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In July 2012, the European Court of Human Rights (ECHR) offered some food for thought in Mouvement Raëlien Suisse v Switzerland (app. no. 16354/06). In a heavily divided (9 to 8) judgment, the Grand Chamber held that denying authorisation to a religious group for a poster campaign did not violate the group’s freedom of expression. The case was unique as it introduced a new category of ‘quasi-commercial’ speech to determine to what extent national authorities are required to permit an association to disseminate its ideas by making certain public space available to it for that purpose.

The applicant association, the ‘Raëlian movement’, is a religious group founded in 1976 with the aim of communicating and connecting with extraterrestrials. In March 2001, its Swiss branch requested authorisation to conduct a poster campaign in the city of Neuchâtel. The poster in question featured a little reading ‘The Message from Extraterrestrials’ while further down it contained the web address of the Raëlian movement. Although the poster contained nothing unlawful or shocking, the advertised website encapsulated ideas and links associated with ‘geniocracy’ (a political model based on individuals’ intelligence), human cloning, and ‘sensuous meditation’ (possibly associated with paedophilia). According to both Neuchâtel’s authorities and the Swiss courts those ideas were likely to undermine public order, safety and morality. As a result, they denied authorisation for the campaign.

To determine whether the restriction was necessary, the majority of the ECHR underlined that freedom of expression does not entail an unlimited individual right to the extended use of public space, particularly in cases involving advertising. Rather, regulating use of public space falls within the margin of appreciation afforded to States. However, the breadth of that margin of appreciation varies depending on the type of speech at issue. It is noteworthy that while there is little scope to restrict political speech, States generally enjoy greater leeway to regulate other types of expression, especially those that may offend religious beliefs or morals. In this case, the main function of the poster was to draw attention to Raëlism. The majority of the ECHR held that it was necessary to ban the poster campaign to protect public order, safety, and morality. As a result, they denied authorisation for the campaign.

By Ilias Tripsiotis | 28 October 2012

Studying Human Rights, Law and Practice
By Laurence Lustgarten | 17 November 2012

Human rights is a subject that increasingly attracts many public-spirited students around the world. For would-be lawyers, this usually means intense study of doctrine. Thirty years ago there was relatively little of it, but now there is an enormous body of statute and case law — at regional, national and even international level — to immerse oneself in. There is even an exciting body of political and moral theory, taking one into the realms of philosophy about justice, freedom, dignity, equality, and related concepts, that links with and gives the student a sense that these ideas are more than academic abstractions.

Or if you are jurisprudentially inclined and think most contemporary states are oppressive in their treatment of the poor — consider the demonisation of claimants that occurs almost daily, though present and proposed cuts to housing benefit would be a good place to start — give central place in your philosophical work to unpicking theories of the so-called ‘free market’ or ‘libertarianism’, which have been so dominant in practical politics since the 1980s, even as the Rawlses and the Dworkins have dominated the Academy.

To recast an old phrase, study the sources of danger and damage if you want, not only to understand the world most fully, but to be able to change it.

Laurence is an Associate Research Fellow at the Centre for Socio-Legal Studies, Oxford University and a Visiting Senior Research Fellow at Green Templeton College.

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Laurence is an Associate Research Fellow at the Centre for Socio-Legal Studies, Oxford University and a Visiting Senior Research Fellow at Green Templeton College.
Internet surveillance in English law

By Ian Brown | 22 June 2013

For the past fortnight, the media has been full of revelations about the surveillance activities of the UK’s National Security Agency (NSA), a shadowy body responsible for communications intelligence for the US government. UK interest has focused on the extent to which the NSA has conducted surveillance on UK residents with its UK equivalent, Government Communications Headquarters (GCHQ). But we now know GCHQ has been engaging in similarly broad, global communications surveillance. What do we know of the legal framework that governs these newly-revealed activities?

The Regulation of Investigatory Powers Act, 2000 (RIPA) allows the Secretary of State to authorise the interception of the communications of individuals, or a category of individuals, for purposes of national security. For the purposes of this section, a category comprises a number of individuals, such as those residing in a particular town, or living in a particular state, or working in a particular profession, or engaged in a particular activity. Typically, GCHQ conducts interception for “customers” in other parts of government.

Such an authorisation need not specify an individual or premises if it relates to the interception of communications external to the UK (s.8(4)). This is understood to be the mechanism by which the government authorises GCHQ to undertake automated searches of communications that originate or terminate outside the British Isles. This could include the transmission of communications or from servers outside the UK – which includes traffic to the facilities of most of the large companies (such as Facebook, Google, and Microsoft) implicated in the NSA’s PRISM programme.

The government’s current policy is to neither confirm nor deny the details of any GCHQ operational activities. The telecommunications expert for the Applicants in the European Court of Human Rights case Liberty v UK suggested that the interception authorisations are provided for specific functions only such as the ability to intercept communications in real-time and to hide the existence of other simultaneous wiretaps from each other. Accordingly, under s.54 of the Telecommunications Act 1984, the Secretary of State may give providers of public electronic communications networks directions of a general character: “in the interests of national security”, which may be protected against disclosure.

Section 12 of RIPA gives the Secretary of State the power to require that public telecommunications providers facilitate lawful interception of their network. This could include requirements such as those mandated by the European Telecommunications Standards Institute (ETSI) which specified the interception capabilities required of equipment such as the ability to intercept communications in real-time and to hide the existence of other simultaneous wiretaps from each other. Accordingly, under s.54 of the Telecommunications Act 1984, the Secretary of State may give providers of public electronic communications networks directions of a general character: “in the interests of national security”, which may be protected against disclosure.

Access to “communications data” — subscriber information, records of calls made and received, e-mails sent and received, websites accessed, the location of mobile phones — is also regulated under RIPA. Subject officials in a range of government agencies, going well beyond intelligence and serious crime, may authorise access. ISPs are required to store some of this data for 6-12 months under the Data Retention Regulations, 2009.

Through the combination of several pieces of legislation (Section 10 of the Computer Misuse Act, s.32 of RIPA and s.5 of Police Act Part III/Intelligence Service Act) government agencies are also able to remotely break into computer systems to access communications and other types of data on those systems.

GCHQ does not itself have the relationships with the largest Internet companies the NSA has with its PRISM programme, since very few of them are located within the UK. But it clearly has the legal authority to conduct large-scale surveillance of communications entering or leaving the UK. The agency has reportedly already spent several hundred million pounds expanding its capabilities to intercept ISP networks.

“Mastering the Internet” programme, with claims of a total budget of over £1bn (£1.5bn) to give analysts “complete visibility of UK Internet traffic, allowing them to remotely configure their deep packet inspection probes to intercept data – both communications data and the communication content – on demand.”

Some of that data may be encrypted, making surveillance much more difficult. But other external traffic is wide open to the interception and automated analysis that has caused such consternation to critics of the NSA’s newly revealed surveillance programmes. The Guardian has now revealed much more about the British programme in the UK regime, based on the lack of legal clarity required for interferences with Article 8 of the European Convention on Human Rights (respect for private and family life), are likely very soon.

Dr Ian Brown is Associate Director of Oxford University’s Cyber Security Centre, and Senior Research Fellow at the Oxford Internet Institute.

Hacking, Blagging and Bribery? The Press After Leveson

By Hugh Tomlinson | 25 February 2013

Hacking, blagging and bribing were, for many years, standard journalistic techniques in parts of the British press. Their exposure led to continuing police investigations, over 100 arrests, several criminal prosecutions and the Leveson inquiry. These criminal techniques were accompanied by bullying, a lack of proper journalistic ethics in the way that stories were obtained, and a lack of respect for the integrity of those supplying them.

In November 2012 Lord Justice Leveson condemned many years of press misconduct and recommended that in future the press should be regulated by a new independent voluntary body accompanied by statutory underpinning. In the three months since he reported the press have paid lip service to his recommendations whilst mobilising all their forces to undermine them.

Can we be confident that, after Leveson, the hacking, blagging, bribing and other abuses will stop?

Do his proposals represent the right approach in principle and will they work in practice?

The press claims that its privileges derive from the fundamental right to free speech which, in a democracy, should not be interfered with by politicians. The press is, indeed, vital to the freedom of expression. The rights of media corporations are not the same as those of the individuals. The press only has freedom and privileges because these serve the needs of citizens to have informed debate and public scrutiny of powerful institutions. And it should not be forgotten that the press is, itself, a powerful institution which also needs to be held to account.

The freedom of the press should be a freedom to engage in “public interest journalism” in accordance with proper standards. The pure commercial interests of newspapers and magazines are not more (or less) protection than those of any other business.

Even when the press is exercising freedom of expression in the service of democracy this is not an absolute right. It is no more important or fundamental than a number of other rights which are engaged by press actions. In particular, the press often does things which impact adversely on the private lives of individuals. Sometimes this is necessary as part of the public interest functions of the press. Often it is not. Media regulation must accommodate these other rights which must be balanced with freedom of the press in individual cases. A regulator must provide a framework in which this is done.

The contribution of the press to democracy is fundamental and requires careful protection. In particular, in order to hold power to account and serve the needs of citizens the press must be free of political interference. Politicians should no longer decide where the boundaries of public interest journalism lie and whether standards have been adhered to. This must be done by a wholly independent body.

The Leveson recommendations meet this basic test of independence from political influence. The Report concedes to the press the great privilege of self-regulation. Under its recommendations the press themselves are to establish the regulator. But, crucially, this regulator must meet certain “minimum process standards”. These are standards of independence and effectiveness. The Board of the regulator would be independently appointed with a majority independent of the press. The regulator would include a Code Committee comprising people making recommendations on the content of the Code of Standards but the ultimate responsibility for the content of the Code would reside with the Board. Government and politicians would have no role in any kind of regulation. The “statutory underpinning” is limited to the establishment of a “recognition body” – which decides whether or not the “ royal charter” by body is anything other than the “minimum Standards. Membership of the self-regulatory body would be voluntary but the statute would provide “incentives” to the press to join. There would be special rules as to costs and exemplary damages. The self-regulator would have three “arms”: complaints, arbitration, and, for the first time, “standards enforcement”. There would be a power to direct the press in cases of corrections and apologies where Code breaches are established.

Will this work in practice? If the tough and independent voluntary regulator is set up in accordance with the Leveson recommendations then, in my view, it has a good chance of success. The report contains detailed recommendations to the self-regulator which, if implemented, would produce a culture change in the British press. For the first time, standards would be properly considered and enforced.

The question remains: will the Leveson recommendations ever be implemented? The system depends on press cooperation. The press must establish an effective independent self-regulator – for the first time they will have to surrender power to an independent body. And unfortunately the recommendations do not contain any “backstop” – there is no fall-back position if the press do not cooperate.

The long history of failed self-regulation demonstrates that the press will not establish an effective regulator unless they think that the alternative is worse. They must believe that unless they act new regulation will be taken out of their hands. This means that, in order to promote press cooperation in the new system, politicians have to present a united front.

As a first step, Leveson required politicians to set up an independent statutory regulator. This was their first test – the first sign they could send to the press that cooperation was the least bad alternative. This is a test that the politicians seem to have failed. The Prime Minister’s refusal on the day of publication of the Report to cross his newly discovered fantasy “Rubicon” of “writing elements of press regulation into the law of the land” has led to a stalemate. It has provided the press with an opportunity to nibble away at key Leveson’s “minimum standards” recommendations – to promote its apparent aim of producing a neutered and ineffective regulator.

The establishment of a recognition body is, at this moment, a matter of life and sharp political debate. Nobody believes that the alternative is worse. They must believe that unless they act new regulation will be taken out of their hands. This means that, in order to promote press cooperation in the new system, politicians have to present a united front.

Hugh Tomlinson QC is a barrister at Matrix Chambers specialising in media and information law.
The case was taken to Strasbourg after the House of Lords upheld the ban in 2008

In that decision Lord Bingham explained the rationale for the ban, stating that ‘it is highly desirable that the playing field of debate should be as far as practicable level’ and warning that ‘to even levels of spending on paid political advertising would mean “elections become little more than an auction”’. The stance of the domestic courts stands in contrast to two previous decisions of the Strasbourg Court. In VgT Verein v Switzerland (2001), the Court found that a similar ban on broadcasting political advertising was a violation of Article 10, after it prevented an animal rights group buying airtime. More recently, in TV Vest AS v Rogaland (2006), a small political party took its case to Strasbourg, arguing that the ban in that country violated freedom of expression. The British government intervened in that case (showing the Court the House of Lords’ decision in Animal Defenders International), asking the Court to confine the earlier decision in VgT Verein or depart from its reasoning. The Court rejected these arguments, finding that such a restriction on political expression called for ‘a strict scrutiny’ and limited margin of appreciation. The ban on political advertising in Norway was therefore found by the Strasbourg Court to be disproportionate.

This does not mean the matter is a foregone conclusion. First, in Murphy v Ireland (2003), the Court found a ban on religious advertising not to violate Article 10. While Murphy might give some support to the UK’s position, the Court in Rogaland distinguished that case on the grounds that the religious advertisements in Ireland ‘might be liable to offend intimate personal convictions within the sphere of morals or religion’. So the Court following Murphy in relation to political advertising on Monday seems unlikely. A second possibility is that the Court might distinguish the position of the UK from the previous cases by looking at its distinctive media market, political system, broadcast regulations (such as impartiality rules and free airtime for political parties), etc. Furthermore, the Court might be persuaded to depart from the reasoning in its earlier decisions, as part of an ongoing dialogue with the domestic authorities.

Lurking behind the arguments is, of course, politics. Tensions between Scotland and the UK government are already high following a number of decisions (such as those concerning prisoner voting rights and the deportation of Abu Qatada). A Strasbourg ruling against the ban on political advertising is only likely to make matters worse. It remains to be seen whether the prospect of a further negative reaction will cause the Court to more be receptive to the arguments advanced by the UK.

Personally, I hope that the Strasbourg Court changes its course and finds that the ban does not violate Article 10. For all its bluntness, the ban has been central to keeping the cost of politics down in this country. Critics of the ban argue that alternative means to solve the problems posed by money in politics. However, as I argued several years ago in Ewing and Isacarhoff’s edited collection, partial controls on political advertising may be effective or will pose difficult questions in themselves. If the Court upholds the ban, it would emphasize the importance of a fair political system in which the opinion of the public is not based on spending power, but where in Baroness Hale’s words ‘each person has equal value’. While I hope the Court takes this path, I am very doubtful it will reach such a conclusion given its previous decisions.

Animal Defenders International v UK: A Case of False Dialogue, or of Strasbourg Losing its Nerve?

By Tom Lewis | 25 April 2013

Animal Defenders International v UK: Where Strasbourg Open the Door to Political Advertisements on TV?

By Jacob Rowbottom | 18 April 2013

On Monday, the Grand Chamber of the European Court of Human Rights will give its long-awaited decision in Animal Defenders International v United Kingdom (app no 48768/09). The Court will decide whether the ban on political advertising on the broadcast media (under the Communications Act 2003) violates Article 10.

The stated reason for the Communications Act ban is to protect democracy from distortion by preventing wealthy groups from buying airtime and flooding the airwaves with their own political messages. However, the prohibition is extremely broad, encompassing not just political adverts in the narrow sense but also ‘social advocacy advertising’ which includes any advert concerning matters of public controversy in the UK.

ADI claimed a breach of Article 10 ECHR (which protects the right to freedom of expression, but permits restrictions as long as they pursue a legitimate aim, are ‘prescribed by law and are proportionate’). Having lost before the domestic courts, ADI then applied to Strasbourg. All parties in the case accepted that some restrictions were legitimate; the main question was whether the Communication Act’s broad prohibition was Article 10 compliant given that ADI itself poses no threat to democracy. The Court held that it was: where there had been ‘exacting and pertinent reviews, by both Parliament and courts, as in this case, the state should be afforded a margin of appreciation. The Court put ‘considerable weight’ on Parliament’s conclusion that more nuanced alternatives (e.g. spending caps) could be subject to abuse and arbitrariness.

This is an interesting decision for several reasons. First, the judgment contradicts the Court’s previous case law. In cases involving Switzerland and Norway, ‘essentially identical’ prohibitions were found to violate Article 10 precisely because the restrictions caught within their wide ambit groups who did not pose any threat. These precedents led the dissentient judges in the ADI case to accuse the majority of ‘double standards’: how could a general ban be necessary for UK’s democratic society but not for Switzerland?

Second, it is not entirely clear why extensive Parliamentary ruminations should have the effect of letting the UK ‘off the hook’. From the applicant’s perspective, it should be the impact of the legislation that is determinative, rather than the quantity and quality of deliberations that led to it.

Finally, in this case an NGO with an important message was denied access to the same airwaves to which commercial organisations (finances permitting) have unlimited access. This must create a risk of unfairness. To illustrate by example: given the current state of affairs, a car manufacturer may advertise its SUVs on TV, but an NGO wishing to publicise the impact of such vehicles on the environment is prohibited by law from doing so.

ADI might be portrayed as an example of successful dialogue between Strasbourg and the UK’s legislature and courts: the former decided to revisit its earlier approach, taking on board the considered views of the latter. A less charitable view is that the Court following Murphy in relation to political advertising on Monday seems unlikely. A second possibility is that the Court might distinguish the position of the UK from the previous cases by looking at its distinctive media market, political system, broadcast regulations (such as impartiality rules and free airtime for political parties), etc. Furthermore, the Court might be persuaded to depart from the reasoning in its earlier decisions, as part of an ongoing dialogue with the domestic authorities.

However, this conclusion disregards the very narrow scope the Court afforded to hate speech legislation. The Court emphasised that the repugnancy of the ideas being expressed was not sufficient to justify restricting freedom of expression. Instead, the Court focused on extreme modes of expression, and their likely effect on vulnerable groups.

Mr Whatcott’s flyers were found to expose people of same-sex orientation to hatred by portraying them as child abusers, or claims of discrimination – not because of any hateful element. The Court made clear that Mr Whatcott was free to express his views, but not through hate speech.

The case concerned four flyers that were published and distributed by the respondent, William Whatcott, on behalf of the Christian Truth Activists. The first two flyers were entitled ‘Keep Homosexuality out of Saskatchewan’s Public Schools!’ and ‘Sodomites in our Public Schools’. The other two flyers were printed by page so that any addressments to which handwritten comments had been added.

The Court unanimously held that while the hate speech legislation did infringe the rights to freedom of religion and freedom of expression in the Charter, the protection of vulnerable groups from discrimination was of such importance as to justify the infringement. However, the Court found that only the first two flyers constituted hate speech.

The Court, confirming earlier case law, said that three principles should be applied in interpreting prohibitions on hate speech: firstly, the prohibition must be applied objectively; second, ‘hate’ must be understood to refer to extreme manifestations of the emotion described by the words ‘detestaton and vilification’; and third, courts must focus on the effect of the expression at issue, rather than the nature of the ideas expressed.

The Court held that s 14(1)(b) was aimed at a pressing and substantial objective: addressing the potential causes of discriminatory practices. Moreover, s 14(1)(b) was a proportionate response to this objective, as it only applied to public, not private, communications, and only applied to hate speech directed at an individual on the basis of characteristics already protected from discrimination.

However, the Court held that the additional words in s 14(1)(b) (i.e. symbols, gestures or other acts of arbitrariness) were a reprint of a page of classified advertisements to which commercial organisations (finances permitting) have unlimited access. This must create a risk of unfairness. To illustrate by example: given the current state of affairs, a car manufacturer may advertise its SUVs on TV, but an NGO wishing to publicise the impact of such vehicles on the environment is prohibited by law from doing so.

Professor Michael Paxton has raised concerns that ‘the practical effect of the ruling is to all but strangle certain kinds of argument – particularly those made from a religious point of view.’ However, this conclusion disregards the very narrow scope the Court afforded to hate speech legislation. The Court emphasised that the repugnancy of the ideas being expressed was not sufficient to justify restricting freedom of expression. Instead, the Court focused on extreme modes of expression, and their likely effect on vulnerable groups.

Mr Whatcott’s flyers were found to expose people of same-sex orientation to hatred by portraying them as child abusers, or claims of discrimination – not because of any hateful element. The Court made clear that Mr Whatcott was free to express his views, but not through hate speech.

Lauren Dancer is currently reading for the BCL at St John’s College, Oxford.
Mobile Phone Evidence: Implications for Privacy in South African Law
By John van der Berg | 15 June 2013

Contemporary criminal investigations, particularly in cases of conspiracy and joint participation, routinely include search and seizure of mobile phones and access of their stored electronic data. This prompts two questions: Does the core element of the right in question, viz a ‘reasonable expectation of privacy’, exist in the case of electronically stored information? And does this investigative practice infringe the right to privacy?

Referring to the US Fourth Amendment, Justice Brandeis in Olmstead v United States said that ‘the right to be let alone (is) the most comprehensive of rights and the right most valued by civilized men’. This sentiment has found approval throughout the Commonwealth (see eg Canada and South Africa, whose constitutions similarly entrench the right to privacy). The right to privacy is universally interpreted to include the right to be protected against unreasonable search and seizure, to the extent that any encroachment on the private sphere is regarded as being prima facie unlawful.

In South Africa, this right is extended by section 14(d) of the Constitution to ‘the right not to have … the privacy of [one’s] communications infringed’. In Malone v United Kingdom (app no 8197/98) the ECCHR held that the record of telephone numbers dialled by a person forms an integral part of protected telephonic communications. Thus, logically, there can be little doubt that electronically stored information, which includes text messages, photographs, and phone directory details, raises a legitimate expectation of privacy and is worthy of protection.

Protection consists of the requirement that search and seizure may only occur by virtue of a search warrant, the contents of which must be restrictively interpreted. Disregarding for present purposes the American practice of extending the reach of search warrants to include articles found ‘in plain sight’ on seized premises, the American ‘closed container’ doctrine may be conveniently applied to mobile phones: if the warrant authorises the seizure of a filing cabinet (a single, closed, opaque container), its contents remain sealed; when a mobile phone is seized under a warrant, it should be treated as a closed container and its electronic contents should only be accessible by virtue of a further warrant. (Although by no means settled law, the American experience proves instructive.)

In South Africa, search warrants may be authorized in respect of ‘anything’, an overly broad term that has been both judicially and legislatively qualified as meaning ‘any article’. Thus, by definition, the power to authorize search and seizure of intangible matter such as communications must be excluded.

Accordingly, it is submitted, once the mobile phone, the ‘article’, has been seized, the warrant’s authority is exhausted and the data stored in the phone may not be accessed. This submission, however, has not been authoritatively decided by the South African courts. One can only hope that when such a matter does come before the courts, the impingement of purposes underlying the constitutionally entrenched right to privacy will be acknowledged and upheld.

John van der Berg is a senior advocate practising in Cape Town, South Africa, specialising in criminal justice and related human rights law, and the author of several works on criminal law and procedure.

L’écran Noir: Shutting Down Hellenic Broadcasting Corporation (ERT)
By Ilías Trispóti | 6 July 2013

As I am writing these lines, Greece is the only state in the Council of Europe with no public broadcast media. On Tuesday 11 June 2013, the Greek Conservative-led coalition government announced its decision to immediately shut down Hellenic Broadcasting Corporation (ERT). Government spokespeople claimed that ERT is a case of an exceptional lack of transparency and incredible extravagance. This ends now.’ His statement is causing great social and political turmoil throughout the country. ERT has been unduly expensive and inefficient for years, but shutting it down results in the immediate loss of 2,700 jobs, when the Greek overall unemployment rate was historically high 27.4 per cent.
In Monis v The Queen [[2013] HCA 4], the High Court of Australia considered the unique Australian doctrine of "implied freedom of political communication". As Australia lacks a statutory or constitutional bill of rights, it is relatively rare for the High Court to be confronted with human rights questions. This was one of those occasions.

The appellants in Monis were alleged to have contravened s 471.12 of the Criminal Code (CB) by posting letters to relatives of Australian soldiers killed in action in Afghanistan. These letters not only particularised the involvement of the Australian military in Afghanistan: they also referred to deceased soldiers "do not belong (in any other things) murdering civilians, contaminated and having "the dirty body of a pig".

Section 471.12 criminalises the use of "a postal or similar service ... in a way ... that reasonable persons would regard as being, in all the circumstances, ... offensive". At issue was whether this section contravened the freedom of political communication implied into Australia's Constitution by a line of cases commencing with ACTV v Commonwealth (1992) 177 CLR 106 on the basis that it is an indispensable incident of the system of representative government created by the Constitution. A law would contravene the implied freedom if (1) it effectively burdened freedom of communication about government or political matters; and (2) it was not 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 government: Lange v ABC (1997) 189 CLR 520 as modified in Coleman v Power (2004) 220 CLR 1.

The Court split 3-3: the plurality of Crennan, Kiefel and Bell JJ held that s 471.12 was valid, while the minority of French CJ, Hayne and Heydon JJ (each of whom delivered separate judgments) held that it was invalid. Since the Court was evenly split, the decision of the court below – the Court of Criminal Appeal of New South Wales – was affirmed.

The critical matter which split the Court was what constituted a "legitimate end".

The plurality characterised the end as the individual's interest to be free from intrusion of seriously offensive material into his or her personal domain. They viewed this to be an aspect of individual liberty, an end compatible with the constitutionally prescribed system of representative government. The dissenting judges, however, characterised the end as the prevention of the use of postal or similar services which reasonable persons would regard as offensive. Hayne J held that the end had to be identified by the ordinary processes of statutory construction. However, it was not clear why such a process led to such a narrow conclusion. He simply said that the end "must be framed in limited terms". French CJ (Heydon J agreeing) was even more sparse on this point. He stated that broader considerations of promoting or protecting postal services, the integrity of the post and public confidence in the post "do not define in any meaningful way a legitimate end served by s 471.12", before concluding simply that the purpose was "properly described" in the limited way set out above. By characterising the end so narrowly, the dissenting judges left little room for questions of legitimacy or proportionality to operate: the question of validity fell at the first hurdle.

The even split of the Court, along with the paucity of reasoning, means that Monis is highly unsatisfactory. In addition, Heydon J offers as being "among other things" the existence of the doctrine of freedom of political communication, declaring it to be "a noble and idealistic enterprise which has failed, is failing, and will go on failing". His retirement, along with the swearing in of two new Justices – Gageler and Keane JJ – might well provide the opportunity to reconsider not only the more limited issues of characterising the "legitimate end", but, potentially, the very existence of the doctrine itself.

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