RIGHTS, VALUES AND LEGAL INSTITUTIONS: RESHAPING AUSTRALIAN INSTITUTIONS*

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INTRODUCTION

The belated recognition, after the lapse of 800 years, that our judges make law has concentrated attention on the place and role of values in the law. Values have become the beguiling fashion of the moment, the imagined key which will unlock and explain the behaviour of institutions, especially the courts. At least that is what some commentators would have us believe. So, as inevitably as night follows day, we need to know the values of those who are appointed as judges so that we can assess whether they are suitable for appointment and we can predict with more certainty how they will perform, if appointed. And it does not matter if the lesson to be learned from the confirmation hearings conducted by the United Nations Senate Judiciary Committee is that they do not provide us with useful intelligence of that kind.[1]

At another and important level, the claim is made that judges should be accountable in relation to the values on which they rely in order to formulate legal principle and interpret statutes. According to some who make that claim, accountability requires that the judges should not only disclose, but also demonstrate the values on which they rely as contemporary values of the Australian community.[2]

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1 Judge Bork's confirmation hearing merely confirmed what was already known about him.

2 See Braithwaite, "Community values and Australian jurisprudence" (1995) Sydney Law Review 351; Doyle, "Implications of judicial law-making" in Saunders C, Courts of Final Jurisdiction (1996, Federation Press, Sydney) 84, 96; Doyle, "Judicial law making - is honesty the best policy?" (1995) 17 Adelaide Law Review 161.

There is an element of unreality in this elevation of values to such an influential position in the judicial process. Curiously enough, some judges and lawyers have unwittingly contributed to this development by claiming for the judicial process a value-free neutrality which cannot be rationally supported. It is not so long ago that we were told that judges do not make law[3] and that there was a strict dichotomy between law and morals, just as there was a strict dichotomy between law and politics and law and policy. That was the doctrine according to the legal positivists. Such an extreme view of the judicial process provoked critics of the process into asserting that the lengthy discussion of legal principles and authorities so characteristic of court judgments was but a cloak for decision-making based on the personal values of the individual judge.

In this, as in other controversies, some of the combatants have taken up extreme positions. I do not share either of the views which I have just described. Neither view amounts to an accurate description of the judicial process or the inmates of the judicial zoo as I know them. Those who overstate the role of values tend to downplay the specificity of the judicial decision-making process. Infrequently, it is concerned with broad picture questions and has its focus on precise, mostly narrow, questions which generally turn on the meaning of words. That is why Edmund Burke said that the practice or the study of law narrowed the mind and why legal argumentation is not attractive to those outside the law. It is meticulous and detailed, less concerned to paint a broad canvass and win over the reader who favours an impressionistic approach.

VALUES

What do we mean by the word "values"? It is a portmanteau type expression, used in the context which I am addressing, in a variety of senses. In the context of judicial decision-making, the word is often employed to signify a *mêlange* of considerations which may be relevant to the making of a decision, for example moral and ethical values, political, social and economic goals, even relevant policy factors. Values can include rights and freedoms, such as personal liberty, freedom of expression, the

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3 R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd (1970) 123 Commonwealth Law Reports 361 per Kitto J at 374; see also Sir Frank Kitto's Foreword in Meagher RP and ors, Equity - Doctrines and Remedies (1975, lst ed, Butterworths, Sydney).

sanctity of life, the inviolability of the person. Freedom of expression, which is today counted as a fundamental right or freedom, has always given great weight by courts in the formulation of general principles of law and in the interpretation of statutes,[4] notwithstanding that in Australia there is no Bill of Rights protecting freedom of expression.

"Values" is also a term sometimes used to denote standards, especially community standards, sometimes referred to as "contemporary" or "prevailing" community standards. The trial judge, the jury and the magistrate are confronted almost as a matter of routine with community standards in an endless variety of situations. Likewise, "values" might be used to signify "attitudes" to specific questions.[5] Professor John Braithwaite has drawn a distinction between deeper community values and attitudes in the sense just identified, which is instructive. That distinction corresponded with the contrast made by Brennan J in *Dietrich v R*[6] between the *permanent* values of the community ("enduring values") and the transient reaction of the community to a particular event.

THE VALUES OF THE JUDGE

Every judge brings to his or her office or, as I think is more often the case, develops while in office, a judicial philosophy. That philosophy may extend over a very wide range of matters related to the law, its place in society, the role of the courts and their relationship with other arms of government. Manifestations, even declarations of that philosophy, are to be found in the judgments of the individual appellate judge, shrouded as they are in the mists of doctrine and decided cases. Judgments in the area of public law, criminal law and equity are revealing on this score.

Yet it is a mistake to think that a judge's judicial philosophy is fixed, unyielding and dominant in the sense that it will overpower other

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4 See for example, Davis v Commonwealth (1988) 166 Commonwealth Law Reports 79 where a far-reaching intrusion into freedom of expression which was constituted by a statutory provision prohibition, subject to the consent of a public authority, was held to exceed the Australian Parliament's legislative power to set up an Authority to celebrate and manage arrangements for the Bicentennial: see Mason CJ, Deane and Gaudron JJ at 100; Brennan J at 116.

5 See Braithwaite, "Community values and Australian jurisprudence" (1995) 17 Sydney Law Review 351.

6 (1992) 177 Commonwealth Law Reports 292, 319-320.

considerations. More likely than not, the individual's judicial philosophy is flexible and adaptable. And there are powerful constraints that serve to constrain a judge in giving effect to the philosophy or set of values to which he consciously or unconsciously subscribes. First, the mechanics of the legal process require the judge to address and resolve specific legal issues and to resolve them by giving reasons which relate to the vast body of legal doctrine consisting of statute law and general law principles. Secondly, resolution of the issue takes place after consideration of substantial legal argument about doctrine and decided cases. The presentation of argument about values occupies a relatively minor part in the curial process, even in appellate courts. That presentation appears to reflect the professional advocate's assessment of the part that values play in judicial decision making. However, it may be that the professional advocate complies with what he or she regards as a judicial convention that argument will focus on doctrine rather than values.

The point is that the discipline of reading and listening to legal argument and of giving detailed reasons has a much greater impact on setting practical limits on what is taken into account in the making of a judicial decision, particularly by judges overburdened with work, than most observers realise. Above all else, there is the perceptible influence of precedent and the overburden of doctrinal authority accumulated over centuries that bears down on the judge. Precedent and authority lead to certainty, consistency and predictability, which are very important values in the law. The tension between these values and the insistent demand for justice in the individual case is the dilemma that constantly confronts the judge.

There is no denying that the judicial philosophy or values of the judge play a part in judicial decision making. Strong judicial disagreements about the role of the courts in overturning previous decisions have resulted in split decisions in the High Court.[7] The decisions to which I refer are those in which judges are in disagreement about how far the Court should go in overturning principles or what has been thought to be the law. The point is

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[7] Trident General Insurance Co Ltd v McNiece Bros Pty Ltd (1988) 165 Commonwealth Law Reports 107 per Brennan J at 140-141, per Dawson J at 161-162; Jago v District Court of New South Wales (1989) 168 Commonwealth Law Reports 23 per Brennan J at 53-54; O'Toole v Charles David Pty Ltd (1991) 171 Commonwealth Law Reports 232 per Brennan J at 266-269.

simply that there are powerful constraining factors which curb the part that philosophy or values will play. Of course, doctrine is ultimately based on values and if the values on which doctrine is based become outmoded, for example, the ownership of slaves and the husband's dominance over the wife, doctrine must accommodate the change. The cases of *Mabo v Queensland (No 2)*[8] and *Reg v L*[9] (the rape in marriage case) are recent examples. However, instances of new doctrine based on outmoded values are exceptional, a fact which is often overlooked.

VALUES AS COMMUNITY STANDARDS

Contemporary community standards play an important part in the judicial process, particularly in the evaluation of conduct of the individual litigant where that becomes a material consideration. Standards of honesty, reasonableness and obscenity are instances.[10] But community standards can contribute directly to a benchmark for a decision. The answer to the question what is the particular standard of care to be observed by a defendant in a particular situation who owes a duty to take reasonable care to avoid the infliction of injury to another "must be influenced by current community standards" and "community expectations".[11] Did the defendant owe to the plaintiff a duty of care and did the defendant's conduct, according to the standards of society today, amount to the taking of reasonable steps to avoid injury to the plaintiff in the particular situation in which the parties were placed? Here we are looking at *contemporary* standards for the purpose of determining whether there was an obligation to take care and whether it was discharged. In the instance given, we are not seeking to formulate a legal principle or rule. According to an unsatisfactory distinction drawn by the law, the first issue - as to the existence of the duty - is one of fact. Historically, the second issue was determined by juries. Nowadays, judges have taken over the functions of juries in many civil cases so they decide both issues.

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8 (1992) 175 Commonwealth Law Reports 1 ("Mabo No 2").

9 (1991) 174 Commonwealth Law Reports 379.

10 See Director of Public Prosecutions v United Telecasters Sydney Ltd (1990) 168 Commonwealth Law Reports 594, 607.

11 Bankstown Foundry Pty Ltd v Braistina (1986) 65 Australian Law Reports 1 per Mason, Wilson and Dawson JJ at 7.

The sentencing of offenders provide a similar but by no means identical example. Here again, we are concerned with contemporary community standards. But that does not mean that the judge seeks to apply that standard which would be thought appropriate by the majority in the community. The majority may well favour preventive detention in the form of indeterminate sentences for violent offenders. But the courts regard it as impermissible to extend a sentence merely by way of preventive detention beyond what is appropriate to the crime.[12] Protection of society is a relevant factor to be taken into account in assessing the appropriate sentence. But it is no more than that.

Legal principles governing the penalty to be imposed include the proposition that the sentence must be proportionate to the offence's seriousness. Consistency is another factor. What is appropriate as a sentence must conform to legal principle. Application of principle will take account of community conditions, circumstances and standards, notably in assessing the seriousness of the offence. That is not the same as saying that the judge gives effect to what the community regards as the appropriate sentence.

Yet another illustration is the judge's function in family provision cases of determining whether the testator has made adequate provision for a member of his family. This function requires the judge, in the words of Sir Ninian Stephen in *White v Barron*:[13]

> to recognise and to apply prevailing community standards of what is right and appropriate since it is by those standards that the content both of the moral duty...and of departures from it will be measured.[14]

VALUES AND THE FORMATION OF GENERAL LEGAL PRINCIPLES

If we seek to formulate a general legal principle or rule, our inquiry is necessarily more general and has less focus on the particular. Take, for example, the question whether the principle in *Donoghue v Stevenson*,[15] the negligence case involving the snail in the bottle of soft drink, was to be

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12 Veen v The Queen (No 2) (1987) 164 Commonwealth Law Reports 465.

13 (1980) 144 Commonwealth Law Reports 431.

14 Ibid at 440.

15 [1932] Appeal Cases 562 per Lord Atkin at 580; but compare Jaensch v Coffey (1984) 155 Commonwealth Law Reports 549 per Deane J at 579.

adopted. There the Court decided that the manufacturer of a consumable product, which involves a foreseeable risk of injury to consumers if it contains deleterious matter, owes a duty to take reasonable care to avoid injury to them. The formulation of that general principle rested on something more substantial than mere current community standards. It rested on a more enduring notion of the responsibility of one person to another when the actions of the first person involve a foreseeable risk of injury to that other. The principle, often referred to as "the neighbourhood principle", rested on long standing moral values.

In *White v Barron*, the family provision case referred to above, the High Court disapproved the earlier presumption in favour of confining to widowhood a benefit ordered by the court in favour of a widow out of the estate of the testator.[16] The High Court departed from the old presumption and that was because, in my view, there was a change in relevant community values, standards and attitudes. However, my view is not based on evidence or on any survey.

In areas where general legal principle is in the course of development, courts also take account of values in the form of policy considerations. Take the developing area of principle governing the recovery of damages for economic loss occasioned by negligence. Here it is openly acknowledged that policy considerations are relevant and influential and that they in turn are influenced "by the court's" assessment of community standards and demands.[17] One such policy consideration is the law's concern to avoid the imposition of liability in an indeterminate amount for an indeterminate time to an indeterminate class. Another relevant consideration is that, in the context of economic loss, a duty to take reasonable care to avoid economic loss to another, may be inconsistent with community standards in relation to what is ordinarily legitimate in the pursuit of personal advantage.[18]

All this is a far cry from the view of the judicial function as expressed almost 30 years ago in the High Court in *Rootes v Shelton.*[19] That was a

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16 Note 13 per Stephen J at 438-439, per Mason J at 444.

17 Bryan v Maloney (1995) 128 Australian Law Reports 163 per Mason CJ, Deane and Gaudron JJ at 165-166.

18 Ibid at 166.

19 (1967) 116 Commonwealth Law Reports 383.

case in which the plaintiff was injured when he collided with a stationary boat while water skiing due to the negligence of the driver of the speed boat towing the plaintiff. The New South Wales Court of Appeal reversed the jury's verdict in favour of the plaintiff on the ground that the driver owed no duty of care to the plaintiff as they were participants in a sport, who had by engaging in it, accepted the risks of injury involved. The High Court rightly allowed an appeal and criticised the Court of Appeal's references to "changing social needs", "designing a rule", "judicial policy" and "social expediency". These references, it was said, were "to introduce deleterious foreign matter into the waters of the common law."[20]

The relevance, as distinct from the magnitude of the contribution, of values in the formulation of general legal principle and statutory interpretation cannot be disputed. The relevance of values was obscured, often by the judges themselves, as they emphasised that their concern was with principle and doctrine as if they could exist independently without visible means of support. Perhaps it was *Mabo (No 2)*,[21] particularly the judgment of Brennan J (with which McHugh J and I agreed),[22] that aroused nearly all the Rip Van Winkles from their long slumber.

Generally speaking, enduring values rather than contemporary standards contribute to the formulation of general principles of liability. That is not surprising. But sometimes the acceptable value, like non-discrimination or the *Mabo* value, does not have such a long prominence. Its virtue has been mainly recognised in more recent times in international instruments. On the other hand, the rule that all people stand equal before the law has been a long-standing common law principle. Emphasis on "enduring values" rather than "community standards" serves to highlight the point that the judicial process, so far as it involves a law-making function, is concerned with historic values, values that have stood the test of time, rather than transient contemporary attitudes or the subjective values of the judge. In many cases, the enduring values which have informed legal principle have been recognised by the common law over a long period of time, for example, personal liberty, freedom of expression, inviolability of the person, and no imprisonment without trial.

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20 Ibid per Kitto J at 387.

21 (1992) 175 Commonwealth Law Reports 1, 39-42.

22 Ibid at 15.

THE IMPORTANCE OF VALUES IN THE JUDICIAL PROCESS

Nonetheless, it is important that we do not exaggerate the place of values in the judicial process, especially in the formation of legal principle, which is that part of the judicial process that amounts to law making. Most cases, including appeals brought to appellate courts, do not call for identification of new values or involve a significant dispute about the existence of values. Generally speaking, the existence of the relevant value is rarely in dispute. Judges tend to rely on well-accepted values, recognised by the common law or evidenced by international instruments. The "no man's land" of judicial decisions where values or policy considerations are critical lies in the interaction of competing values and policy considerations, the analysis of that interaction and the weight to be given to them in the context of the issue for decision.[23] The contempt cases which raise the question whether public discussion of a matter of public interest will tend to prejudice the administration of justice in a particular trial is a typical example.

In Australia and England, as in the United States, the courts have recently encountered a series of cases in which fundamental moral and ethical issues have arisen for decision. An example is *Re Marion*[24] where the High Court held that sterilisation of a profoundly intellectually handicapped female unable to take care of herself and unable to understand what is involved in sexual relationships and pregnancy, could not be undertaken without court approval. Brennan J, who dissented, observed:[25]

> Although the issues...relate to the law's protection of the physical integrity of a person suffering from an intellectual disability, there is no clear community consensus on these issues which the courts or the legislature can translate into law.

Nevertheless, the Court was called upon to give a decision which required consideration of the female's right to reproduce, the inviolability of the person and the need to protect a handicapped person from detrimental consequences to herself and others.

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23 See Krygier and anor, "Shaky premises: values, attitudes and the law" (1993) 17 Sydney Law Review 385.

24 (1992) 175 Commonwealth Law Reports 218.

25 Ibid at 264.

Another example is *Airedale NHS Trust v Bland*[26] where the House of Lords decided that a doctor could withhold care and treatment from an insensate patient who had no hope of recovery but was bound to die if care and treatment were withheld. Lord Browne-Wilkinson said:[27]

> Where a case raises wholly new moral and social issues, in my judgement it is not for the judges to seek to develop new, all embracing, principles of law in a way which reflects the individual judge's moral stance when society as a whole is substantially divided on the relevant moral issues... The judges' function in this area of the law should be to apply the principles which society, through the democratic process, adopts, not to impose their standards on society. If Parliament fails to act, then judge-made law will of necessity through a gradual and uncertain process provide a legal answer to each new question as it arises. But in my judgement, that is not the best way to proceed.

These cases, along with others, show that when Parliament fails to determine important social, economic and political questions, as was the case in *Mabo (No2)*, the courts will be called upon to resolve them in the form of legal issues. From time to time, politicians find it politically convenient to leave these questions to the courts.

Despite Lord Browne-Wilkinson's comments, in jurisdictions where individual rights are constitutionally entrenched, such as the United States and Europe, the courts regularly determine questions of this kind and in doing so, they have developed a coherent body of legal principles. No doubt some sociologists believe that the judicial process in Australia should be more directly and overtly concerned with values than it is. Such a change, if taken too far, could so transform the methodology of the judicial process that it would no longer constitute an exercise of judicial power in conformity with Chapter III of the Australian Constitution.[28]

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26 [1993] Appeal Cases 789.

27 Ibid at 880.

28 See Polyukhovich v Commonwealth (1991) 172 Commonwealth Law Reports 501 per Deane J at 703 where his Honour stated that Chapter III was based on an assumption of traditional judicial methodology.

IDENTIFICATION OF VALUES

If you were to conduct a computer search of reports into recent judgments for instances of judicial references to "values", it is as likely as not that you would find that most of the references are to values protected by the common law. Judges, ingrained by tradition to look for authority in the decisions of the past and uneasy about relying on unauthenticated values, seek assurance in relying on the values traditionally protected by the common law. Accordingly, personal liberty, freedom of expression, no imprisonment without trial, and procedural fairness are commonly identified by judges as values which inform legal principle and require an unambiguous expression of statutory intention to override them. This emphasis on values protected by the common law is in one sense an instance of institutional values or morality. The fact is that judges are more at home in dealing with values with which they are familiar. And it may be that they tend to treat those values as absolute or near absolutes.

More recently the High Court has also expressed the view that an unambiguous expression of statutory intention is required to override a fundamental right.[29] The identification of fundamental rights and freedoms is more problematic than identifying the values protected by the common law. Which fundamental rights and freedoms should the courts select and protect?

It has been suggested that judges tend to assert, without demonstrating, that particular values are protected by the common law. The statement in *Mabo (No 2)* that non-discrimination is one of "the fundamental values of our common law"[30] has been instanced as an example. It is said that judges attribute to the common law values which they perceive to be desirable. Be that as it may, there is even more room for debate about the accredited list of fundamental rights and freedoms.

The Australian Constitution itself is a source of rights and values which can be used in the development of general principles of law. Apart from express and implied rights in the Constitution, representative government, responsible government, the separation of powers, and an independent

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29 Coco v The Queen (1994) 179 Commonwealth Law Reports 427, 437-438; also see Mabo (No 2).

30 Ibid.

judiciary are among the values which could be derived from the Constitution. It has even been suggested that certain values could be derived from the concept of a modern liberal democracy of the kind for which the Constitution provides and from the concept of citizenship. In *Theophanous v Herald and Weekly Times Ltd*,[31] the Court re-shaped the law of defamation in order to reflect the implied freedom of communication. From media reports in August 1996, it seems that the Court may be reviewing *Theophanous*.[32] So, the legitimacy of using constitutional values to elucidate the general law may be further examined.

Outside the field of established values, the authoritative identification of relevant values is more debatable. That is why international conventions ratified by Australia and widely ratified by other states have an attraction for judges. Take, for example, the reference in *Mabo (No 2)* to international conventions declaring fundamental rights.[33] These conventions provide identifiable and documented landmarks in a terrain which is otherwise as bleak and featureless as the Russian steppe. A provision in a convention, like other materials, is a relevant and potential source of common law principle whether by means of informing values or otherwise. We keep faith with the common law rule about treaties which are not implemented by denying to their provisions the automatic character of domestic law.

VALUES AND A BILL OF RIGHTS?

The supreme modern example of the place of values in the law is the entrenched Bill of Rights, a prominent feature of the vast majority of constitutions throughout the world. A Bill of Rights need not be entrenched. New Zealand has a statutory Bill of Rights which may be repealed or amended by Parliament. A Bill of Rights, whether entrenched in a constitution or statute-based, is something more than a recital or statement of values. A recital or bill of values may be no more than a guide which influences or guides legislative, executive or judicial action. A Bill of Rights is judicially enforceable as such and is therefore prescriptive. A Bill of Rights commits the courts to a direct and overt examination of

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31 (1995) 182 Commonwealth Law Reports 104.

32 *Editor:* This case has since been reviewed in Lange v Australian Broadcasting Corporation (1997) 145 Australian Law Reports 96. Also note Levy v State of Victoria and Others (1997) 146 Australian Law Reports 248.

33 (1995) 182 Commonwealth Law Reports 104.

values and it therefore affects in a very significant way the nature of the judicial process.

Australia's adoption of a Bill of Rights would bring Australia in from the cold, so to speak, and make directly applicable the human rights jurisprudence which has developed internationally and elsewhere. That is an important consideration in that our isolation from that jurisprudence means that we do not share what is a vital component of other constitutional and legal systems, a component which has a significant impact on culture and thought, and is an important ingredient in the emerging world order that is reducing the effective choices open to the nation State.

Australia's accession to the First Optional Protocol to the 1966 International Covenant on Civil and Political Rights ("ICCPR") could, in time, result in the importation into the common law of some of the values, if not the provisions, of the ICCPR. As Australian complainants can invoke the jurisdiction of the United Nation Human Rights Committee in Geneva and require the Committee to apply to Australia the provisions of the Covenant, as it did in the *Toonen v Australia*,[34] it may be that Australian courts will, in conformity with *Minister for Immigration v Teoh*,[35] have regard to the ICCPR in formulating common law principles. However, the First Optional Protocol will not have an impact on our law which is commensurate with the impact a Bill of Rights would have.

Of the objections to a Bill of Rights, there is one that I should mention. That objection is that an entrenched Bill of Rights would tie us to a "rights" based legal culture, that being a central element in the modern liberal political philosophy. Not everyone accepts the self-evident superiority of those liberal values. Populism (or majoritarianism) and communitarianism each challenge the liberal claim to superiority. Is it right that this contest should be finally and perhaps irrevocably resolved by this generation in favour of liberalism and its values? No doubt resort to a statute-based Bill instead of an entrenched Bill would preserve some leeway for retreat. But how much? In today's climate, there is a political reluctance to support major constitutional and institutional change. A statutory Bill would quickly acquire the aura of a quasi-constitutional instrument and the

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34 Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992, 4 April 1994.

35 (1995) 183 Commonwealth Law Reports 273.

judicial interpretation of the Bill would make amendment a problematic exercise.

A Recital or Bill of Values

With a view to overcoming objections to a Bill of Rights and, at the same time, providing a list of values on which the courts could legitimately draw in order to develop legal principles, it has been suggested that a recital or bill of values could be incorporated in a preamble to the Australian Constitution. There are several problems with this suggestion. What precisely would the courts be expected to do with the bill of values? Would a statute be invalid for inconsistency with a value? Presumably no; otherwise the value would be expressed as an operative provision. Would parties to litigation regularly invite the courts to review existing principles for conformity with the constitutional values? If that be the expectation, it begins to look like an exercise in legislative activity.

One problem with a bill is that in all likelihood it would be confined to the values which judges have usually relied on. It would not include what I call community standards. Most importantly, it would not address the major difficulty which confronts the courts, namely, the interaction between competing values or a competing value and a policy consideration. That is the critical point on which court decisions in this area turn. For example, in contempt cases involving pre-trial discussion in the media of aspects which will be dealt with at the trial, the competing values, freedom of expression and protection of the administration of justice are obvious Their interaction is the critical problem. A bill of values would give no guidance on this question; it would simply offer a menu of values. It would be for the judge to determine what weight force he would give to any listed value in the context of the particular question for decision. It seems to me that those who suggest a constitutional bill of values fail to appreciate specificity of the judicial process. That no doubt is due to the "big picture" image of Bill of Rights litigation. And, in any event, I see no reason why a bill of values should be entrenched in the Constitution rather that statute based.

Court Resources and Methodology

How well equipped are Australian courts to identify and assess relevant values? As I have said, identification of values is not a major problem; assessment of their interaction or of their relationship with competing

policy considerations is. Australian courts, though not as well resourced as United States and Canadian courts, are organised along the same lines. Australian courts, like other common law courts, do not have an association with an Advocate-General who brings an important perspective to the work of European courts.

The Australian appellate courts, notwithstanding their incidental law-making role, follow procedures which are adapted to their adjudicative function in a system of adversarial litigation. They are therefore dependent on the materials and arguments presented. Leave to intervene can be granted to interest groups. But, in general, leave is granted only to those who have an interest which may be directly affected by the outcome of the case. Courts are reluctant to grant leave to intervene too readily. Interventions add to the length of hearings and make the litigation more expensive to the parties. Judges regard an appeal as an extension of the adversarial litigation, even though in the case of a High Court appeal, the appeal almost always raises a question of public importance.

The parties and interveners could under existing procedures bring materials forward which would correspond to materials included in a Brandeis brief, though how this is to be achieved might require judicial directions. Courts have difficulty with the establishment of broad standards; they do not accommodate to the accepted modes of proof of specific facts. And the doctrine of judicial notice is quite confined.

One of the difficulties lies in the adjudicative model of the court and the traditional notion of appeal which restricts the appellate court to the materials placed before the court below. Although the High Court has a research capacity, it is essentially a legal research capacity. That research capacity will bring to light previous consideration of similar issues in other jurisdictions, especially common law jurisdictions. And that is one reason why in ultimate courts of appeal, particularly in the High Court of Australia and the Supreme Court of Canada, much emphasis is now given to comparative jurisprudence.

There is perhaps a consequential tendency to treat value and policy related discussion in the United States, Canada or the United Kingdom as if it has an equal application to the common law in Australia, without noting relevant differentiations and assessment of competing values and interests. Whether this is a matter of significance, I do not know. In Australia, there

is not the wealth and depth of informed research and commentary that is available elsewhere, particularly in the United States. Unfortunately, in Australia, informed research and commentary tend to come into existence in the wake of court decisions rather than in advance of them.