

A Law for Free Speech and Freedom of the Press in Australia

The legislatures of Australia, State, Territory and Federal, should all guarantee freedom of speech and freedom of the press by a law to the following effect:

A Bill for an Act to be submitted to every Parliament in Australia securing the right to free speech and freedom of the press to every person within the jurisdiction of the particular parliament whether that of a State, or a Territory or of the Commonwealth Australia.

“Notwithstanding anything provided in any other law,

(a) the freest discussion, comment, criticism, censure and provision of information is permissible, whether by spoken words, by signs or in writing, whether privately between persons or at meetings, or in public or in the media of communication between persons, and whether or no the medium be print, writing, a form of writing, graphic representation, film, electronics, broadcasting, or other means, in part or in whole, and notwithstanding any form of language adopted for the purpose of the communication, in relation to all political or party questions, all acts of members or servants or agents of the government, of bodies created by or funded in whole or in part by the government or by the parliament, or which are subject in whole or part to the direction of the government, in every case being acts not peculiar to or within the personal or the private life of the actor, and of all acts of the government, and of all proceedings before and by officers at law, of tribunals and of courts of justice.

(b) No narrow construction is to be put at law upon expressions used in any such discussion, comment, criticism, censure and provision of information.

(c) No person may be convicted of or for or in connexion with any alleged offence related to any publication or utterance within the ambit of sub-section (a) construed consistently with sub-section (b) unless it is shown in a trial on indictment before a jury of twelve persons whose verdict shall be unanimous that the matter complained of was published with intent to be of aid and assistance to an enemy certain and identified with which the Commonwealth of Australia has declared itself by the law and usage of nations to be and is at war or was published or uttered in a public place and in a public circumstance with the intent of causing a breach of the peace then and there and that the utterance or publication did cause a breach of the peace then and there.”

cf: 9 Halsbury 2 ed. 303, and A. V. Dicey, The Law of the Constitution, ed E.C.E Wade, 9th edition 1948, Macmillan, chapter 6 and Appendix 576-579.

The concept of sedition can be traced to the law of slander and libel developed to abate and rectify disputes in the ordinary course amongst the common people, in the community at large. It was a development under the writ of trespass, the first great writ of the law set in terms to uphold peace in the realm. It was in the Star Chamber, ostensibly in the cause of peace in the land, that the repression of speech in criticism of governing institutions and persons was developed. The Star Chamber was brought into being by lawmakers to hear complaints insinuating breaches, sedition, of the King's peace by slander or libel of the king and his nobles, the magnates of the day.

The Star Chamber was to be a “court” specially constituted to hear suits originating in political controversy involving the king, members of his council of advisers, and other

magnates. The suits brought to the Star Chamber alleged a fear of or a real or notional breach of the peace arising from slanders and libels of persons who were in or close to the ruling party.

It was from the council of persons privy to the king in the early days that there came the modern Privy Council, a place never populated by the lower orders.

The idea of seditious libel was developed and exploited to protect the dignity, privileges and office of noble persons. The idea of *criminal* libel can be traced to a statute of 1275 promulgated soon after the barons' rebellion led by Simon de Montfort which imposed punishments for anyone guilty of *scandalum magnatum*, (*speaking ill of great persons*), that is, slandering the King and his baronial supporters in a manner calculated to produce discord amongst them and antagonism towards them. Prosecution for criminal libel is now not permitted under most if not all of the Defamation Acts of the Australian States.

The concept of criminal conspiracy also originated in the Star Chamber. The use of this charge is now widely deplored in Australian criminal practice. Resort to conspiracy charges in the practice of prosecutors is deprecated in the handbooks set for the guidance of public prosecutors.

The concept of treason has like origins. It was also developed by the Star Chamber from the writ of trespass. It served also to protect great and powerful persons - the king, but not only the king. Shakespeare illustrates time and again the royal resort to the concept of treason for its utility in suppressing political rivals.

In the Star Chamber, when printing was becoming simple and convenient, the circulation of the expression of ideas in books was restrained by instituting licensing by the Chamber of the publication of books under the same authoritarian policy considerations. Political and religious censorship of publications flourished under the Star Chamber's edicts and licenses.

There is, thus, for the law of sedition, a sordid origin, but its aftermath in the law has been consistently resisted, especially in litigation in the courts of England, from the beginning of the 19th century, in the times after George III. A more liberal view was taken in the courts of the law of England in the second half of the 19th century and onwards. In 1933, from the cases, Halsbury put the outcome of this resistance to the repression, during the years of reaction brought on by the fear of the influence in England of the French Revolution, thus:

"The freest public discussion, comment, criticism, and censure, either at meetings or in the Press, is permissible in relation to all political or party questions, all public acts of the servants of the Crown, all acts of the Government, and all proceedings of courts of justice are permissible, and no narrow construction is to be put upon the expressions used in such a discussion, but the criticism and censure must be without malignity, and must not impute corrupt or malicious motives." : 9 Halsbury 2 ed. 303

The reputation of the Star Chamber rightly fetches condemnation in controversy nowadays, but its spirit is alive and well, and it is beginning to flourish once more here in

Australia

Illustrations taken from the reported cases read in conjunction with the history books show that "sedition" has always been prosecuted in the pursuit of the political opponents of those in power. The concept has been more or less invariably abused. Nothing illustrates this better in Australia than the facts that led to the gaoling in Sydney of Lance Sharkey in 1949 for three years. If ever there was the use in this country of the law of sedition to capture and repress a political opponent, it was that case.

In the post-war period, Sharkey was the *la bête noire* in Australian political rivalries. Sharkey received a telephone call late at night from an unknown stranger relating to a recent incident in Europe. The caller asked a question about it. He wanted a comment from Sharkey. Sharkey said the question was hypothetical and he had nothing to say. The caller insisted on a substantive response. Sharkey refused. The insistence continued. Eventually, Sharkey uttered fifteen words. He made a prediction of a consequence of a hypothetical future event. The caller published the words uttered. There was no breach of the peace on the telephone that night. Sharkey got three years' gaol. He was found to have uttered a bad thought, to have a bad imagination about outcomes in the future. Bad thinking was deemed to be wicked advocacy. Not nice.

Now, the "war on terror" renews once again in our lives an intimidation against disclosing our 'bad' thoughts. We now have a renewed licence placed in some persons for the exercise of power over the minds of others, over the manifestation of man as a social being, over our very humanity. Abuses in the courts under the laws of sedition, as history shows, is in the nature of things.

To meet this renewed state of affairs, we need to set aright the statute books of all the Australian States, Territories and of the Commonwealth. And that won't happen without clamour for a statutory guarantee of freedom of speech.

ENDS

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