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Anthony Gray^a

^a University of Southern Queensland

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Government funding of non-governmental organisations and the implied freedom of political communication: The constitutionality of gag clauses

ANTHONY GRAY

University of Southern Queensland

Provisions in government funding agreements with non-governmental organisations (NGOs) may constrain the ability of these organisations to contribute to political debate. NGOs perceive risks to their funding if they criticise government policy. Such organisations play a significant role in the democratic process, and this article examines the applicability of the constitutional freedom of political communication to ‘gag clauses’. Australian courts have not considered the constitutional freedom in this context, but the Supreme Court of the United States has considered the question in relation to the First Amendment. The article shows what can be learned from American jurisprudence and Australian case law in order to challenge such provisions.

Keywords: advocacy; constitution; First Amendment; funding agreements; gag clauses; implied freedom of communication

Introduction

Australian state governments have attempted in recent years to restrict the ability of government-funded services, such as community legal centres, to engage in lobbying or advocate political change. For example, the *Principles for Funding of Legal Assistance Services in NSW* states that funding for ‘legal assistance services’ at Legal Aid NSW or NSW community legal centres should not be used for ‘political advocacy or political activism’. Section 24 of the *Tasmanian Forests Agreement Act 2013*, an agreement between governments and environmental groups on Tasmanian forestry, requires regular assessment of the ‘durability’ of the agreement, including assessment of the extent of ‘substantial active protests’ about environmental matters in that state. Some have interpreted this as a gag on environmental protest as a condition of the funding (Denniss 2013).

Government attempts to control speech are not new. Precedents include newspaper-licensing in England (Milton 1644), taxes on certain forms of speech,¹ and arguably

Anthony Gray is Professor of Law at the University of Southern Queensland.

¹See, for instance, *Grosjean v American Press Co Inc* (1936) 297 US 233, 246.

the federal government's now abandoned 2013 media reforms involving the proposed creation of an office to oversee complaints about the press. Restrictions on non-governmental organisations (NGOs) have existed for some time (Lyons 2003). The recent High Court *Aid/Watch* decision confirmed that advocacy by an organisation did not disqualify it from designation as a 'charity'.² Proposed legislation in 2003, however, would have disqualified a charity from tax-exempt status if it engaged in advocacy or attempted to change government policy (Maddison, Denniss and Hamilton 2004: 2; O'Connell, Martin and Chia 2013: 293).

An Australian study regarding NGOs and democracy found that 58 per cent of NGOs believed that governments were attempting to silence debate (Maddison, Denniss and Hamilton 2004). Some 76 per cent of respondents disagreed that 'current Australian political culture encourages public debate', and a similar percentage reported pressure to amend their public statements in accordance with current government policy. About 90 per cent agreed that NGOs that criticised government decisions or policy risked having their funding reduced (Hamilton and Maddison 2007: 91–94; Maddison, Denniss and Hamilton 2004: 38–39). The relevant funding agreement specifically restricted the organisation from commenting on government policy in fewer than 30 per cent of cases. Between 50 and 72 per cent of respondents (depending on whether they were fully funded by government, partly funded or funded for specific projects), however, believed that the funding restricted their comment on government policy. This suggests a significant discrepancy between the wording of agreements and the perceptions of signatories. Recent publicity about such clauses indicates that their use is increasing, making explicit what NGOs understand to have been the case for some time.

Suppression of political advocacy by NGOs is contrary to the tenets of liberal-democratic institutions and processes (Melville and Perkins 2003: 97). As Mill argued:

No argument, we may suppose, can now be needed against permitting a legislative or executive, not identified with the interest of the people, to prescribe opinions to them, and determine what doctrines or what arguments they shall be allowed to hear ... all silencing of opinion is an assumption of infallibility. (2002: 83)

Fundamental to democratic society is the right to advocate change. Without lobby groups or champions for change, reform is more difficult. Lobby groups have power as a collective voice not available to the individual. Community legal centres are well positioned to be aware of grassroots community concerns about the impact of laws on particular groups, which are often marginalised or otherwise without a strong voice.

This article considers the implied freedom of political communication in the context of clauses limiting free speech. The High Court has not considered the implied freedom in relation to funding agreements containing gag clauses. The Supreme Court of the United States, however, has considered an equivalent right, and I examine these cases to determine the position according to Australian constitutional principles. The article considers the theoretical bases upon which the court might strike down such laws, including the doctrine of unconstitutional conditions

²*Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539, 556–57.

and the principle of inalienability of constitutional freedoms. It examines the argument that an organisation has no right to be funded, so it is permissible to fund it with conditions, which the organisation is legally free to accept or not.

Implied freedom of political communication in Australia

In the 1990s, the High Court of Australia recognised an implied freedom of political communication in the Constitution (Bronitt and Williams 1996; Gelber 2011; Kirk 1995; Meagher 2005; Patmore 1998; Stone 1998, 2001; Williams 1996).³ The judges found that the Constitution made representative democracy central to governance in Australia; for representative democracy to operate effectively, political communication must be preserved. The court characterised political communication as a negative right, offering protection from laws that infringe the right, rather than a positive right to sue. The right is not absolute. As with most other rights, the court applied a proportionality test to examine the constitutional validity of laws that infringed such a right. The court developed a two-stage test.

Does the law in question effectively burden freedom of communication about government or political matters⁴ in terms or effect? If so, is the law reasonably appropriate and adapted to serving a legitimate end in a manner compatible with representative and responsible government, which the Constitution prescribes?⁵ If the answer to the first question is yes, and the answer to the second is no, then the law is unconstitutional.

The court has emphasised the centrality of freedom of political discussion to the system of representative democracy (Mill 2002: 88; Patmore 1998: 100–07). As Chief Justice Mason argued in *Australian Capital Television Pty Ltd v Commonwealth*:⁶

Only by exercising that freedom can the citizen communicate his or her views on the wide range of matters that may call for, or are relevant to, political action or decision. Only by exercising that freedom can the citizen criticise government decisions and actions, *seek to bring about change, call for action where none has been taken*, and in this way influence elected representatives ... individual judgment, whether that of the elector, the representative or the candidate, on so many issues turns upon free public discussion in the media of the views of all interested persons, groups and bodies and on public participation in, and access to, that discussion. (emphasis added)

Ely claimed that the core of representative democracy includes political change, and courts should intervene when:

The ins are choking off the channels of political change to ensure they will stay in and the outs will stay out... (or) an effective majority are systematically

³For example, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

⁴The precise meaning of these terms is elusive (Bronitt and Williams 1996: 298–99; Kirk 1995: 53; Stone 2001: 378).

⁵*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567–68; *Coleman v Power* (2004) 220 CLR 1, 50, 57, 62.

⁶*Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138–39.

disadvantaging some minority out of simple hostility or a prejudicial refusal to recognise commonalities of interest. (1980: 103; see also Meagher 2005: 35)

The court has contrasted laws that directly prohibit or control political communication (Coleman 2004: 31; Levy 1997: 619),⁷ and laws with a different character, whose effect on such communication is incidental or indirect.⁸ It is more difficult to defend the constitutionality of the former.⁹

The court has determined that the implied freedom of political communication can apply to state and federal laws,¹⁰ and to different methods of political communication, including political protests (Levy 1997).¹¹ It is not confined to communication by or to politicians, and includes communication among citizens.¹² The meaning of ‘politics’ has been broadly interpreted to include discussion of possible police corruption,¹³ comments on Australia’s involvement in war,¹⁴ and advocacy with a view to reversing government policy or administrative decisions (Martin 2011). It includes both the right to express views and the right to hear them. The freedom is not confined to statute law, and applies in relation to actions of the political executive. It can also shape the common law on a particular topic.¹⁵

Debate has considered the philosophical basis of the Australian implied freedom. Narrowly, it can be tied to ‘institutional democracy’, which aims to ensure that citizens are exposed to a broad range of views so that they can exercise their vote in an informed way (Fiss 1996: 101). Broadly, it can be tied to an idea of ‘participatory democracy’, in which citizens are not simply passive recipients of information, but have the right (or duty) to contribute actively to public debate (Maddison 2007: 28; Patmore 1998: 99–106). The High Court has appealed to both conceptions of the implied freedom in its decisions (Chesterman 2000: 317). NGOs play an important role, regardless of which conception of democracy is applied, but they are crucial in the participatory model (Sawer 2002: 41; Yeatman 1998: 3, 17). They have been described as ‘essential intermediaries’ between the community and government, conveying information about the needs and preferences of a wide range of often marginalised groups to governments that would otherwise not hear from such sections of society, and are ‘essential components of a healthy and robust democracy’ (Maddison, Denniss and Hamilton 2004: vii).

The implied freedom has not been used to strike out a clause in a funding agreement that makes funding conditional on the recipient’s abstention from lobbying.

⁷Levy v State of Victoria (1997) 189 CLR 579, 619 (Gaudron J); Coleman v Power (2004) 220 CLR 1, 31 (Gleeson CJ).

⁸Hogan v Hinch (2011) 243 CLR 506, 555 (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); Wotton v State of Queensland and Anor (2012) 246 CLR 1; Monis v The Queen [2013] HCA 4, [64] (French CJ), [342] (Crennan, Kiefel and Bell JJ); Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106, 169.

⁹Wotton v State of Queensland and Anor (2012) 246 CLR 1, 16 (French CJ, Gummow, Hayne, Crennan and Bell JJ); Nationwide News v Wills (1992) 177 CLR 1, 76–7 (Deane and Toohey JJ).

¹⁰Wotton v State of Queensland and Anor (2012) 246 CLR 1, 15 (French CJ); Hogan v Hinch (2011) 243 CLR 506, 543, 555; Stephens v West Australian Newspapers (1994) 182 CLR 104, 232, 235.

¹¹Levy v State of Victoria (1997) 189 CLR 579, 594, 614, 623, 638.

¹²Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, 560.

¹³Coleman v Power (2004) 220 CLR 1, 11, 24.

¹⁴Monis v The Queen [2013] HCA 4, [361], [387].

¹⁵Aid/Watch v Commissioner of Taxation (2010) 241 CLR 539, 556.

Could the freedom be applied in this context to prevent such a condition being attached to government funding?

A law that simply banned an organisation or individual from communicating about legal reform or political change would likely infringe the constitutional freedom. In terms of the two-stage test, it would burden communication about political matters. This would be difficult to justify under the second limb: what legitimate end could justify a law gagging political debate in Australia? The law would be constitutionally invalid.

The present scenario is somewhat different because the government has not directly passed a law banning political speech; rather, the government has made it a condition of government funding, a term of a contract, that a funded organisation not participate in such speech. According to the strict terms of the two-limbed test, the first limb is not satisfied, since there is no *law* burdening freedom of communication, but *a term of a contract* that does so. Cases suggest (though this is never the basis of the decision) that the freedom could apply to actions of the executive,¹⁶ including the granting of funding.¹⁷ This would overcome the argument that the implied freedom does not apply here since there is no 'law'.

Such a law is likely to be directed at the same end, and to achieve the same effect, as legislation banning such speech. The question becomes whether the court should allow something to be done indirectly, through a clause in a funding contract, that could not be done directly, through legislation. If the answer is no, funding on condition of non-lobbying is constitutionally invalid.¹⁸

No individual or organisation has a constitutional right to government funding.¹⁹ Governments are not obliged to fund community organisations, and might argue that they are not, and should not be, required to fund advocacy. The argument is that if the government is free to decide whether to fund an individual or agency, it can impose conditions on the recipient of the funding.²⁰ If the recipient does not like the conditions, it does not have to accept the money.²¹ This argument suggests that funding on condition of non-lobbying is constitutionally valid. Some counter that governments must fund NGOs, including advocacy, because other voices, such as business groups and middle-class interests, can fund themselves. NGOs may be the only means of public communication for the marginalised (Lyons 2001: 222).

How should the High Court reconcile these arguments? Australian precedent does not consider this point directly, but the issue of tying funding to suppression of speech is not new. The Supreme Court of the United States has examined this issue on many occasions. It is instructive to consider how the US court has reconciled spending powers of government with rights to free speech, taking account of the differences between the American free-speech provision and the Australian version. The American provision applies to all speech, but the Australian version applies, at present, only to political speech. This is not relevant here, however,

¹⁶*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.

¹⁷*Williams v Commonwealth* (2012) 86 ALJR 713, 737, 747, 759, 818.

¹⁸*Cummins v Missouri* (1867) 71 US (4 Wall) 277.

¹⁹*Regan v Taxation with Representation of Washington* (1984) 461 US 540; *Agency for International Development v Alliance for an Open Society* (2013) 133 S Ct.

²⁰*Western Union v Kansas* (1910) 216 US 1, 53.

²¹*South Australia v Commonwealth* (1942) 65 CLR 373, 417; *Agency for International Development v Alliance for an Open Society* (2013) 133 S Ct.

since questions of funding restrictions arise, in both jurisdictions, in the context of speech that is ‘political’. Nor is the other difference relevant: that the American right is a positive right, but the right in Australia is negative, in the sense of freedom from interference with such a right, rather than a ground on which a legal claim may be asserted.

Three High Court judges stated that ‘there is little to be gained (in considering the Australian implied freedom) by recourse to jurisprudence concerning the First Amendment’.²² There should be no objection, however, to considering First Amendment case law in respect of the implied freedom of political communication. The relevance of American constitutional principles to the Australian context has been recognised at the macro-level (Dixon 1965: 102; Winterton et al. 2007: 172; Zines 2008: 55).²³ This is relevant to the Constitution generally, as well as to interpretation of the implied freedom, where numerous uses of First Amendment case law and principles have advanced Australian jurisprudence (Stone 1998: 220).²⁴

American case law

American jurisprudence has shifted from the literal text of the First Amendment. For instance, the First Amendment literally applies to laws that Congress has passed. The court has departed from this text. It has deemed that the First Amendment extends to state laws, as well as laws passed by Congress.²⁵ In addition, the court has applied the First Amendment where an action, not a law, is challenged. In *Perry v Sindermann*,²⁶ for example, a teacher claimed that the non-renewal of his teaching contract was based on his criticism of the college board. The court accepted that First Amendment principles applied:

Even though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.²⁷

²²*Monis v The Queen* [2013] HCA 4, [326] (Crennan, Kiefel and Bell JJ).

²³*Cheatle v The Queen* (1993) 177 CLR 541, 556; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 318; *Andrews v Howell* (1941) 65 CLR 255, 282.

²⁴*Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 140, 143 (Mason CJ), 231, 235, 239 (McHugh J); *Nationwide News v Wills* (1992) 177 CLR 1, 32 (Mason CJ), 79 (Deane and Toohey JJ); *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 130 (Mason CJ, Toohey and Gaudron JJ), 177, 182 (Deane J); *Levy v Victoria* (1997) 189 CLR 579, 594 (Brennan CJ), 623 (McHugh J), 638–42 (Kirby J); *Coleman v Power* (2004) 220 CLR 1, 75 (Gummow and Hayne JJ); *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3, [151] (Heydon J); *Monis v The Queen* [2013] HCA 4, [27–8] (French CJ); *Wotton v State of Queensland* (2012) 246 CLR 1, 21 (Heydon J).

²⁵*Cantwell v Connecticut* (1940) 310 US 296.

²⁶*Perry v Sindermann* (1972) 408 US 593.

²⁷*Perry v Sindermann* (1972) 408 US 593, 597; see also *Elrod, Sheriff v Burns* (1976) 427 US 347; *Pickering v Board of Education of Township High School* (1968) 391 US 563.

The court has also applied the First Amendment as a defence to a common law action in tort,²⁸ in a similar manner to how the court in Australia has used the implied freedom to shape the common law.²⁹

This approach could be used in Australia to overcome the argument that the implied freedom does not apply to gag clauses in funding agreements because such agreements are not laws. The American courts have extended the freedom beyond 'laws', despite the literal terms of the First Amendment. They have done so knowing that a narrow interpretation – that the Constitution only guards against *legislative* provisions offensive to free speech – would allow governments to circumvent the requirement by resorting to other methods invasive of free speech.

The First Amendment applies to speech generally, rather than merely political communication, as in the Australian version. The Supreme Court, however, tends to apply First Amendment protection differentially, according to the nature of the speech involved, with the strongest protection accorded to political speech:

The First Amendment has its fullest and most urgent protection in the case of regulation of the content of political speech ... above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.³⁰

The Supreme Court has examined the question of linking funding or denial of funding with speech. In *Speiser v Randall*, the court considered the constitutionality of a law that exempted citizens from property tax if they pledged allegiance to the US government. A taxpayer who refused to sign the oath was denied the exemption. In effect, the law compelled speech as a condition of a government benefit. The taxpayer successfully challenged the government decision on First Amendment grounds. The court held that to deny an exemption to claimants who engaged in certain forms of speech was to penalise them for such speech. It had the same deterrent effect as if the state were to fine them for such speech.³¹

The court has developed the doctrine of unconstitutional conditions: that the government cannot deny benefits to people on a basis that infringes their constitutionally protected freedom of speech, regardless of whether people (or organisations) are entitled to that benefit.³² In *Federal Communications Commission v League of Women Voters of California*, the court struck out a section in legislation allowing for government agencies to provide funding to non-commercial providers of television and radio services. A section of the Act forbade any provider who received such funding from engaging in 'editorialising'. The court noted that editorials have traditionally played an important role in informing the public by critically commenting on matters of public interest to ensure their broad discussion.³³ Speech of that

²⁸*Snyder v Phelps* (2011) 131 S Ct 1207.

²⁹*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Aid/Watch v Commissioner of Taxation* (2010) 241 CLR 539.

³⁰*Brown v Hartlage* (1986) 456 US 45, 53; *Snyder v Phelps* (2011) 131 S Ct 1207, 1215; *Police Department of the City of Chicago et al. v Mosley* (1972) 408 US 92, 95.

³¹*Speiser v Randall* (1958) 357 US 513, 518.

³²*Rumsfeld v Forum for Academic and Institutional Rights Inc* (2006) 547 US 47, 59; *United States v American Library Association* (2003) 539 US 194, 210.

³³*Federal Communications Commission v League of Women Voters of California* (1984) 468 US 364, 382.

kind was entitled to the highest protection, and the government had not demonstrated a compelling interest in regulating it.

The Supreme Court has struggled to reconcile two competing ideas. First, Congress is not obliged to fund particular viewpoints or subsidise the exercise of fundamental rights, including freedom of speech.³⁴ Second, Congress may attempt to influence speech indirectly by the selective use of funding, tax exemptions or other means, placing First Amendment rights in jeopardy. As the court reiterated recently in *Agency for International Development*:

Government may not deny a benefit to a person on a basis that infringes his (or her) constitutionally protected ... freedom of speech even if (they) have no entitlement to that benefit.³⁵

The court has reconciled these ideas by distinguishing conditions placed on the use of funding, and conditions that leverage funding to regulate speech outside the specific programme being funded. The court has recognised that the line can be difficult to draw, however, and care must be taken to stop Congress recasting programmes to fall artificially on the 'constitutional' side of the line. The court is wary of conditions on funding that prevent recipients from asserting beliefs contrary to the government.³⁶

Congress has also attempted to limit funding to groups that might make particular legal arguments. For example, *Legal Services Corporation v Velazquez* concerned a law by which Congress specifically prohibited the appellant from funding any organisation that assisted clients to seek to amend or challenge welfare law, including on the grounds of constitutional law (Yoder 1998). The appellant successfully challenged this. Congress could not seek to insulate its own laws from legitimate judicial challenge. Its decision could not aim to suppress ideas perceived as contrary to the government's interests.³⁷ Such a law struck at the heart of First Amendment freedoms.

The court is aware that Congress may seek to achieve indirectly what it cannot achieve directly. The court considered the validity of a state law requiring a private carrier to become a common carrier as a condition of the right to do business in that state, and noted:

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold ... as a general rule, the state having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and ... it may not impose conditions which require the relinquishment of constitutional rights.³⁸

³⁴*Rust v Sullivan* (1991) 500 US 173; *Regan v Taxation with Representation of Washington* (1984) 461 US 540; *Agency for International Development v Alliance for an Open Society* (2013) 133 S. Ct.

³⁵*Agency for International Development v Alliance for an Open Society* (2013) 133 S. Ct, 16.

³⁶*Agency for International Development v Alliance for an Open Society* (2013) 133 S. Ct, 17, 23.

³⁷*Legal Services Corporation v Velazquez* (2001) 531 US 533, 549.

³⁸*Frost v Frost Railroad Commission of California* (1926) 271 US 583, 593–94.

The court has been particularly concerned with restrictions pertaining to content.³⁹ Even more serious are restrictions on particular viewpoints in relation to a topic. These kinds of restrictions would be unlikely to survive a First Amendment challenge, unless they apply to a limited public forum on a particular topic.⁴⁰ In order to defend such laws, it would be necessary to show a compelling state interest, and that the law was narrowly tailored towards achieving that particular objective.⁴¹

In summary, the Supreme Court has responded to the possibility that Congress, since it cannot directly proscribe speech based on content or viewpoint, might seek to achieve its aims indirectly by refusing to fund speech with which it disagrees. As a result, governments are not permitted to provide funding on the condition that recipients maintain silence on matters of interest to them, or on the condition that a party will not advocate for law reform. These precedents are analogous to current moves by Australian governments to limit the contribution of funding recipients to public debate.

The Supreme Court of the United States has not accepted that such actions are consistent with rights to free speech; nor should the High Court of Australia. Certainly, there are differences between freedom of speech in the US, and the narrower freedom of political communication in Australia. Those differences are not relevant here because we are discussing the freedom of community organisations to speak about political and legal issues rather than more general speech, and whether such organisations should be defended from interference by the government in the form of provisions in funding contracts. This is consistent with the negative conception of the freedom in Australia, that is, freedom from interference by government, not a positive source of rights. This does not, however, render American jurisprudence irrelevant.

Waiving constitutional freedoms

The American doctrine of unconstitutional conditions

Can a theoretical framework be constructed to better understand when it is permissible to waive constitutional freedoms? There is little Australian authority on this question, but American jurisprudence recognises the doctrine of unconstitutional conditions. The doctrine states that governments cannot grant benefits on the condition that beneficiaries surrender their constitutional rights, but the government could, if it wished, withhold benefits altogether (Sullivan 1989: 1415). This doctrine could be used to challenge the constitutional validity of funding NGOs on the basis that they do not exercise freedom of political communication, accepting that discussion in the US takes place in the context of a ‘right’ with different scope to the Australian ‘freedom’. This might inhibit application of the doctrine of unconstitutional conditions in Australia, unless the court was prepared to consider a broader conception of the freedom.

³⁹*Police Department of the City of Chicago et al. v Mosley* (1972) 408 US 92, 95.

⁴⁰*Rosenberger v Rector and Visitors of the University of Virginia* (1995) 515 US 819, 830.

⁴¹*Simon and Schuster v Members of the New York State Crime Victims Board* (1991) 502 US 105, 117–18.

The inalienability of constitutional freedoms

Some freedoms may be so fundamental that they are inalienable (*International Covenant on Civil and Political Rights*; *Universal Declaration of Human Rights*; Locke 1960). They may be inalienable because not merely a personal right of an individual is at stake. Broader community interests are at stake, which an individual cannot be expected to consider.

The argument for the purposes of this article is that it is not legally possible for a funded organisation to relinquish those freedoms, or to make funding conditional on relinquishing those freedoms, because they *cannot* be sold. The fundamental freedom of communication belongs as much to the speaker (the funded organisation) as to those who would listen. As the High Court has acknowledged in this context, it is a two-sided freedom (Cole 1992: 680).⁴² A two-sided freedom cannot be sold by the agreement of only one.

If it is accepted that constitutional freedoms, such as the implied freedom of political communication, are inalienable, then the argument that the power to do the greater (deny funding altogether) includes the power to do the lesser (provide funding on certain conditions) can similarly be dismissed. For instance, the government has the power to provide public housing for those in need of it. Surely, this does not mean that the government has the power to provide public housing only to white Australians, and not to other races. Such an action would rightly be condemned as racially discriminatory. In other words, the fact that the government has the power to provide public housing does not enable it to act in an unlawful manner by discriminating in the provision of services. Similarly, the fact that the government has the power to deny funding does not allow it to provide funding on condition of relinquishment of constitutional rights.

A theory that constitutional freedoms, whether explicit or implicit, are inalienable would also answer the suggestion in American⁴³ and Australian⁴⁴ cases that the purpose of the law is relevant in assessing its compatibility with free-speech protections. A purpose-based test has several problems, including identifying which purpose/s are proscribed, difficulties where an act might be argued to have multiple purposes, some of which are legitimate and others illegitimate (Kreimer 1984: 1334–38), and the possibility that effects on freedom of speech are sidelined.⁴⁵ In Australia, the two-stage test partly ameliorates these problems by focusing on aspects other than purpose, including, in the first stage, the extent to which the law burdens political speech and, in the second, reference to the ‘manner’ in which the law operates.⁴⁶

Australian law has included argument about the inalienability of constitutional freedoms. This occurred in the context of an attempted waiver of an express right to jury trial in the Constitution. There is no reason to suppose that the view of inalienability in the constitutional sense should differ according to whether we discuss an express provision or an implied one. The jury provision is often referred to as a ‘right’, but the freedom of political communication is a freedom in the nature of a

⁴²*Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 232.

⁴³*Board of Education, Island Trees Union Free School District No 26 v Pico* (1982) 457 US 853, 871; *Minneapolis Star and Tribune Co v Minnesota Commissioner of Revenue* (1983) 460 US 575, 592.

⁴⁴*Levy v State of Victoria* (1997) 189 CLR 579, 619 (Gaudron J); *Coleman v Power* (2004) 220 CLR 1, 31 (Gleeson CJ); *Wotton v State of Queensland* (2012) 246 CLR 1, 31 (Kiefel J).

⁴⁵*Sherbert v Verner* (1963) 374 US 398, 404.

⁴⁶*Wotton v State of Queensland* (2012) 246 CLR 1, 31–32.

‘negative right’. I acknowledge these differences, but they do not justify a different view on the question of whether a constitutional freedom (or right) can be waived or alienated. I now discuss the High Court’s consideration of the attempted waiver of the constitutional right in Section 80.

In *Brown v The Queen*, the High Court considered whether an accused could waive the right to jury trial in Section 80 of the Constitution. The court rejected this suggestion. Justice Deane found that the ‘right’ to jury trial was not simply a personal right or privilege of the accused, but reflected broader community interests. Justice Dawson agreed that use of the jury had public advantages, and its benefits were not confined to the individual accused. In other cases where a person has been allowed to waive statutory benefits, the right was merely a personal or private one, not of a broader nature involving public policy.⁴⁷

I argue that the High Court should not allow an NGO to waive (or, more accurately, should not allow a government to require an NGO to waive) its freedom of political communication, for the same reason the court gave in *Brown* to not permit an accused person to waive the right to trial by jury. In both cases, the freedom or right is not a personal one that the individual may relinquish. Broader community interests are at play. Because it is not a personal right, individuals cannot voluntarily trade it for government funding, and it is constitutionally unacceptable for the government to make funding conditional on the waiver of that right (Kreimer 1984: 1387). As the High Court has confirmed repeatedly, it is critical to representative democracy, for which the Constitution provides, that the public be exposed to a full range of views on matters of a political nature. Community groups play a pivotal role in giving voice to matters of public concern. It is anathema to representative democracy for a government to seek, directly or indirectly, to silence those voices it would prefer the voting public not to hear (Gelber 2011: 144).

The two-stage test for conditional funding agreements

Does the law burden freedom of communication about government or political matters in terms or effect?

I have explained how the court could deal with the problem that the freedom, as currently constructed, is confined to laws rather than funding agreements. American case law has supported broadening the freedom beyond application to laws, given that government should not be able to achieve indirectly what it cannot constitutionally achieve directly. The principle is what is important, rather than the form of the intrusion. Funding agreements conditional on non-advocacy have significant potential to undermine the constitutional freedom. The High Court has accepted the principle that what the Constitution forbids directly, it also forbids indirectly.⁴⁸

The requirement otherwise clearly burdens freedom of communication about political matters. An argument for law reform is a political argument, given that the main purpose of parliaments is to make and change laws. The High Court recently confirmed, in a different context, that advocates for changing government policy are engaged in political activities. The court noted the Constitution’s insistence on

⁴⁷*Brown v The Queen* (1986) 160 CLR 171, 202, 208.

⁴⁸*ICM Agriculture Pty Ltd v Commonwealth of Australia* (2009) 240 CLR 140, 170, 216; *New South Wales v Commonwealth* (1949) 76 CLR 1, 350; *British Medical Association v Commonwealth* (1949) 79 CLR 201; *Commonwealth v Tasmania* (1983) 158 CLR 1, 283.

representative and responsible government and the implied freedom of political communication, and observed that: ‘the system of law which applies in Australia thus postulates for its operation ... agitation for legislative and political changes’.⁴⁹ Advocacy for legal change and lobbying fall within the ambit of what can be considered ‘political’ (Stone 2001: 384–85).⁵⁰ The answer to the first limb of the two-stage test is therefore ‘yes’.

*Is the law reasonably appropriate and adapted to serving a legitimate end in a manner which is compatible with the maintenance of representative and responsible government which the Constitution prescribes?*⁵¹

The High Court has distinguished between laws that directly and/or substantially prohibit or control political communication, and laws with a different character whose effect on such communication is indirect and/or incidental.⁵² The former are more difficult to justify,⁵³ requiring compelling justification. The relevant conditions of funding contracts belong to the first category. The judge will therefore require a ‘compelling justification’.⁵⁴

The government does not admit that such provisions are intended to gag what can be uncomfortable debate about a law. Governments may not appreciate criticism of a law that is overtly, or in effect, producing unfair outcomes. Modern governments have become increasingly concerned with managing the media cycle, and it is reasonable to imply that media managers might seek to silence dissent from those who rely on government funds for their survival.

The government might have a stronger argument that it is the trustee of public funds and has a legitimate interest in ensuring that scarce funds are allocated to the most efficient use, and that it should have the right to dictate how funds are spent. The High Court would need to weigh this argument (if this is a legitimate end compatible with representative and/or responsible government) in light of the fundamental importance of freedom of political communication in Australia’s system of representative government. The US Supreme Court, however, has not looked kindly on restrictions applying selectively to some speakers on a topic. For instance, in *Minnesota Star and Tribune Co.*,⁵⁵ one of the difficulties with the tax on the use of ink and paper was that, due to exemptions, it applied only to a few newspapers. The court noted that laws drafted in such a way could potentially be abused. These laws could have the same effect as content-based restrictions on speech, distorting the market for ideas. The narrow base of the tax might limit political fallout for the government.⁵⁶ In the Australian context, therefore, it is difficult to see how a restriction narrowly aimed at only a small number of contributors to a political debate could satisfy the test of ‘compelling justification’.

⁴⁹*Aid/Watch v Commissioner of Taxation* (2010) 241 CLR 539, 551, 556 (French CJ, Gummow, Hayne, Crennan and Bell JJ), 565 (Kiefel J).

⁵⁰*Hogan v Hinch* (2011) 243 CLR 506.

⁵¹*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, as reinterpreted in *Coleman v Power* (2004) 220 CLR 1.

⁵²*Hogan v Hinch* (2011) 243 CLR 506, 555 (Gummow, Heydon, Hayne, Crennan, Kiefel and Bell JJ).

⁵³*Wotton v State of Queensland* (2012) 246 CLR 1, 16 (French CJ, Gummow, Hayne, Crennan and Bell JJ).

⁵⁴*Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 143 (Mason CJ), 235 (McHugh J).

⁵⁵*Minneapolis Star and Tribune Co v Minnesota Commissioner of Revenue* (1983) 460 US 575.

⁵⁶*Leathers, Commissioner of Revenues for Arkansas v Medlock* (1991) 499 US 439, 503.

Furthermore, in the context of the implied freedom, the court has considered proportionality, including whether the intrusion on the implied freedom is ‘minimalist’ compared with the legitimate objective it seeks to meet (Meagher 2005: 501).⁵⁷ In relation to the funding arrangements noted at the beginning of this article, at the least the ban on linking to websites where interested parties can obtain advocacy advice fails this test. It is not necessary, in order to secure a legitimate objective, that community legal centres or other organisations use taxpayers’ money for the specific (non-advocacy) purposes for which it was given, or that organisations do not provide information on where parties seeking advocacy services should go. If the court found that the provision of government funding on condition that the recipient does not engage in political communication failed the two-stage test, the government’s power to fund NGOs would not be in question; rather, its funding capacity should not be conditional on the recipient’s engagement or non-engagement in political communication.

Conclusion

NGOs are essential to democracy, providing a voice to groups that would otherwise be marginalised. Their role is under threat with the growing use of clauses making funding conditional on non-engagement in political dialogue. This article has argued that such clauses might be challenged using the implied freedom of political communication. It has drawn on First Amendment jurisprudence, where freedom of speech has been considered in relation to these issues. The debate also concerns the nature of the democracy for which the Constitution provides, and the nature of rights and freedoms, including political communication. The High Court has found that a constitutional right is inalienable.

Rights and freedoms are not absolute, but justification is required for incursion on fundamental freedoms such as political communication. The law must respond proportionally to an identified legitimate end. Governments have a responsibility as the custodian of public funds. Attempts to gag voices in debate over contentious political issues, especially the voices of people who might not otherwise be heard, are not proportional responses to that legitimate end, given the fundamental nature of political communication. These are content-based restrictions requiring ‘compelling justification’, which is not demonstrated. Freedom of political communication is an inalienable freedom. The High Court has been wary of parties waiving their constitutional freedoms, particularly where the freedom is not theirs alone, but part of a broader conception of representative democracy. Not merely the freedom of community centres to speak is at stake, but the freedom of individuals to hear their contributions and those of the people they represent, and to consider arguments in favour of law reform. Such voices should not be silenced.

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⁵⁷ *Wotton v State of Queensland* (2012) 246 CLR 1, 34 (Kiefel J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 143 (Mason CJ), 235 (McHugh J).

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