

Rule of law and national security concerns: whither human rights? [^]

- 1 Organised crime, including that conducted by, in the Australian vernacular, ‘bikie gangs’, has been recognised “as a major threat to individuals and to society”.¹ The nature of the threat has been widely publicised by the media and the symptoms of the issue have been playing themselves out in our courts in drug, weapon and murder cases. Over the last decade, the problem has been the subject of significant legislative reform by State and Commonwealth Parliaments with the introduction of Crime Commissions and specific legislative regimes aimed at countering the threat.

Human rights and the Australian legal system

- 2 In the context of a Commonwealth Constitution that confers minimum express rights² and the principle that international treaties ratified by Australia do not form part of Australian law unless validly incorporated by statute,³ it might be thought that Australia is a somewhat barren legal landscape for human rights protection. Only one state, Victoria, and one territory, the Australian Capital Territory, have introduced human rights instruments. The Federal Government rejected⁴ the recommendation of the National Human Rights Consultation Committee in 2009 that the Commonwealth Parliament adopt a federal *Human Rights Act*.⁵

[^] I express my thanks to my Researcher, Myles Pulsford, for his extensive research and invaluable assistance in the preparation and writing of this paper.

¹ Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) [37.2].

² See *Commonwealth Constitution*, s 116. Section 116 provides: “The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth”.

³ See *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; 183 CLR 273, 286-287 (Mason CJ and Deane J).

⁴ See Australian Government, *Australia’s Human Rights Framework* (April 2010) Attorney-General’s Department
<<http://www.ag.gov.au/Consultations/Documents/Publicsubmissionsonthedraftbaselinestudy/AustraliaHumanRightsFramework.pdf>>.

⁵ National Human Rights Consultation Committee, National Human Rights Consultation Committee Report (30 September 2009) Attorney-General’s Department, Recommendation 18

3 The role of human rights in the Australian legal system can be seen, however, through implications drawn from the Constitution and the principle of legality.

4 Albeit with marked restraint, the High Court has shown a willingness to draw implications from the Constitution that have been very important in limiting legislative power and protecting human rights. The most obvious example is the freedom of political communication implied primarily from the requirement in ss 7 and 14 of the Constitution that the Commonwealth House of Representatives and the Senate be “*directly chosen by the people*.”⁶ Another example are the implications drawn from Chapter III of the Constitution and, in particular, the *Kable* doctrine which recognises that States cannot “*legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth*.”⁷

5 Absent constitutional constraints, human rights are also protected through the principle of legality, defined as a principle of statutory interpretation whereby:

“Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment”.⁸

6 The principle is conceptualised as a requirement:

<<http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Documents/NHRCR-Recommendations.pdf>>.

⁶ See *Lange v Australian Broadcasting Corporation* [1997] HCA 25; 189 CLR 520, 559 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

⁷ *Kable v DPP* [1996] HCA 24; 189 CLR 51, 103 (Gaudron J).

⁸ *Al-Kateb v Godwin* [2004] HCA 37; 219 CLR 562, [19] (Gleeson CJ).

“... for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them.”⁹

- 7 Gleeson CJ has explained that this is not a “*factual prediction*” but rather “[i]n a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament”.¹⁰ This working hypothesis, known to the Parliament and the Courts, “is an aspect of the rule of law”.¹¹

Organised crime

- 8 These two safeguards have already played a significant role in the judiciary’s assessment of the validity of the legislature’s attempts to fight organised crime. Indeed, ‘bikies’ have become quite frequent litigants in the High Court of Australia.¹²
- 9 In *Wainohu v State of New South Wales*,¹³ a member of the Hells Angel Motorcycle Club was successful in obtaining a declaration from the High Court that the *Crimes (Criminal Organisations Control) Act 2009*, which empowered an eligible judge to make a declaration that a particular organisation was a “*declared organisation*” under the Act, was invalid on *Kable* grounds.
- 10 In *X7 v Australian Crime Commission*,¹⁴ the High Court considered the scope of the powers of the Australian Crime Commission, a function of

⁹ *Coco v R* [1994] HCA 15; (1994) 179 CLR 427, 437 (Mason CJ, Brennan J, Gaudron J and McHugh J).

¹⁰ *Al-Kateb v Godwin* [2004] HCA 37; 219 CLR 562, [20].

¹¹ *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] HCA 40; 221 CLR 309, [21] (Gleeson CJ).

¹² See eg. *Assistant Commissioner Condon v Pompano Pty Ltd* [2013] HCA 7; 295 ALR 638; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4; 234 CLR 532; *Wainohu v New South Wales* [2011] HCA 24; 243 CLR 181; *Tajjour v State of New South Wales*; *Hawthorne v State of New South Wales*; *Forster v State of New South Wales*.

¹³ [2011] HCA 24; 243 CLR 181.

¹⁴ [2013] HCA 29; 248 CLR 92.

which was to investigate “*federally relevant criminal activity in relation to ‘serious and organised crime’*”.¹⁵ In that matter, Hayne and Bell JJ, with whom Kiefel J agreed, invoked the principle of legality to find that under the Act the powers of the Commission did not authorise the compulsory examination of an accused about the subject matter of offences for which that person was charged but not yet tried.¹⁶ Hayne and Bell JJ observed that:

“The general provisions made for compulsory examination, when read in their context, do not imply, let alone necessarily imply, any qualification to the fundamentally accusatorial process of criminal justice which is engaged with respect to indictable Commonwealth offences.”¹⁷

11 Although the language of human rights is not front and centre in such decisions, human rights are nonetheless protected by these legal doctrines. The majority decision in *X7* for example can be seen to be protecting the rights conferred by Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR).¹⁸

¹⁵ Ibid [2] (French CJ and Crennan J).

¹⁶ Ibid [147], [148], [157].

¹⁷ Ibid [147].

¹⁸ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. Article 14 provides:

“1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have

The limited nature of the protection

- 12 Ultimately, however, it must be recognised that these two mechanisms provide limited protection for human rights.

Principle of legality

- 13 The utility of the principle of legality in rights protection is ultimately undermined by the fact that it is a principle of statutory interpretation and provides no protection against clear legislative intention to the contrary. Of perhaps more concern, at least from a rights protection perspective, is the apparent change in the manner that the principle has been applied in the High Court.
- 14 In *Lee v New South Wales Crime Commission*¹⁹ the Court was concerned with a provision in the *Criminal Assets Recovery Act 1990* (NSW) authorising the compulsory examination of a person for the purposes of a confiscation order. Relevantly, the Act abrogated the right against self-incrimination. The question before the High Court was, relevantly, whether

legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”

¹⁹ *Lee v New South Wales Crime Commission* [2013] HCA 39; 302 ALR 363.

the Act authorised an order “*for the examination of a person touching the subject matter of criminal charges pending against that person.*”²⁰

15 Although the High Court is not bound by its own decisions,²¹ this question arguably should have been answered conformably with the Court’s decision in *X7*.²² The majority in *X7*, Hayne, Kiefel and Bell JJ, were in dissent in *Lee*, with the two new members of the Court, Gageler and Keane JJ, joining French CJ and Crennan J in the majority. The High Court did not overrule *X7*. The apparent divergence in approach between the two cases as to the scope of the principle’s protection has thus understandably caused some confusion.

16 It is beyond the scope of these brief remarks to examine the differences in outcome in each case. A few short comments are sufficient to demonstrate the problem. In their joint judgment, Gageler and Keane JJ cautioned that the principle of legality should not be extended beyond its rationale:

“... *it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature.*”²³

17 Their Honours continued:

“The principle of construction is fulfilled in accordance with its rationale where the objects or terms or context of legislation make plain that the legislature has directed its attention to the question of the abrogation or curtailment of the right, freedom or immunity in

²⁰ *Ibid* [4] (French CJ).

²¹ See eg *Wurridjal v Commonwealth* [2009] HCA 2; 237 CLR 309, [65] (French CJ). See generally MJ Beazley, PT Vout and SE Fitzgerald, *Appeals and Appellate Courts in Australia and New Zealand* (LexisNexis, 2014) [3.14].

²² See *Lee v New South Wales Crime Commission* [2013] HCA 39; 302 ALR 363, [61]-[74] (Hayne J), [213], [252] (Kiefel J), [256]-[258], [265]-[266] (Bell J).

²³ *Ibid* [313] (Gageler and Keane JJ) (emphases added).

question and has made a legislative determination that the right, freedom or immunity is to be abrogated or curtailed. *The principle at most can have limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked.* The simple reason is that '[i]t is of little assistance, in endeavouring to work out the meaning of parts of [a legislative] scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve'.²⁴

- 18 This can be contrasted with the approach of Kiefel J, with whom Hayne and Bell JJ agreed, who commented:

"The applicable rule of construction recognises that legislation may be taken necessarily to intend that a fundamental right, freedom or immunity be abrogated. As was pointed out in *X7*, it is not sufficient for such a conclusion that an implication be available or somehow thought to be desirable. The emphasis must be on the condition that the intendment is "necessary", which suggests that it is compelled by a reading of the statute. *Assumptions cannot be made. It will not suffice that a statute's language and purpose might permit of such a construction, given what was said in *Coco v The Queen*.*"²⁵

Implications from the Constitution

- 19 Constitutional implications also provide limited protection to human rights because they are drawn from and limited by the text and structure of the Constitution.
- 20 The point may be illustrated by reference to a case currently before the High Court concerning the validity of a New South Wales consorting offence.²⁶ The offence under consideration is very broad and, although ostensibly aimed at the threat of organised crime, potentially burdens the freedom of association of any person who associates with a person convicted of an indictable offence.

²⁴ Ibid [314] (citation omitted) (emphasis added). See also Ibid [29], [45] (French CJ).

²⁵ Ibid [173] (citations omitted) (emphasis added).

²⁶ Judgment has now been delivered in *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35.

- 21 The offence arguably undermines the right to the freedom of association with others and the right to freedom of expression conferred by articles 22 and 19 of the ICCPR.²⁷ Even though the ICCPR recognises that both of these rights are conditional, there must be a question whether the consorting law in question would be valid from a purely human rights perspective: an offence of such breadth could not be said to be necessary for, relevantly, “*public order (ordre public)*”.²⁸
- 22 The problem for the applicants in the High Court is that this is not the relevant inquiry upon which to base a declaration of legislative invalidity.

²⁷ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

Article 22 provides:

- “1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize[2] to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.”

Article 19 provides:

- “1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.”

²⁸ “Public Order” is defined in United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985) follows:

- “22. The expression “public order (*ordre public*)” as used in the Covenant may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (*ordre public*).
23. Public order (*ordre public*) shall be interpreted in the context of the purpose of the particular human right which is limited on this ground.
24. State organs or agents responsible for the maintenance of public order (*ordre public*) shall be subject to controls in the exercise of their power through the parliament, courts, or other competent independent bodies.”

First, the High Court has previously rejected that there is a free-standing freedom of association guaranteed by the Constitution:

“Any freedom of association implied by the *Constitution* would exist only as a corollary to the implied freedom of political communication and the same test of infringement and validity would apply.”²⁹

23 Secondly, the implied freedom is that guaranteed by the Constitution and not the freedom of expression identified in the ICCPR. As a unanimous High Court observed in *Lange*, the implied freedom of communication “*can validly extend only so far as is necessary to give effect to*” the sections of the Constitution from which it was drawn.³⁰ The inquiry under the Australian Constitution is whether:

- “1. Does the law effectively burden freedom of communication about government or political matters in its terms, operation or effect?
2. 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 ...”³¹

24 There is a real question whether the New South Wales provision can be found to burden the freedom of communication about government or political matters in either its terms, operation or effect.³² If the High Court answers this first question in the affirmative, the second question under the *Lange* test, as modified by *Coleman v Power*,³³ remains. It is interesting to note that once a law is found to burden constitutionally protected speech,

²⁹ *Wainohu v New South Wales* [2011] HCA 24; 243 CLR 181, [112] (Gummow, Hayne, Crennan and Bell JJ), [72] (French CJ and Kiefel J). See also *Mulholland v Australian Electoral Commission* [2004] HCA 41; 220 CLR 181, [148].

³⁰ *Lange v Australian Broadcasting Corporation* [1997] HCA 25; 189 CLR 520, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

³¹ *Hogan v Hinch* [2011] HCA 4; 243 CLR 506, [47] (French CJ).

³² See *Wainohu v New South Wales* [2011] HCA 24; 243 CLR 181, [72] (French CJ and Kiefel J), [113] (Gummow, Hayne, Crennan and Bell JJ), [186] (Heydon J)

³³ [2004] HCA 39; 220 CLR 1.

the inquiry under the second limb of the Australian test raises very similar questions as what is required by international human rights law. Articles 10 and 11 of the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*³⁴ make it clear that for a limitation on a right to be valid, it must respond to a pressing public or social need, pursue a legitimate aim, be proportionate to that aim and the means used to achieve the purpose of the limitation must be no more restrictive than necessary.

- 25 As the High Court is reserved in this decision, the last paragraph of this presentation remains to be written.

³⁴ United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985).