwide News Pty Ltd v Wills*,[13] for example, the High Court held that Commonwealth legislation making it an offence 'calculated … to bring … [the Industrial Relations] Commission

[11] *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1; *John Fairfax Publications Pty Ltd v O'Shane* [2005] NSWCA 164.
[12] *R v Dunbabin; Ex parte Williams* (1935) 53 CLR 434; *Gallagher v Durack* (1983) 152 CLR 238.
[13] (1992) 177 CLR 1.

into disrepute' was invalid. Reasoning by analogy with the position of courts, Mason CJ regarded the protection afforded to the Commission as 'so disproportionate' as to be outside the scope of the relevant head of Commonwealth power.[14] His Honour emphasised that, as with courts:

> *'the interest of the public [lies] in ensuring that the Commission and its activities should be open to public scrutiny and criticism'*.[15]

Mason CJ quoted approvingly the celebrated observation of Black J in *Bridges v California*[16] that:

> *'the assumption that respect for the judiciary can be won by shielding judges from public criticism wrongly appraises the character of American public opinion … [A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt, much more than it would enhance respect'*.

Nor is it a matter simply of providing an outlet for critics whose frustrations might otherwise take over. The judiciary itself benefits from vigorous criticism.[17] Judges no less than other fallible human beings may overlook or underestimate the need to change apparently settled principles or practices.

Not surprisingly, the exercise of freedom of speech in relation to courts can collide with competing principles. In *Gallagher v Durack*,[18] the very case which affirmed the 'cardinal' principle that critics of courts have the right to free speech, the High Court breathed new life into what many thought was the moribund offence of contempt by scandalising the court. The Court decided that the law of 'scandalising' contempt survives as a mechanism for punishing those who threaten public confidence in the legal system by making scurrilous imputations about courts or judges.[19] The majority identified the rationale for this branch of the law as the fact that the:

> *'authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges'*.[20]

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[14] *Constitution* s 51(xxxv), which empowers the Commonwealth Parliament to make laws with respect to conciliation and arbitration for the prevention and settlement of interstate industrial disputes.
[15] (1992) 177 CLR 1, 33.
[16] 314 US 252, 270-271 (1941).
[17] *S v Mamabolo* 2001 (3) SA 409, [77], per Sachs J.
[18] (1983) 152 CLR 238. Gibbs CJ, Mason, Wilson and Brennan JJ; Murphy J dissenting.
[19] For a recent example of a conviction for scandalising contempt being upheld, see *Hoser v The Queen; Ex parte Attorney-General (Victoria)* [2003] VSCA 194 (Vic CA).
[20] (1983) 152 CLR 238, 243.

There are two odd features about this passage. The first is that the orthodox view is that neither truth nor justification is a defence to a charge of contempt by scandalising the court.[21] Thus in a case which pits freedom of speech against the perceived importance of maintaining public confidence in the judiciary, it may not be easy for the former to prevail. The second is that the passage assumes that baseless attacks on courts or judges are in fact capable of shaking public confidence in the legal system. On the contrary, it might be thought that **well-founded** attacks on the judiciary have a greater capacity to shake public confidence in the integrity of the system. Yet public comment which fairly identifies judicial conduct that is 'truly disreputable' is said to be for the public benefit, notwithstanding that the revelation necessarily impairs the confidence of the public in the competence or integrity of the court.[22] Perhaps it is for this reason that the majority in *Gallagher v Durack* added a rider that in many cases 'the good sense of the community' will be a sufficient safeguard against scandalous disparagement of a court.[23]

Comments about courts may collide not only with the perceived need to preserve public confidence in the judiciary generally, but with the need to ensure that particular litigants will receive – and be seen to receive – a fair trial. For example, vehement criticism of an individual court or judge, or uninhibited comment about the merits of a specific case, may be calculated to influence the outcome of pending proceedings.[24] The unrestrained ability of the media to press for a given outcome might interfere with a party's right to a fair trial, or at least help create a perception that a fair trial will not be available.

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[21] Australian Law Reform Commission, *Contempt* (Report No 35, 1987), par 415.

[22] *Australian Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 39, per Brennan J.

[23] (1983) 152 CLR 238, 243. See also *Re Colina; Ex parte Torney* (1999) 200 CLR 386, where Gleeson CJ and Gummow J observed (at 391) that the summary jurisdiction to punish for scandalising contempt should be exercised sparingly, and only when necessity demands.

[24] I leave to one side the particular problems posed by prejudicial pre-trial publicity relating to jury trials in criminal prosecutions: see M Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate, 2000), ch 6. The current position in Australia is that any implied freedom of judicial communication must give way to the imperatives of a fair trial for the accused person. In *John Fairfax Publications Pty Ltd v Doe* (1995) 130 ALR 488, 515, Kirby P said it would be a 'complete misunderstanding' of recent developments in constitutional law to suggest that the implied right of free communication deprives courts of the power or duty to protect an individual's rights to a fair trial where it is, as a practical reality, under threat.

Resolving the resultant clash of values may have less to do with legal principle than with competing assessments of the robustness of the judiciary. The point is illustrated by *Craig v Harney*,[25] one of the leading United States cases. At issue was a publisher's conviction for contempt of court by reason of an editorial which was designed to induce an elected lay judge in Texas to grant a returned war veteran a new trial in a civil case.

Douglas J, writing for the majority, took an uncompromising view of the judicial temperament, even that of a lay judge. He considered that:

> '*… the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate*'.[26]

Frankfurter J, by contrast, was more sceptical. He warned that even a conscientious judge, and not merely a lay judge serving under a short judicial tenure:

> *'may find himself in a dilemma when subjected to a barrage pressing a particular result in a case immediately before him'.* [27]

Frankfurter J had acknowledged in the earlier case of *Pennekamp v Florida*[28] that 'weak characters' ought not to be judges and that no judge fit to occupy the office would consciously be influenced by anything other than what he or she sees in court.[29] But, he said in that case, judges are human, not 'angelic', and we 'know better than did our forbears how powerful the pull of the unconscious and how treacherous the rational process'.[30]

A third example of an area where free speech conflicts with other compelling values is the law of defamation. In the absence of constitutional imperatives, a judicial officer who institutes defamation proceedings to vindicate his or her professional reputation is in no different position to any other plaintiff complaining of defamatory publications. Yet successful defamation proceedings by judges against media outlets which choose to attack the manner in which they perform their judicial duties may well have a 'chilling' effect so often referred to in the United States authorities on debate about the performance of the judicial branch of government. Frank and

[25] 331 US 367 (1947).
[26] *Id*, 376.
[27] *Id*, 392.
[28] 328 US 331 (1946).
[29] *Id*, 357.
[30] *Id*, 357, 366.

vigorous media criticism of court decisions and the conduct of judicial officers may be discouraged by the fear of provoking a lawsuit.

It might be thought that the practical constraints on judges bringing defamation proceedings make it unlikely that they will have a 'chilling' effect on public debate about the courts. The Australian Law Reform Commission reported in 1987 that a very large majority of judicial officers responding to a questionnaire reported that they saw 'major problems' in judges suing for defamation.[31] One particular difficulty they identified was that of a judge-plaintiff submitting to cross-examination, perhaps about his or her conduct of a particular case. The Commission reported at the time that defamation actions by judges arising out of criticism of their official conduct, had hitherto been a rare phenomenon.[32]

Recent experience suggests, however, that defamation actions by judicial officers may not be quite as rare as the Commission expected. Two recent Australian defamation cases have involved substantial damages awards to magistrates. In the first, the Victorian Court of Appeal upheld an award to a magistrate of $210,000 for compensatory and aggravated damages for an article which 'distorted' what had transpired in court and wrongly accused the magistrate of misconducting herself.[33] In the second case, a New South Wales court awarded $220,000 to a magistrate for an article which was held to convey eight defamatory imputations, including allegations of bias and incompetence. On appeal in the second case, judgment was entered for the defendants in respect of four of the imputations and the matter remitted for further consideration of the quantum of damages.[34] Two cases do not amount to an opening of the litigation floodgates. But not surprisingly, aspects of the decisions have been interpreted by some sections of the press as examples of the courts looking after their own, to the detriment of healthy criticism of the legal system.[35] In this respect the collective memory of the press is likely to be long.

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[31] Law Reform Commission, *Contempt* (Report No 35, 1987)
[32] *Id*, par 452, n 119.
[33] *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1.
[34] *John Fairfax Publications Pty Ltd v O'Shane* [2005] NSWCA 164.
[35] See, for example, '*Case Against Laws that Halt Free Speech*', *The Australian*, 15 June 2002, 18; '*Matter of Fact Approach to Expressing our Opinions*', *Sydney Morning Herald*, 19 March 2004, 13; '*Judges Able to Stand Criticism*', *Canberra Times*, 31 May 2004, 10.

Challenges to Limits on Freedom of Expression in Relation to Courts

The protection accorded to courts and judicial officers in Australia by the laws of contempt and defamation has not gone unchallenged. As early as 1911, the High Court dismissed a motion for contempt brought against the 82 year old publisher of the *Hobart Mercury*, HR Nicholls.[36] Nicholls had accused Higgins J, a High Court Judge and President of the Commonwealth Court of Conciliation and Arbitration, of being a 'political Judge' who owed his appointment to his services to a political party. Griffith CJ observed that an imputation of want of impartiality was not necessarily a contempt of court and in some circumstances might be for the public benefit.[37] Indeed, the Chief Justice implied that Higgins J may have merited the criticism since he had made some curious remarks in the course of the Arbitration Court hearing that appeared to be highly protective of the government of the day.[38] Griffith CJ made his feelings clear about the contempt proceedings by citing authority to the effect that the class of contempt known as scandalising the court had been regarded as 'practically obsolete in England'.[39]

The High Court's revival of scandalising contempt in *Gallagher v Durack* did not pass without protest. The facts of the case provided a classic illustration of a critic moving from the legal frying pan into the legal fire. Mr Gallagher, the well-known secretary of a construction union, celebrated his successful appeal against two months' imprisonment for contempt of court by announcing his state of mind as follows:

> *'I'm very happy to* [sic] *the rank and file of the union who has* [sic] *shown such fine support for the officials of the union and I believe that by their actions in demonstrating in walking off jobs … I believe that that has been the main reason for the court changing its mind'.*

In a tangible demonstration that speech is by no means always free, this exuberant comment earned Mr Gallagher a sentence of three months' imprisonment for contempt of the Federal Court.

A majority of the High Court refused special leave to appeal from the conviction, holding that the insinuation that the Federal Court had bowed to outside pressure was

[36] *The King v Nicholls* (1911) 12 CLR 280.
[37] *Id,* 286.
[38] J Rickard, *Henry Bourne Higgins: The Rebel as Judge* (1984), 186-188.
[39] (1911) 12 CLR 280, 285, citing *McLeod v St Aubyn* [1899] AC 549, 561, per Lord Morris.

calculated to lower the authority of that Court.[40] Murphy J delivered a powerful dissent, pointing out that the law of scandalising contempt imposed severe limits on the freedom to criticise or comment on courts and thus had a 'chilling' effect on public criticism of courts. In his view, no society should be prepared to accept such censorship. Murphy J proposed adoption of the standard approved in the United States, whereby contempt requires proof not merely of a tendency to detract from the administration of justice, but a 'clear and present danger' to the administration of justice.[41]

The Australian Law Reform Commission in its 1987 report on *Contempt*[42] in effect recommended abolition of the offence of contempt for scandalising the court. The Commission said that the offence intruded too far into freedom of expression and concluded that there was no evidence that the administration of justice could be undermined by comments of the sort that had attracted sanctions. The Commission proposed to substitute the much narrower offence of publishing an allegation imputing misconduct to a judge or magistrate. Such an offence would be committed only where publication was likely to cause serious harm to the reputation of the judge or magistrate in his or her official capacity. Moreover, it would be a defence that the report was a fair and accurate account of legal proceedings or that the defendant honestly believed on reasonable grounds that the statement was true.[43]

More recently, the Chief Justice of Massachusetts, in an address to an Australian audience, has argued that citizens 'should be permitted to say practically anything they please about judges and the courts – even untrue and vicious things'.[44] Chief Justice Marshall suggests that *Bridges v California* and its progeny

> *'have allowed the live practice of justice to unfold before the American people in all of its raw immediacy and sometimes manipulative theatricality'*.[45]

She points out that despite uninhibited criticism of courts and judges, people accept the rulings of courts even in such highly politically charged cases as *Bush v Gore*,[46]

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[40] (1983) 152 CLR 238, 244.
[41] *Id*, 246-248, citing *Bridges v California* 314 US 252 (1941) and *Pennekamp v Florida* 328 US 331 (1946).
[42] Australian Law Reform Commission, *Contempt* (Report No 35, 1987).
[43] *Id*, par 460.
[44] MH Marshall, '*Dangerous Talk, Dangerous Silence: Free Speech, Judicial Independence and the Rule of Law'* (2002) 24 Syd LRev 455, 455.
[45] *Id*, 458.

which virtually decided the outcome of the 2000 Presidential elections.[47] Moreover, she claims, no Massachusetts judge (none of whom is elected) has ever been swayed in the slightest by the glare of publicity. Plainly inclined to the 'angelic' view of judicial temperament, she asserts the Massachusetts judiciary's 'imperviousness to outside bullying'.[48]

In short, Chief Justice Marshall sees untrammelled criticisms of courts and judges as vital to the triumph of the rule of law in a 'pluralist multifaceted democracy'. Accordingly she concludes:

> *'with full deference to the different social, historical, and political climates of our different nations … Commonwealth courts can, and should, tolerate a great deal more criticism of judges and of the judiciary, even when a case is pending, than is presently permitted'*.[49]

Not every element of this reasoning commands unqualified acceptance. For example, while the Massachusetts judiciary may be particularly robust, not all judges, even those enjoying security of tenure, necessarily have what Frankfurter J would have regarded as the necessary angelic powers to resist intense external pressure. The point is illustrated by a well-known case in the United States District Court.[50] Judge Baer, a New York District Court Judge, suppressed physical evidence seized from the car of a defendant who had been charged with illicit drug distribution, on the ground that the seizure had violated the defendant's constitutional rights.[51] In response to this ruling and the furore which followed it, President Clinton threatened to ask for Judge Baer's resignation if he did not reverse himself. Some 140 members of Congress supported a proposal that if the Judge did not resign, he should be impeached. Senior Judges of the United States Court of Appeals for the Second Circuit denounced the threats as 'extraordinary intimidation'. Despite the collegiate support, Judge Baer very swiftly vacated his earlier decision and denied the motion to suppress.[52]

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[46] 531 US 98 (2000)
[47] *Id,* 459.
[48] *Id,* 461.
[49] *Id,* 463.
[50] See SB Bright, '*Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges From Office for Unpopular Decisions?'* (1997) 72 NYUL Rev 308, 310-311; MH Freedman, *'The Threat to Judicial Independence by Criticisms of Judges – A Proposed Solution to the Real Problem'* (1997) 25 Hofstra L Rev 729, 737-739.
[51] *United States v Bayless* 913 F Supp 232 (SDNY, 1996)
[52] *United States v Bayless* 921 F Supp 211 (SDNY, 1996).

In considering Chief Justice Marshall's arguments, it is also important not to minimise the cultural and institutional differences between the United States and Australia. Although federal judges enjoy life tenure in the United States, most states provide for the election of judges. In consequence, nearly 90 per cent of all state trial and appellant judges face election at some point in their tenure.[53] Chief Justice Marshall contends that the system of electing state judges has worked surprisingly well.[54] Be that as it may, the uninhibited freedom to criticise judicial officers in the United States may well owe a good deal to concerns about the variable quality of the state judiciary. It may also owe something to the fact that for a very long time the federal and state judiciary in the United States have exercised far-reaching powers of judicial review of legislation, stemming from their role as the interpreters of both federal and state Bills of Rights. The broad freedom of Americans to criticise courts (in common with other public institutions) constitutes part of the price the American judiciary pays for its formidable constitutional authority.

Making due allowance for these matters, the case for widening the scope of permitted criticisms of courts and judicial officers in Australia is extremely strong. As the Australian Law Reform Commission has observed, there is simply no evidence that public confidence in the judiciary is significantly impaired by baseless allegations made in the media and elsewhere against courts and judges. And the courts themselves have repeatedly stressed that well-founded accusations of judicial misconduct are in the public interest. Current laws have the additional disadvantage that they too often place courts in a position where they can be seen as literally judges in their own cause. It is difficult to deny that contempt for scandalising the court, in particular, bears the hallmarks of a doctrine designed to provide special protection for courts against harm that is more imaginary than real. Recent comments by Sachs J of the Constitutional Court of South Africa have particular force:

> *'It is particularly important that, as the ultimate guardian of free speech, the Judiciary show the greatest tolerance to criticism of its own functioning. Its standing in the community can be undermined only if the public are led to*

[53] MH Marshall, note 44 above, 464.

[54] The claim that the system has worked well does not sit easily with the recognition that for an elected judge to ignore the political ramifications of a decision near election time is like 'ignoring a crocodile in your bathtub': *id*, 467.

> *draw the inference that, in pursuance of the principle that an injury to one is an injury to all, the judicial establishment is closing ranks'*.[55]

The existing constraints on the freedom to criticise courts have been informed by an assumption that the judiciary cannot respond to ill-informed or malicious criticism about particular decisions or the conduct of individual judges. The time has come, however, for that assumption to be re-evaluated. In recent times, judges have participated actively in debates about matters affecting the judiciary. Heads of jurisdiction or their representatives have publicly corrected inaccurate statements made about their courts. Courts now have media liaison officers who can ensure, among other things, corrections reach the right quarters (even though they cannot ensure publication). Bodies representing the judiciary, such as the Judicial Conference of Australia, have contributed to public discussion on contentious issues confronting the courts. Moreover, there may be techniques available to courts, short of formal contempt proceedings, that properly draw public attention to inappropriate comments about judicial proceedings or judges, whether made by politicians or others.[56] The greater willingness of the judiciary to respond to public criticism reflects the reality that the traditional stoic silence in the face of an ill-informed or even malicious attack is by no means the most effective means of maintaining confidence in the judicial system.

Towards Greater Freedom

In jurisdictions that have express constitutional guarantees of freedom of speech, the traditional protections accorded to courts and judges have come under close scrutiny. In Canada, for example, the Ontario Court of Appeal held in 1987 that legislation preserving the common law offence of scandalising the court infringed the guarantee of freedom of expression contained in s 2(b) of the *Canadian Charter of Rights and Freedoms*.[57] Statements of a sincerely held belief on a matter of public interest, even if intemperately worded, were said to be protected by the guarantee.[58] A majority of the Court also held that the offence of scandalising the court would not satisfy the 'proportionality' test embodied in s 1 of the *Charter*, which subjects the express

[55] *S v Mamabolo* 2001 (3) SA 409, [78].
[56] E Campbell and HP Lee, '*Criticism of Judges and Freedom of Expression'* (2003) 8 Media & Arts L Rev 77, 87-88.
[57] *R v Kopyto* (1987) 47 DLR (4th) 213.
[58] *Id*, 229, per Cory JA.

guarantees to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. The particular vice of the scandalising offence was that it assumed that the words which were the subject matter of the charge would bring the court into contempt or lower its authority without requiring any proof of that fact.[59] Houlden JA expressed his confidence:

> *'that our judiciary and our courts are strong enough to withstand criticism after a case has been decided no matter how outrageous or scurrilous that criticism may be. I feel equally confident that the Canadian citizenry are not so gullible that they will lose faith and confidence in our judicial system because of such criticism. If the way in which judges and courts conduct their business commands respect, then they will receive respect, regardless of any abusive criticism that may be directed towards them'.*[60]

The European Court of Human Rights has considered on a number of occasions the scope of the freedom of expression guaranteed by the *European Convention on Human Rights*, as applied to criticisms of courts and judges.[61] Like the Canadian Charter, the *European Convention* is not unqualified in its terms. Article 10(2) provides that the exercise of the freedom of expression may be subject to such restrictions 'as are prescribed by law and are necessary in a democratic society' for, among other things, maintaining the authority and impartiality of the judiciary.

The general principles have recently been restated by the European Court of Human Rights in *Hrico v Slovakia*.[62] The case arose out of an action by a Slovakian judge 'for protection of his personal rights'. The action was based on newspaper articles which alleged that the judge's decisions were motivated by his political views. The Slovakian courts ultimately awarded the plaintiff a small amount as compensation for non-pecuniary damage he had suffered as a result of the publications.

The European Court said that an interference with a person's freedom of expression violates Art 10(1) if it does not come within one of the exceptions in Art 10(2). The Court therefore had to determine whether the interference was prescribed by law, had an aim that was legitimate under Art 10(2) and was 'necessary in a democratic

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[59] *Id*, 239, per Cory JA.
[60] *Id*, 255.
[61] See generally M K Addo, *'Are Judges Beyond Criticism under Article 10 of the European Convention on Human Rights?'* (1998) 47 I & CLQ 425.
[62] 20 July 2004, Case No 49418/99.

society' for that aim. The Contracting State had a 'certain margin of appreciation' in assessing whether the measure was necessary, but the Court retained a supervisory role. In exercising its supervisory functions, the Court had to have regard to the comments and the context in which they were made, and had to determine whether the interference was 'proportionate to the aims pursued'. The press had a right and duty to impart information and ideas on matters of public interest, including the functioning of the judiciary. On the other hand, courts were entitled to be protected against unfounded attacks, especially given that judges could not respond in kind to criticism.

The Court considered that the critical point in the case before it was that the judge had made public his intention to become involved in politics. He should therefore have withdrawn from a case that could be linked to his political views. While the articles had used strong language and contained factual errors, Art 10 protected opinions 'which may shock or offend' and permitted 'recourse to a degree of exaggeration'. Accordingly, the standards applied by the Slovakian courts were not compatible with the principles embodied in Art 10.[63]

The *South African Constitution* gives everyone 'the right to freedom of expression', including freedom of the press and the freedom to receive and impart information or ideas.[64] As in Canada, the freedoms are qualified, in that they may be limited by a law of general application:

> *'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom …'*[65]

The South African Constitutional court has taken a cautious approach to these provisions as applied to the offence of scandalising the court. In *S v Mamabolo*,[66] the Court rejected an argument that the law of scandalising contempt unjustifiably limited the constitutional right to freedom of expression. Kriegler J, writing for the Court,

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[63] For other examples of restraints on freedom of speech that were held not to be proportionate to the aim pursued see *The Sunday Times v United Kingdom* (1979) 2 EHRR 245; *De Haes and Gijsels v Belgium* (1998) 25 EHRR 1. For a decision upholding a restraint in respect of articles accusing Viennese judges of pre-judgment, incompetence, rudeness, arrogance and maladministration, see *Prager and Oberschlick v Austria* (1996) 21 EHRR 1.

[64] *Constitution of the Republic of South Africa Act 1996,* s 16(1).

[65] *Id*, s 36(1).

[66] 2001 (3) SA 409.

emphasised the importance of informed and public scrutiny in promoting the impartiality, accessibility and effectiveness of the courts and in acting as a 'democratic check on the Judiciary'.[67] Nonetheless, he saw a role for the offence of scandalising the court to perform, principally as a means of protecting the 'moral authority' of the judiciary as 'an independent pillar of State'.[68]

Kriegler J rejected the view that the First Amendment jurisprudence should be imported into South Africa, not least because of the very different constitutional texts. Even so, he accepted that in view of:

> *'founding constitutional values of human dignity, freedom and equality, and more pertinently the emphasis on accountability, responsiveness and openness in government, the scope for a conviction on this particular charge must be narrow indeed if the right to freedom of expression is afforded its appropriate protection. The threshold for a conviction on a charge of scandalising the court is now even higher than before the superimposition of constitutional values on common-law principles; and prosecutions are likely to be instituted only in clear cases of impeachment of judicial integrity.'*[69]

Kriegler J said that the test was whether:

> *'the offending conduct, viewed contextually, **really** was likely to damage the administration of justice.'* (Emphasis added.)[70]

Clearly enough, scandalising contempt will rarely be invoked in South Africa.[71]

In an eloquent concurring judgment, Sachs J argued for a higher threshold, namely that conduct 'must pose a real and direct threat to the administration of justice.'[72] He envisaged that the standard might be satisfied if, for example, someone engaged in a campaign to promote defiance of the law or the challenge the legitimacy of the constitutional State. A less demanding standard would detract from the goal, in an open and democratic society, of exposing 'all public institutions to criticism of the most robust and inconvenient kind'.[73]

The Implied Freedom of Communication

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[67] *Id*, [29], [30].
[68] *Id*, [16], [17].
[69] *Id*, [45].
[70] *Ibid.*
[71] The conviction and sentence of the appellant for contempt were set aside.
[72] *Id*, [75].
[73] *Id*, 71.

In Australia, the recent judicial defamation cases have thrown up the question of where criticism of the judiciary fits within the framework of the implied freedom of political communication that the High Court says is to be discerned from the text and structure of the *Constitution*.[74] Because the implied freedom does not apply to freedom of speech generally, but only to speech of a particular kind,[75] it poses awkward questions of classification, many of which have not yet been resolved.

As Michael Chesterman has pointed out,[76] traditional accounts of theories of speech generally rely on three justifications. The first conceives of freedom of speech as a personal right deriving from each person's capacity for self-expression. The second, reflected in many decisions of the United States Supreme Court, sees freedom of speech as a means of discovering the truth through the marketplace of ideas. It assumes that false ideas will ultimately be exposed as such and that the truth will prevail in the marketplace. The third more limited justification sees freedom of expression as the means of ensuring that the electors are able to exercise a free and informed choice as an incident of representative government.

It is the third of these theories that the High Court has invoked to justify implying a freedom of political communication from the provisions of the *Constitution*, notably ss 7 and 24,[77] which create the system of representative government at federal level. In *Lange*, a unanimous High Court held that ss 7 and 24:

> *'necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors. Those sections do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power'*.[78]

The Court made it clear that the implied freedom cannot be confined to the receipt and dissemination of information during an election period and that electors cannot be denied information concerning the conduct of the executive branch of government.

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[74] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 209 ALR 182. E Campbell and HP Lee, *'Criticism of Judges and Freedom of Expression'* (2003) 8 Media & Arts L Rev 77.
[75] *Coleman v Power* (2004) 209 ALR 182, [28], per Gleeson CJ.
[76] M Chesterman *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate, 2000), 20-21.
[77] These sections require the members of the House of Representatives and of the Senate to be 'directly chosen by the people' of the Commonwealth and the States, respectively.
[78] *Lange v Australian Broadcasting Authority* (1997) 189 CLR 520, 560.

But the freedom of communication protected by the *Constitution* is not absolute. It is limited to what is necessary for the effective operation of the system of representative and responsible government for which the *Constitution* provides.[79]

Lange laid down a two-limb test for determining the validity of a law of a Commonwealth, State or Territory Parliament said to infringe the implied freedom of communication. As slightly modified in *Coleman v Power*, the test is as follows:

> *'First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people … If the first question is answered "yes" and the second is answered "no", the law is invalid'.*[80]

The Court went on to hold that the law of defamation, insofar as it required electors and others to pay damages for the publication of communications concerning government or political matters, burdened the freedom of communication about these matters.[81] Accordingly, the defence of qualified privilege had to be extended to cover communications on government and political matters to the public at large, provided that the defendant's conduct was 'reasonable'. As a general rule conduct would not be reasonable unless the defendant:

> *'had reasonable grounds for believing the imputation was true, took the proper steps, so far as they were reasonably open, to verify the accuracy of material and did not believe the imputation to be untrue'.*[82]

The *Lange* test presents many difficulties of application. Most importantly, the vagueness of the Court's language provides opportunities – indeed virtually requires – judges to give effect to their own value judgments. Thus in *Coleman v Power*, Kirby J protested at the:

> *'ungainly phrase "appropriate and adapted" [which] involves a ritual incantation devoid of clear meaning'.*[83]

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[79] *Id*, 561.
[80] *Id*, 567-568; *Coleman v Power* (2004) 209 ALR 182, [93], per McHugh J.
[81] *Id*, 568.
[82] *Id*, 574.
[83] (2004) 209 ALR 182, [234].

Callinan J observed that:

> *'[t]he appreciation of what is reasonably appropriate and adapted to achieving a legitimate end may very much be a matter of opinion'*.[84]

It is difficult to disagree.

The extent to which value judgments are involved is shown by *Coleman v Power*, itself a case concerned with State legislation prohibiting the use of insulting words in public places. Heydon and Kirby JJ took diametrically opposed views as to the role, if any, insulting words have to play in communications on governmental or political matters. Heydon J saw the State legislation as directed to the preservation of 'an ordered and democratic society'. For him:

> *'[i]nsulting words are inconsistent with that society … because they are inconsistent with civilised standards'*.[85]

For his part, Kirby J had difficulty in recognising in this analysis the Australian political system. To him, Heydon J's chronicle sounded:

> *'more like a description of an intellectual salon where civility always (or usually) prevails'*.[86]

This does not exhaust the difficulties posed by the *Lange* test. Its language does little to discourage different approaches in assessing the extent to which courts should allow (in the language of the European Court of Human Rights) a 'margin of appreciation' to the elected legislature.[87] The fact that the implied freedom is limited to what is necessary for the effective operation of the system of representative and responsible government for which the *Constitution* provides, creates yet further difficulties. How is the line to be drawn between conduct which is sufficiently related to the political system and conduct which, although it involves elected representatives or public officials, does not affect people in their capacity as federal electors? What is the position when criticism is made of State or local government officials about purely State or local issues?

In *Coleman v Power*, a concession was made that allegations against a State police officer were capable of concerning matters within the scope of the implied freedom.

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[84] *Id*, [292].
[85] *Id*, [324]. See also *id*, [297], per Callinan J.
[86] *Id*, [238]. See also *id*, [81], per McHugh J.
[87] Compare *id*, [101]–[106], per McHugh J; [296]-[297], per Callinan J.

Of those members of the Court who considered the point, two thought the concession was properly made; two thought it was probably correct; and one apparently thought otherwise.[88] Those who thought the concession was correct did so essentially on the basis that the conduct of State police officers is relevant to the system of representative government established by the *Constitution* because in Australia the police are responsible for enforcing federal as well as State laws.

In the light of these uncertainties, it is not clear how far, if at all, the *Lange* principle applies to criticisms of the judiciary. Two questions arise, although they may be interrelated. First, is criticism of the decisions or official conduct of a judge or magistrate capable of constituting communications on government or political matters within the *Lange* principle? Secondly, if so, is criticism of a State judicial officer, exercising only State jurisdiction, sufficiently connected with the effective operation of the system of representative and responsible government for which the *Constitution* provides?

In *Herald & Weekly Times Ltd v Popovic*[89] it was not strictly necessary for the Victorian Court of Appeal to decide whether criticisms made of a magistrate were within the implied constitutional immunity, since the publisher, in any event, could not satisfy the reasonableness test. However, two members of the Court expressed the view that the comments did not attract the implied immunity. Winneke ACJ said that criticisms by a newspaper of a magistrate's performance in conducting or handling isolated proceedings in the Magistrates' Court, even to the point of implying his or her unfitness to hold office, was not discussion of government or political matters of the relevant type.[90] Winneke ACJ acknowledged that each case had to depend upon its own circumstances. However, he thought that criticisms and comment directed to the conduct of individual judicial officers cannot be said to be concerned with the exercise of powers at a government or administrative level:

> *'It is true that, when discharging their functions, judicial officers are performing a public role; one which is to be performed in the "public gaze" and thus, open to public scrutiny and comment … However … [s]uch comment*

[88] McHugh and Kirby JJ thought the concession was correct: [80], per McHugh J [229], per Kirby J; Gummow and Hayne JJ thought it was probably correct: [197]; and Callinan J apparently thought otherwise: [293].
[89] (2003) 9 VR 1.
[90] *Id*, [6].

> *and criticism could, in my view, have no impact or influence upon the choice of their representatives by the people of Australia'*.[91]

Warren AJA understood the *Lange* principle to be 'confined strictly to matters of government and politics'.[92] Her Honour recognised that some members of the High Court, before the decision in *Lange*, had expressed the view that the implied freedom might extend to comments about the judiciary.[93] But this view had not been adopted in *Lange*. In any event, the need to promote public confidence in the judiciary was a further reason for exempting the judiciary from the province of 'government' and 'politics' as applied in *Lange*.[94]

In *John Fairfax Publications Pty Ltd v O'Shane*,[95] the New South Wales Court of Appeal rejected an argument that the *Lange* principle applied to criticisms of the conduct of judicial officers generally. Giles JA[96] followed dicta in an earlier case[97] to the effect that the:

> *'conduct of courts is not, of itself, a manifestation of any of the provisions relating to representative government upon which the freedom is based'*.

Giles JA distinguished the position of judicial officers from public representatives and officials:

> *'Judicial officers are not elected representatives, and are not subject to the control of parliament or the executive in the exercise of their functions, short of removal from office by parliamentary act in extreme circumstances. This independence of the judiciary exists for sound reasons, was historically hard won, and serves a vital constitutional and social purpose in the impartial dispensation of justice'*.[98]

Young CJ in Eq adopted similar reasoning. His Honour reviewed the authorities and concluded that such authority as there was held against the extension of the *Lange* principle.[99] He specifically rejected an argument that discussion of the conduct of

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[91] *Id*, [9].
[92] *Id*, [500].
[93] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 74, per Deane and Toohey JJ; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 179-182, per Deane J; *Cunliffe v Commonwealth* (1994) 182 CLR 272, 298, per Mason CJ.
[94] *Id*, [507].
[95] [2005] NSWCA 164.
[96] With whom Ipp JA agreed.
[97] *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* (2000) 181 ALR 694, [83], per Spigelman CJ (with whom Priestly JA agreed).
[98] [2005] NSWCA 164, [95].
[99] *Id*, [282].

judicial officers was related to representative government because of the possibility of their removal by Parliament and because electors may have concerns about the quality of judicial appointments made by the executive government. He was persuaded by the 'general thrust' of submissions that included a warning that an extension of the *Lange* principle would be 'a licence for irresponsible journalism'.[100] Young CJ in Eq accepted that 'considerable latitude' should be given to reports about courts and tribunals. But, he said:[101]

> *'if the reports are too negative too often, the effect will be not that the public is informed, but that they will (probably unjustifiably) lose confidence in the legal system. Once public confidence goes, disputes will again be decided by the "Might is Right" philosophy and thus decided by reference to the party with the greater economic power or the best fighter behind the hotel'.*

Where to now?

The High Court, as always, will have the last word concerning the application of the *Lange* principle to criticisms of the courts and the judicial system. The legal arguments that have led to the judiciary being largely exempted from the operation of that principle have considerable force. Given that the rationale for the privilege is based on implications from the system of representative government established by the *Constitution*, the reasoning in cases such as *Herald & Weekly Times v Popovic* and *John Fairfax v O'Shane* has a logical attraction.

But as Oliver Wendell Holmes famously said, the life of the law has not been logic, but experience.[102] At the very least, logic should be tempered by experience. The current trend of authority reflects the longstanding belief that the judiciary requires special protection, when compared with other institutions of government, in order to maintain public confidence in the legal system. That belief, however, has always rested on dubious assumptions rather than solid empirical evidence. Other jurisdictions, like Canada, the European Union and South Africa, while not adopting the First Amendment jurisprudence of the United States, have modified common law or traditional principles in the interests of protecting freedom of speech. Their actions do not seem to have prompted a crisis of community confidence in the judiciary of those countries.

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[100] *Id*, [291], [298].
[101] *Id*, [302].
[102] OW Holmes J, *The Common Law* (Little Brown, 1881), 1.

The fact is that judicial power is 'an element of the government of society' and the judicial branch is the 'third great department of government'.[103] Although the Court in *John Fairfax v O'Shane* appeared to doubt whether freedom of the press is a means of making the court accountable to the broader community, the proposition is hard to dispute. It is true that mechanisms adopted by the courts themselves, such as the appellate process and the concept of open justice, are extremely important for ensuring that the Judiciary is 'accountable'. But these are not the only mechanisms appropriate to a democratic society. Criticism of the courts often goes beyond matters than can be tested on an appeal. In any event, the perspectives informing the approach of an appellate court are not the only ones deserving of a public airing.

The work of the courts may be as relevant to the informed judgment of electors as the actions of elected representatives or public officials. This is so notwithstanding that the courts are and must remain independent of other branches of government. Unlike elected representatives, judicial officers are not answerable to the electors for their decisions in particular cases. Yet judicial decisions are not only frequently based on policy considerations in respect of which members of the community will have strongly divergent views, but they may impinge directly upon the program of the elected government of the day. Court decisions may also be intensely controversial and generate proposals for responses or changes through the political process. Even the day-to-day work of the courts can be of profound political importance. Criminal sentencing, for example, is very frequently the subject of passionate community discussion and debate. More specifically, criticism of individual decisions or of the conduct of particular judicial officers, may directly bear on the appointments made by the executive government or the selection procedures followed by the government.

Nor is it difficult to discern a relationship between the actions of State judicial officers and the concerns of federal electors. State courts exercise federal jurisdiction, including in prosecutions for offences against Commonwealth law. Just as the conduct of State police officers is intertwined with federal concerns, so the decisions and

[103] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92, [32]-[33].

conduct of the State judiciary cannot readily be divorced from the concerns of federal electors.

The ambivalent position of the judiciary under the *Lange* principle is a consequence of the limited nature of the implied freedom of political communication recognised by the High Court. Yet it is very difficult, from a policy perspective, to justify placing courts in a separate and privileged category so far as protection from unjustified criticism is concerned. Moreover, if the High Court endorses the current trend of authority, the courts will be open to the charge that they have awarded themselves an immunity that is difficult to justify and is likely to prove counter-productive to the values they have repeatedly espoused.

This is not to say that the courts should be bereft of powers that are capable of being used in the rare cases where verbal attacks pose a genuine threat to the standing of the judiciary. These powers might take the form recommended by the Australian Law Reform Commission, or they might involve the High Court relying on the *Lange* principle to set a much higher threshold for conduct amounting to scandalising contempt. Similarly, there is no reason in principle why individual judges should enjoy fewer avenues for redress of unjustified attacks on their reputation than elected representatives or public officials. But the independence of the judiciary does not justify conferring on judges greater protection than those representatives or officials enjoy.

It is to be hoped that the High Court will interpret the scope of the implied freedom of communication more broadly than recent decisions might suggest. If the High Court does not do so, there is a strong case for legislation to bring the principles governing criticism of the Australian judiciary into line with those of other liberal democracies.