TAJJOUR V NEW SOUTH WALES, FREEDOM OF ASSOCIATION, AND THE HIGH COURT'S UNEVEN EMBRACE OF PROPORTIONALITY REVIEW

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I INTRODUCTION

In *Tajjour v New South Wales*,[1] the High Court considered the constitutionality of s 93X of the *Crimes Act 1900* (NSW) which made it an offence for a person to habitually consort with two or more convicted offenders after being warned by a police officer that they are convicted offenders and that consorting with a convicted offender is an offence. Section 93X is an example of what might be termed 'anti-gang' legislation. However, whereas most such cases have turned on the separation of judicial power found in Chapter III of the Constitution, *Tajjour* is primarily concerned with the implied freedom of political communication. Although s 93Y of the *Crimes Act 1900* (NSW) set out certain 'innocent purpose' defences, none of these covered consorting that occurs in the course of, or for the purpose of, political communication. Section 93X was also challenged for inconsistency with the International Covenant on Civil and Political Rights and an implied freedom of association that was said to exist in the Constitution independently of the implied freedom of political communication.

It is well established that international treaties that have been ratified by Australia do not form part of Australian law unless incorporated into domestic law, and so it is unsurprising that the plaintiffs' arguments relating to the Covenant were unsuccessful.[2] This comment therefore focuses on the Court's decision regarding the implied freedom of association and the implied freedom of political communication. In respect of the latter, the comment explores two areas of disagreement on the High Court. The first concerns the distinction between direct and incidental burdens on freedom of political communication. Direct burdens on free political communication have historically attracted a higher standard of justification than incidental burdens. However, an intriguing aspect of *Tajjour* is the emergence of a majority that rejects this distinction.

The comment also explores the relationship between the *Lange* test,[3]

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[1] [2014] HCA 35.

[2] *Tajjour v New South Wales* [2014] HCA 35 at [48] (French CJ), [98] (Hayne J), and [136] (Gageler J).

[3] The *Lange* test was formulated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and as most recently updated in *Unions NSW v New South Wales* [2013] HCA 58 provides

applied to determine whether legislation is compatible with the implied freedom of political communication, and proportionality review. *Tajjour* signals an increasing willingness to apply the *Lange* standard with reference a proportionality test modelled on that developed by the German Federal Constitutional Court (and which will be referred to in this note as the 'European' proportionality test).[4] However, adoption of proportionality is occurring unevenly, with some judges rejecting proportionality almost entirely; others adopting proportionality in part; and still others adopting divergent interpretations of how the proportionality standard should be understood. These disagreements may relate to deeper differences regarding the nature of the implied freedom of political communication and the role of the judiciary in a constitutional democracy.

II THE IMPLIED FREEDOM OF POLITICAL ASSOCIATION

On the facts of *Tajjour* there was no indication that the plaintiffs had consorted for the purpose of political communication, or indeed engaged in political communication of any kind. In this light, it is perhaps unsurprising that they sought to establish that the Constitution contains an implied freedom of association that exists independently of the implied freedom of political communication. From the perspective of the plaintiffs, the High Court would only have assisted them by finding that s 93X was invalid in its entirety, not only insofar as it relates to political communication.

It is well-known that the implied freedom of political communication was initially derived from a broad doctrine of representative government that was regarded as inherent in the terms of the Constitution.[5] At the time, this gave rise to speculation that further implications might be identified, including a constitutional guarantee of freedom of association.[6] However, the rationale for the implied freedom of political communication was subsequently

as follows: (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, or proportionate, to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative government?

[4] The European proportionality test originated in Germany but has now been adopted throughout Europe and indeed many jurisdictions around the world. The term 'European' is used for ease of reference. For a comprehensive account of the European proportionality test see Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012).

[5] George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory* (The Federation Press, 6th edn, 2014) 1259.

[6] See, for example, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 212 (Gaudron J); Jeremy Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23 *Federal Law Review* 37, 55-56.

narrowed to specific provisions of the Constitution, particularly those providing that the Senate and House of Representatives should be 'directly chosen by the people.'[7] In the process, the High Court appears also to have narrowed the range of implications that can be drawn from the rationale for the implied freedom of political communication. Prior to *Tajjour*, the High Court repeatedly found that an implied freedom of association may exist but only as a corollary to the implied freedom of political communication.[8]

In *Tajjour*, this view is confirmed by Hayne J, Gageler J, and Keane J.[9] French CJ does consider the issue but cites case-law to the same effect.[10] Crennan, Kiefel and Bell JJ simply do not consider the issue. The High Court has therefore clearly rejected the view that the Constitution contains an implied freedom of association. However, the existence of an implied freedom of political association as a corollary to the implied freedom of political communication would seem to be well established. Indeed, Gageler J takes care to emphasise that '[a]ssociation for the purpose of engaging in communication on governmental or political matter is part and parcel of the protected freedom.'[11]

This position is unlikely to be revisited but it is worth considering whether this conception of the implied freedom of political association is analytically satisfactory. In particular, it is unclear why the implied freedom of political association should be regarded merely as an adjunct to the implied freedom of political communication and not as deriving directly from the constitutional commitment to representative government and therefore as existing in its own right. As George Williams argues in an early article on implied freedoms under the Australian Constitution, the 'ability to associate for political purposes is obviously a cornerstone of representative government in Australia. How could the people "directly choose" their representatives if denied the ability to form political associations and to collectively seek political power?'[12]

Of course, it might be asked whether in practice it would make any difference if the implied freedom of political association were regarded as enjoying an independent existence. There might not be any difference as far as the scope of the freedom is concerned. It is difficult to conceive of

[7] Sections 7 and 24 of the Australian Constitution respectively.
[8] See, for example, *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 225-226 (McHugh J), 234 (Gummow and Hayne JJ), and 306 (Heydon J); *Wainohu v New South Wales* (2011) 243 CLR 181, 230 (Gummow, Hayne, Crennan and Bell JJ).
[9] *Tajjour v New South Wales* [2014] HCA 35, [95] (Hayne J), [143] (Gageler J), and [244] (Keane J).
[10] Ibid [46].
[11] Ibid [143].
[12] 'Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform' (1996) 20 *Melbourne University Law Review* 848, 861.

circumstances where free political association is burdened but free political communication is not. However, there may be consequences for the standard of review that is applied where the burden of a law falls primarily on free political association.[13] The High Court has historically drawn a distinction between laws that directly and incidentally burden free political communication, with laws in the former category subject to a more exacting standard of review than laws in the latter category.[14] Where a law directly burdens free political association, but only incidentally burdens free political communication, the standard of review would be less intense than if free political communication was directly engaged. The effect would be to downgrade the level of judicial protection that the implied freedom of political association is accorded.

Nevertheless, as explored below, it may be that the distinction between direct and incidental burdens on free political communication does not survive *Tajjour*. If so, the main consequence following from the High Court's decision regarding the implied freedom of political association may simply be to restrict the scope for further implications to be drawn from the constitutional commitment to representative government.

III The Implied Freedom of Political Communication

A *The Distinction between Direct and Incidental Burdens on Free Political Communication*

The judgment of the High Court in *Tajjour* reveals a range of responses regarding the distinction between direct and incidental burdens on free political communication, coupled to the emergence of a majority rejecting the distinction.

On the one hand, certain judges make use of the distinction in its traditional form. In upholding s 93X, Hayne J, for example, emphasises that 's 93X does not prohibit the expression or dissemination of any political view or any information relevant to the formation of or debate about any political opinion or matter. Rather, the section ... limits the *occasions* on which political views and information can be formed, expressed or disseminated by or between those persons.'[15]

[13] Anthony Gray, 'Freedom of Association in the Australian Constitution and the Crime of Consorting' (2013) 32(2) *The University of Tasmania Law Review* 149, 159-160.

[14] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 143 (Mason J), 234 (McHugh J), and 169 (Deane and Toohey JJ); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 200 (Gleeson CJ); *Coleman v Power* (2004) 209 ALR 182, 266-7 (Heydon J); *Wotton v Queensland* (2012) 246 CLR 1, 16 (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Hogan v Hinch* (2011) 243 CLR 506, [95] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). For criticism of this distinction, see Dan Meagher, 'The Protection of Political Communication under the Australian Constitution' (2005) 28(1) *UNSW Law Journal* 30, 31-35.

[15] *Tajjour v New South Wales* [2014] HCA 35, [91] (Hayne J).

In his dissenting judgment, Gageler J found that s 93X should be read down so as not to apply in circumstances where it would infringe the implied freedom of political communication. Nevertheless, Gageler J likewise found the *Lange* test can be applied with varying degrees of intensity, and that a distinction can be drawn between laws which directly restrict free political communication and laws with respect to some other subject which incidentally restrict free political communication.[16]

On the other hand, the distinction is flatly rejected by some other judges. In their joint judgment, Crennan, Kiefel and Bell JJ state, for instance, that the 'test in *Lange* does not involve differing levels of scrutiny.'[17] In a similar vein, French CJ distinguishes various ways in which laws may impact upon free political communication before observing that these 'categories of laws do not attract different levels of scrutiny in the application of the criteria of validity.'[18] The issue was not considered by Keane J. Nevertheless, once French CJ's judgment is combined with the joint judgment of Crennan, Kiefel and Bell JJ, a majority can be identified rejecting the principle that direct and incidental burdens on free political communication should give rise to different levels of review.

What explains this aspect of *Tajjour*? Neither the joint judgment, nor that of French CJ, is particularly forthcoming on this point. Nevertheless, both judgments seek to contrast the *Lange* test with American constitutional jurisprudence. French CJ, for example, states that 'the test in *Lange* does not import the range of different kinds of scrutiny, from minimal to strict, adopted in the Supreme Court of the United States.'[19] Crennan, Kiefel and Bell JJ offer a similar explanation: 'the Court in *Lange* adopted aspects of proportionality analysis. American jurisprudence, respecting strict scrutiny, has not been accepted by this Court as relevant to the *Lange* test.'[20]

There is considerable debate regarding the differences between the methods of constitutional rights adjudication employed in the United States and the European proportionality test.[21] Nevertheless, one frequently cited point of contrast is that the United States Supreme Court employs a system of tiered scrutiny whereby different levels of review are applied according to the category of right or interest in question.[22] French CJ, and Crennan, Kiefel and

[16] Ibid [151] (Gageler J).
[17] Ibid [132] (Crennan, Kiefel and Bell JJ).
[18] Ibid [37] (French CJ).
[19] Ibid [37] (French CJ).
[20] Ibid [132] (Crennan, Kiefel and Bell JJ).
[21] Some commentators question whether the tests are fundamentally distinct. See, for example, Paul Yowell, 'Proportionality in United States Constitutional Law' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds) *Reasoning Rights: Comparative Judicial Engagement* (Hart, 2014) 87.
[22] Ibid 94.

Bell JJ, may therefore be seeking to distance the second leg of the *Lange* test from US constitutional law and draw it closer to European proportionality review. It is to this issue that we now turn.

B *Proportionality and the Second Leg of the Lange Test*

In *Monis v The Queen*,[23] Crennan, Kiefel and Bell JJ observed that although the phrase 'reasonably appropriate and adapted' in the second leg of the *Lange* test has been identified with European proportionality analysis,[24] it in fact has its origins in US constitutional law.[25] The joint judgment in *Monis* expresses a preference for a more structured proportionality test that would lend clarity to the *Lange* standard.[26] In *Unions New South Wales v New South Wales*, this suggestion is endorsed in the joint judgment through amendment of the *Lange* test to include a reference to proportionality.[27]

The European proportionality standard is generally understood as involving four steps:

1. A measure restricting a right must serve a legitimate goal (legitimate goal stage);
2. It must be a suitable means of furthering this goal (suitability or rational connection stage);
3. There must not be any less restrictive but equally effective alternative (necessity stage);
4. The measure must not have a disproportionate impact on the right holder (strict proportionality).

Each of these steps has been subject to extensive analysis.[28] However, for our purposes, the distinction between the necessity and strict proportionality stages is of particular importance. At the necessity stage, the question is typically framed as whether a hypothetical alternative exists that would be less harmful to the right in question while equally advancing the law's purpose.[29] In contrast,

[23] [2013] HCA 4.

[24] For example, in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562 the Court held that: '[s]ome judges have expressed the test as whether the law is reasonably appropriate and adapted to the fulfilment of a legitimate purpose. Others have favoured different expressions, including proportionality. In the context of the questions raised by the case stated, there is no need to distinguish these concepts.'

[25] *McCulloch v Maryland* [1819] USSC 5; 17 US 316 at 421 (1891).

[26] *Monis* [2013] HCA 4, [346].

[27] [2013] HCA 58, [44].

[28] See generally Barak A, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012).

[29] Barak, above n 4, 317. However, there are weaker and stronger versions of necessity. See, for example, David Bilchitz, 'Necessity and Proportionality: Towards a Balanced Approach' in Lazarus, above n 21, 41.

strict proportionality requires the court to balance the benefits gained by the public against the harm caused to the constitutional right in determining the constitutionality of the measure.[30]

With this background in mind, how is proportionality applied in *Tajjour*? The judgments in the case reveal a range of responses. French CJ, for example, appears to endorse the importation of European proportionality analysis.[31] Nevertheless, his Honour's judgment is cast in terms of the 'reasonably appropriate and adapted' formula and does not apply the structured approach entailed by the European test.[32] The conclusion reached by French CJ is that the potential for s 93X to apply to innocent habitual consorting means that it is not 'appropriate and adapted' to its purpose.[33] French CJ held further that s 93X could not be read down and was therefore invalid in its entirety.[34]

In contrast, Hayne J found that s 93X met the legitimate goal, rational connection, and necessity stages of proportionality analysis. On the latter point, Hayne J held that any hypothetical alternative to s 93X would be less effective in achieving the legislative end of crime prevention. A consorting law that included an exception for political communication would 'shift the focus of the present law from the fact of association in proscribed circumstances to what is said or done during the act of association or to the purpose or reason for the act of association.'[35] Hayne J applied strict proportionality to a limited extent in finding that s 93X did not impose an 'undue burden' on political communication.[36] However, his Honour did not overtly balance the benefits gained by the public against the harm caused to the implied freedom.

The judgment of Crennan, Kiefel and Bell JJ is of particular interest. Like Hayne J, their Honours apply the legitimate goal, rational connection, and necessity stages of proportionality analysis in upholding s 93X. On the necessity stage, the reasoning of the joint judgment is also similar to that of Hayne J: hypothetical alternatives to s 93X would be less effective in pursuing the crime prevention goal of the section.[37] However, the joint judgment expressly declines

[30] Barak, above n 4, 340. The distinction between the necessity and strict proportionality stages is usefully illustrated by Dieter Grimm's example of a law that allows a police to shoot a person to death if this is the only means of protecting property. The law would pass the necessity test given that no less restrictive alternative is available. It is only at the strict proportionality stage that the court would weigh the relative values of life and property. See Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 (2) *University of Toronto Law Journal* 383 at 396.

[31] [2014] HCA 35, [36].

[32] Ibid [45].

[33] Ibid.

[34] Ibid [49]-[52].

[35] Ibid [89].

[36] Ibid [91].

[37] Ibid [125].

to apply strict proportionality, finding that the question of whether it should form part of the *Lange* test would be more appropriately resolved in a case where there is a 'substantial' burden on free political communication.[38] Their Honours observe further that strict proportionality evolved in the context of constitutional rights adjudication, whereas the High Court is concerned with the enforcement of an implied freedom.[39]

Gageler J likewise applied proportionality analysis. However, Gageler J's understanding of the steps of proportionality analysis differs from the structure outlined above. In respect of necessity, Gageler J found that the question is not whether there are hypothetical alternatives that would be equally effective in pursuing the legislative objective. Instead, the implied freedom limits legislative options, with the result that 'some ends will not be able to be pursued to the same extent as they might have been pursued absent the implied constitutional freedom.'[40] It follows that means that come at 'too great a cost to the system of representative and responsible government established by the Constitution must be abandoned or refined.'[41] In contrast to French CJ, Gageler J found that s 93X should be read down so as not to apply to free political communication.[42]

Gageler J therefore appears to incorporate an element of balancing *within* the necessity stage. His Honour's formulation departs from a means-end necessity analysis inasmuch as it requires judges to weigh the cost to the system of representative and responsible government in determining whether the implied freedom has been breached. In this respect, Gageler J's test resembles the approach developed by the Canadian Supreme Court in the aftermath of *R v Oakes*,[43] whereby balancing is incorporated within the first three steps of the proportionality enquiry. It should be noted that the Canadian approach has been trenchantly criticised for not clearly separating the steps of proportionality analysis, which may result in a lack of transparency and a degree of arbitrariness.[44]

Finally, Keane J found that properly construed s 93X does not apply to political communication or association for the purposes of political communication. His Honour therefore did not consider the application of the *Lange* test. However, it should be recalled that in *Unions New South Wales* Keane J found that even the necessity stage of proportionality analysis 'would seem to countenance a form of decision-making having more in common with legislative than judicial power.' [45] Keane J therefore rejected a test of

[38] Ibid [133].
[39] Ibid [130].
[40] Ibid [163].
[41] Ibid [163].
[42] Ibid [168]-[178].
[43] [1986] 1 S.C.R. 103.
[44] Grimm, above n 30.
[45] *Unions New South Wales* [2013] HCA 58, [129].

proportionality in favour of a more limited test of reasonableness.[46]

IV Conclusion

The immediate result of *Tajjour* is that the constitutional validity of s 93X of the *Crimes Act 1900* (NSW) was upheld. However, of more lasting constitutional significance may be the uncertainty surrounding the second leg of the *Lange* test. A majority of the High Court appears to be developing the *Lange* test so that it more closely resembles European proportionality review. However, this is occurring unevenly with different judges embracing proportionality to varying degrees and divergent understandings emerging of what proportionality entails. It would obviously be to the benefit of Australian courts and legislatures if the High Court could settle on a uniform approach. However, these disagreements raise fundamental questions about the nature of the implied freedom of political communication and the role of the judiciary in a constitutional democracy that are unlikely to be amenable to easy resolution. Further exploration of these issues is likewise beyond the scope of this note.

[46] Ibid [133].