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Fair trial, procedural fairness and other traditional rights | Prof Adrienne Stone

Speaking notes from Professor Adrienne Stone, Director, Centre for Comparative Constitutional Studies, University of Melbourne, at ALRC Freedoms Symposium(https://www.alrc.gov.au/news-media/alrc-news/national-freedoms-symposia) , Federal Court, Melbourne, 30 September 2015.

The idea of traditional rights and freedoms

The title of this inquiry poses an interesting philosophical question: What are our traditional rights and freedoms? As conceived by this Inquiry, traditional rights and freedoms[1] are identified by their source and their character. They are found in long standing legislative practice and in the common law, and they have the character of 'civil and political' rights.

Civil and political rights, sometimes also referred to by scholars of human rights as 'first- generation' rights, are typically 'vertical' and 'negative' in character. That is, they govern the interaction between the individual and the state (vertical); and provide protection against government action (negative) rather than conferring an entitlement to provision of resources. In this respect they are contrasted with 'second generation' or social and economic rights and third generation, cultural and other group rights. Traditional rights and freedoms are usually taken to protect an underlying conception of human freedom that is grounded in liberty that is usually contrasted with the idea of equality that motivates second generation rights and the respect for group identity reflected in third generation rights.

As I have just described them, the concept has some troubling aspects. It seems both vague (making it difficult to identify the content of the concept) and, in its exclusion of second and third generation rights, excessively narrow. Moreover, because of the central characteristics I just identified – their negative and vertical operation; the centrality of liberty over equality – the rights are thought not to be truly important for vulnerable people offering little by way of transformative potential.

This last sentiment is one that is usefully addressed by this Inquiry. The importance of traditional rights and freedoms has been well illustrated by both Professor Gans and Professor Groves. They have shown that such rights are diffused through the legal system. Certainly areas of law as diverse as the criminal law and administrative law are centrally concerned with rights protection. And, no doubt, much of the legal system may be characterised as geared towards protecting the kinds of rights with which this Inquiry is concerned. By demonstrating the diffusion of rights protection through the legal system, this Inquiry has special significance for lawyers, reminding us that, precisely because we are lawyers, we are all (and not just specialist human rights lawyers) concerned with the protection of rights.

As well as demonstrating their centrality to our legal system, the Interim Report(https://www.alrc.gov.au/publications/alrc127) of the Inquiry also reminds us of some of the strengths of the traditional rights and freedoms. Because of their longevity, they have been worked out over time in detail in legislation or in the common law. In addition, one category of traditional rights, freedoms and privileges (criminal and due process rights) may be characterised as conceptually familiar to judges and the judicial process.[2]

But while traditional rights and freedoms have some strengths, this Inquiry also demonstrates the importance of the vigilant policing of rights. There are enduring pressures on these rights that present quite familiar kinds of challenges. (In putting together my submission to the ALRC inquiry, I was surprised to find laws that encroach upon freedom of expression in quite obvious ways, including some that are almost certainly unconstitutional (such as the offence for insulting a Royal Commissioner found in s 60 of the *Royal Commissions Act* 1902)). The Inquiry's Interim Report also shows how these challenges are refreshed as changing circumstances present new challenges. The circumstances giving rise to the constitutionally guaranteed rights of

judicial review – central to Professor Groves' remark – also demonstrate the capacity of traditional rights and freedoms to address at least some of the rights of the vulnerable. No doubt a full conception of rights should not be limited to this category of rights but with the assistance of this Inquiry we are better placed to to focus on a full conception of rights, including traditional right and freedoms.

I have, however, a final word of caution to sound about our current arrangements with respect to traditional rights and freedoms. It is usually said that Australia has no bill of rights, making us virtually unique among modern democracies. While there is some truth in this characterisation, in truth the situation is more complex. While we do not have a comprehensive bill of rights, nor do we have a full parliamentary system. The *Constitution*, in limited ways, protects rights. These rights, however, exist alongside fuller more comprehensive protections.

My view is that these limited protections for rights, while they hold some promise, also pose some risks for the protection of rights and freedoms. The limits of our 'constitutional rights' arise from their contested interpretive foundations. Because there has been disagreement over the foundations of, the constitutional freedom of political communication, that 'right' has been rather narrowly and unsatisfactorily interpreted. I raise this now because the decision in *Kirk v Industrial Relations Commission* is also subject to the kind of disagreement that has attended the freedom of political communication. That disagreement potentially weakens the 'right' itself.

Where we have constitutional rights that are weak and narrow, moreover, an additional problem arises. Sometimes constitutional rights can devalue rights protected in the non-constitutional right. That is, it is tempting – as a matter of law and in politics – to take the view that if a right were truly important, The *Constitution* would protect it. For this reason, there is a risk that the limited protection of expression conferred by the freedom of political communication might undermine the protection given to non-political expression. The limited protection of judicial review provided by *Kirk* and related decisions poses the same risk of devaluing or undermining the importance of related due process rights.

Our system of rights protection poses, then, a unique challenge: the protection of rights in the context of a mixed system of constitutional and non-constitutional protection. One challenge is to ensure that the *Constitution* provides a floor for rights protection and not a ceiling.

[1] I include here the related notion of 'privileges'.

[2] Others, such as freedom of expression or religion are not necessarily areas where lawyers and judges have special expertise.

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