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Conferences and Forums

Civil Disobedience Today

Free speech and civil disobedience in Australia
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Free speech is essential to a democratic society. Yet Australia possesses no explicit free speech protection in law. I will consider existing free speech protections in Australian law, especially with regard to political speech. I will outline the most important elements of the constitutional implied freedom of political speech developed since 1992, and look at some examples of civil disobedience in light of the freedom. I will conclude by reiterating the limitations of protections that exist for free speech, and especially political speech, in Australia today.

Today I want to trace out the battlelines of one particular area of the civil disobedience tradition, and that is the idea and the practice of free speech. In the time I have my presentation will be necessarily limited. First I want to consider briefly why free speech is considered important, to reiterate its importance within liberal democratic states. I then move on to consider existing free speech protections in Australian law, such as they are, including an outline of what is and what isn't protected by the constitutional implied freedom of political communication developed in Australia since 1992. I finish with some conclusions about the limitations of the free speech right in Australia.

Why is free speech important?

Free speech is a cornerstone of a democratic society. In recognition of its importance, most liberal democracies around the world a free speech right is elucidated in statutory or constitutional law. It is worthwhile considering briefly some central arguments as to why free speech is important. There are four which I will elucidate here: the argument from truth, the argument from self-development, the argument from rights and the argument from democracy. This classification of free speech arguments is derived in part from Barendt (1985: 8-23) and Schauer (1982) who differentiate three free speech theories which conform to the first two and the last presented here. To these I have added a fourth type, the 'argument from rights'.
The 'argument from truth' reflects the perception that free and open discussion is essential to the search for 'truth'. Engagement in speech, in the sense of the exchange of ideas via communicative expression, is considered important because of its outcome. According to the argument from truth, it is possible and even necessary that discussion may result in the acquisition of 'truth' via dissemination of new information and/or knowledge (Schauer 1982: 15).

Although it may seem a little old hat, part of the importance of academic research is to understand and acknowledge where your ideas come from. It was John Stuart Mill who

presented some of the most powerful arguments in 1859 for the preservation of free speech. He argued there were reasons for the special protection of freedom of speech (1991: Chapter 2). These include that no individual is infallible. Therefore, if an opinion is silenced the effect may be to silence a 'truth', or element of knowledge, of which we had previously been unaware or unconvinced but which may be more 'true' or credible than the knowledge we currently possess.

This means that to stifle debate is to risk silencing or repressing a 'truth', even a partial one. Mill advised us that we need to protect dissent and difference, and in particular that we must not let majority opinion obscure dissent and difference. Instead, it is important to allow a collision of diverse opinions to occur. Because it is only by allowing an opinion to be tested out against other ideas that we are able to discover which idea is more correct, or more credible.

Just as importantly, even if we are right belief requires contestation. For Mill, it was crucial that individuals hold their ideas based on conviction and reason, not simply due to prejudice or emotion. The holding of an idea due to prejudice stagnates both the idea (which may not forever be the most true) and the holder of that idea, who limits their opportunities for self-development. A 'living truth' must be 'fully, frequently, and fearlessly discussed' (Mill 1991: 40) in order to be held rationally. If any belief is not contested it exerts a stagnating influence over the mind and denies the progression of ideas and knowledge.

A second reason why free speech is important is the argument from self-development (or self-fulfillment) (Barendt 1985). In this argument, the emphasis is on the benefits of the process of engaging in expression. Mill argued that we must be at liberty, that is we must be generally free from restraint or impediment, to be able to cultivate our individual capacities (Rees 1985: 48; Gray in Mill 1991). These include the capacities to think, to reason, to argue, to make choices, to develop as fully human beings. It is the same principle on which education is considered important.

The third reason why free speech is important is a right-based argument, the idea that as human beings we have an intrinsic right to free speech. Free speech is considered so central to what it means to be human that it may not be abridged, because to do so would be to rob us of a capacity which is inherently human and which is inalienable and universal.

Finally, the argument from democracy is probably the most commonly applied defence of free speech. This is the argument that effective democracy is dependent on citizens' ability to criticise government, to individuals' capacity to participate actively in deliberation over issues that affect them. That would include this conference today. The argument from democracy has been used as a justification for First Amendment free speech protections in the United States . It was also evident in the reasoning underpinning the finding of an implied constitutional free speech protection on political matters in Australia (which will be discussed below), where it was argued that guarantees of freedom of expression on political matters necessarily inhere to the practice of an effective representative democracy.

Lack of explicit free speech protection in Australia

Australia has ratified international treaties providing for the protection of free speech, including by adopting the Universal Declaration of Human Rights in 1948 and ratifying a range of UN conventions including the International Covenant on Civil and Political Rights (ICCPR), which upholds a right to freedom of opinion and expression in Article 19 and which came into force in Australia in 1980. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which entered into force in Australia in 1975, also contains a provision for the right to freedom of opinion and expression in Article 5d(viii). The Australian Constitution is a relatively mechanical

document which sets out the primary structures of government, and is lacking in the grandiloquence typical of some other Constitutions.

There is no constitutional or statutory free speech protection in Australian law. A combination of common law and responsible government have been the methods used for most of Australia's post-settlement history to preserve and protect rights, including the free speech right (Williams 2002: 25). Free speech in Australia has historically been a residual freedom. Speech that is free is that which is not restricted by laws of limited scope such as, for example, defamation, libel, sedition, obscenity, commercial confidentiality or privacy laws and there is also evidence of the common law protection of free speech. For example, in 1988, legislation passed by the federal government to grant the Australian Bicentennial Authority exclusive commercial use of some common expressions was regarded as an 'extraordinary intrusion into freedom of expression' (at 100) and overridden. Prescribed expressions which were not permitted to be used without the permission of the Authority included 'Bicentenary', 'Bicentennial', '200 years', 'Sydney', 'Australia', 'Melbourne' and 'World Fair' used in conjunction with '1788' or '1988'. However, the lack of an explicit protection has rendered free speech vulnerable to incursion. (Chesterman 2000: 7-12)

Parameters of implied constitutional freedom of political communication

Since 1992, the High Court of Australia has, in a series of important cases, developed a limited free speech doctrine. There are some important parameters to the doctrine, which I will outline for you. Firstly, the doctrine relates not to speech or expression generally, but to 'political communication'. Political communication has been understood broadly by the Court, and includes matters of public affairs and political discussion, criticism of political institutions and policies, and matters relevant to political action or decisions. These terms are broad, and poorly defined. Political communication has also been held to include the entry of protestors into a duck shooting area – and therefore inclusive of non-verbal communication (the Levy case). On the other hand, a student newspaper article which advocated shoplifting and critiqued capitalism was not considered to constitute political speech (Stone 2001: 375), and an injunction was upheld against the broadcasting of a Pauline Pantsdown song which satirised Pauline Hanson was upheld on the grounds that the Pantsdown song was not political communication. Instead, the Court found it was 'grossly offensive' (Stone 2001: 376).

However, finding that an expression constitutes political communication is not enough to ensure its protection. Even in cases where discussion can be been determined 'political', such as during election campaigns, the freedom may not extend to its protection if the restriction is regarded as appropriately adapted to serve a legitimate government end. In some important cases, speech held to be political has still been allowed to be regulated, because the regulations were held to be legitimate. This occurred in Muldowney in which a South Australian electoral law which prevented the advocacy of informal votes was upheld. In Langer, similar provisions at Commonwealth level were also upheld. Given that these decisions revolved around the advocacy of ways of voting, these decisions seem important in demonstrating the potential lack of applicability of the freedom in practice. To vote informally is not illegal. To advocate an informal vote, however, may be restricted by law. In the Levy case, the plaintiff's action was regarded as 'political communication' by the Court, but the regulations prohibiting entrance to the area without a licence were upheld as appropriate and adapted to legitimate concerns for safety (Williams 2002: 192). These are examples of the far-reaching restrictions that have been considered legitimate by the Court and therefore not incompatible with the freedom.

Secondly, the freedom is not a 'right' to free speech as such, rather it is an implication derived from the text and structure of the Constitution (and not extrinsically). This means that it facilitates the institutions of representative government rather than individual rights per se. The freedom was not interpreted to be a right for individuals to communicate on political matters, but rather as a burden on government to ensure that institutions work in

accordance with the principles and assumptions inherent in the text and construction of the constitution which establishes the democratic and representative system of government. In this sense, it can be argued that the freedom was characterised in negative terms.

Thirdly, the freedom usually applies to all levels of government – federal, state and local. And finally, the freedom is supposed to apply at all times, not only in election periods.

Conclusions

So, what do we end up with? I'd like to summarise here. In Australia we have a robust historical and general stated commitment to free speech, and a common law heritage of some free speech protection but no explicit free speech protection and nothing that comes anywhere near constituting a free speech 'right'. We have an implied constitutional freedom of political communication, which raises some hope because of its emphasis on political communication, and its willingness to incorporate non-verbal forms of expression and protest. Also, this freedom applies to all levels of government and at all times. These are positive indications for free speech in Australia.

On the other hand, our free speech doctrine permits the restriction of even overtly political speech as long as that regulation is considered appropriately adapted to serve a legitimate government end. This caveat has been applied in important cases. I have already mentioned the Langer and Muldowney cases, in which discussion about how to vote was restricted and that restriction was held to be valid. In a recent case in Townsville, Qld, a protestor was charged after engaging in political speech in the Flinders Street Mall. His appeal to the Queensland Supreme Court on the grounds of the implied freedom failed, because the Court held that the Council by-law which required people to get a permit before engaging in political speech was legitimate and not overbroad. This by-law also had an important exemption which said that if you were engaged in election campaigning or you set up a 'booth' you did not require a permit.

But the constitutional free speech doctrine is a negatively conceived one. This implies that the burden for not restricting speech falls on the government, the state. The state is supposed to be mindful of the importance of free speech, and to exercise caution when trying to suppress speech. The burden here is on government to check itself, or when that fails on citizens and individuals to check government. I see relatively little conscious acknowledgement or implementation of the tendency to self-check. As the advance coverage of this seminar itself showed, some politicians can be quick to censor and to silence, and they can demonstrate and lack of mindfulness of their need to exercise caution and care.

We don't have a great deal of free speech protection in Australia, even for overtly political speech. We don't have anything approximating a free speech right. To get one we would require an explicit free speech protection in a statutory or a constitutional Bill of Rights, but that is another debate. In the meantime, it seems it is the job of those who support civil disobedience as a democratic activity to push the boundaries on this issue as well.

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