85. Professor Ben Saul

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Ch 1. The Inquiry in Context

The scope of the inquiry appears to omit one of the oldest and most fundamental of all common law rights: the right to personal liberty, including freedom from unlawful detention (and its procedural dimension, the right of habeas corpus - with a pedigree stemming back at least to the Magna Carta). To put it mildly, this is startling omission. The report gives attention to freedom of movement (chapter 6), which is one aspect of personal liberty, but that does not cover the field by any measure. Freedom of movement is an aspect of liberty, not exhaustive of it; some argue further that liberty/detention is an entirely distinct legal category from freedom of movement, for the latter encompasses only restrictions on liberty whereas the former concerns its deprivation.

The report should squarely address - in a new and separate chapter - Australian laws entailing the deprivation of liberty, not mere or lesser restrictions upon freedom of movement. In international law terms, the right is expressed in article 9 of the ICCPR, namely freedom from unlawful or arbitrary detention and ancillary rights to judicial review of detention and release from unlawful detention. (Chapter 6 mentions only article 12 of the ICCPR and ignores article 9 altogether). As discussed below concerning chapter 6, this also has implications for detention laws and policies, including in respect of non-citizens. Freedom from unlawful detention is enjoyed by citizens and non-citizens alike, though the limitations on the freedom may be justified in certain cases depending upon citizenship or migration status.

Ch 2. Scrutiny Mechanisms

Ch 3. Freedom of Speech

Ch 4. Freedom of Religion

Ch 5. Freedom of Association

Ch 6. Freedom of Movement

As noted above, this chapter largely does not deal with deprivations of liberty constituted by detention or detention-like situations (such as house arrest). It suggests (para. 6.126) that migration laws do not 'appear to engage' freedom of movement in respect of non-citizens, as interpreted in common law and international law.

It must be emphasised, however, that non-citizens still enjoy the freedom from illegal or arbitrary detention (codified in article 9 of the ICCPR, and protected in common law, as mentioned above). That freedom may be limited or restricted in certain circumstances in respect of non-citizens, but it may not be eliminated altogether. In the case of non-citizens, incluidng asylum seekers, any restriction on freedom from illegal or arbitrary deprivation of liberty must be justified as necessary for a legitimate public purpose and be proportionate to that aim.

I note, for example, that automatic, mandatory detention of asylum seekers in Australia has been routinely found to be a violation of that freedom by the United Nations Human Rights Committee in numerous individual communications since the 1990s, because it is not based on an individualised assessment of the necessity of detaining each particular person. The same principles apply in respect even of non-citizens unlawfully present in Australia (such as visa overstayers, or failed asylum seekers) - there must still be a necessity of detaining a person, for instance, because they are demonstrably dangerous or present a flight risk and so on.

I note also that there may be a violation of personal liberty under article 9 of the ICCPR even where detention is lawful under domestic (Australian) law, where it is 'arbitrary', in the sense of being unpredictable, unreasonable, unjust and so forth. There may, therefore, be some daylight between the common law and international law conceptions of personal liberty. The common law is antiquated in accepting that a thin model of the legality of detention (permitting it as long as parliament says so, even if parliament permits indefinite detention without charge and without individual justification), whereas international law examines the quality of domestic law in terms of its reasonableness.

The point is that the right of personal liberty is a right autonomous of freedom of movement, being both wider than it but also targeting an element not addressed by freedom of movement, namely complete deprivation of liberty in the form of detention.

Ch 7. Property Rights

Ch 8. Property Rights—Real Property

Ch 9. Retrospective Laws

Ch 10. Fair Trial

Ch 11. Burden of Proof

Ch 12. Privilege Against Self-incrimination

Ch 13. Client Legal Privilege

Ch 14. Strict and Absolute Liability

Ch 15. Procedural fairness

Ch 16. Delegating Legislative Power

Ch 17. Immunity from Civil Liability

Ch 18. Judicial Review

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