

## A Bill of Rights: The Ultimate in Participation, or an Immature Stage in our Development?

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*“A bill of rights is what the people are entitled to against every government on earth, general or particular and what no just government should refuse to rest on inference”.* (Thomas Jefferson, December, 1787 – as the First Fleet was sailing along the east coast of Australia).

Has Australia missed the boat on a Bill of Rights as the vehicle to achieve a just society? Yes and no. Yes, inasmuch as it seems a little late, that particular device has been rendered obsolete; and No, for precisely the same reasons. Australia has so many instruments, institutions and customs, which secure an array of rights, beyond the wildest dreams of Thomas Jefferson, that it hardly needs a Bill of Rights. More importantly, the argument that the ultimate mechanism in ensuring citizen participation in society is to arm every citizen with rights displays a naiveté about the needs of the political system.

The “rights” strategy is part of a broader rights culture that has high expectations of individualised justice. It views the citizen as the holder of rights. It places great weight on one mechanism, the law, to achieve the objective. Further, it suggests some form of final settlement of the question of the well-being of citizens. In short, what looks like a remnant of an earlier constitutional project, the Bill of Rights debate, is in fact the vanguard of a broader citizenship strategy.

As an advocate of rights recently acknowledged:

“[t]he idea of a *rights-based* society represents an immature stage in the development of a free and just society ... a society whose values are defined by reference to individual rights is by that very fact already impoverished. Its culture says nothing about individual duty – nothing about *virtue* ... accordingly rights must be put in their proper place. I think it is to be done by choosing to regard them as a legal, not a moral construct”.<sup>1</sup>

But if rights are merely a legal construct, it is conceivable that such a society is asking too much of the law. The law should enforce old majorities, consensus decisions built over time. Its strength lies in the stability of its rule making, its authority is derived from making the law apply consistently. The more the law is used to seek justice, the more it will become a political tool to be consumed and wielded. The rights strategy may suit an electorate used to gaining its own way, and where the law acts to restrain excess, all is well. Where the law encourages excess all is not well. The discussion of an Australian Bill of Rights needs to be couched in a wider analysis of the rights culture and its use of the law. This is the purpose of this paper.

### **Australia’s Bills of Rights: a game for more than one player**

Australia has Bills of Rights in the form of the common law, the Constitution both expressly and implied, Commonwealth and State statutes, and international instruments to which Australia is a signatory. Principally these are:

1. A fundamental principle of the common law tradition, the right to due process: “there are no circumstances in which a man may be denied impartial justice”.<sup>2</sup>
2. Expressly in the Constitution: s.80, the right to trial by jury; s.116, religious freedom; s.117, prevents discrimination on account of State residence; s.92, free trade between the

States; s.51 (xxxi), Commonwealth may only acquire property on “just terms”.

3. Implied in the Constitution, freedom of political communication, procedural fairness in the exercise of judicial power.<sup>3</sup>

4. Commonwealth anti-discrimination statutes.<sup>4</sup>

5. Various international treaties which the Commonwealth accesses through s.51(xxix), the “external affairs” power.<sup>5</sup>

The criticism of this state of affairs is that an as yet unspecified though presumed ultimate list of rights is not guaranteed, meaning, is not beyond the reach of Parliament. The solution to these failures is to have a consolidated list of rights guaranteed by constitutional means. Whereas at present the courts have no express power to review primary legislation, a Bill of Rights would allow all legislation to be reviewed against a broad menu. The more democratic proponents<sup>6</sup> foresee an intermediate step of statutory rights, on the grounds that, under an entrenched set of rights, unelected judges would be given too much power, and for fear that a Bill of Rights ethos “quashes any sustained discussion of the common good”.<sup>7</sup> A non-entrenched set of rights has the appeal of maintaining democratic primacy and the sovereignty of the Parliament within constitutional bounds.

The undemocratic architecture of the judiciary is only the first level of concern with the use of the rights approach. A responsible forum like the Parliament, which is unwilling or unable to constrain a non-responsible forum like the courts, which has become populist by inclination, say through implied rights, is a danger. An unconstrained judiciary invites new and more customers, it beckons the triumph of the little citizen against government and companies. A court, which constrains populism in favour of the public good, has a worthy rationale; a populist court has no such rationale.

Unfortunately, the non-entrenched strategy may come unstuck. For example, in New Zealand the *Bill of Rights Act 1990* was enacted so as not to override other inconsistent legislation and not allow the judiciary any invalidating power. It was to be an ordinary statute to strengthen parliamentary scrutiny of proposed legislation. The Court of Appeal in *Baigent’s Case*<sup>8</sup> took a different view and created *ad hoc* a previously unheard of remedy of public civil liability. Adopting a Bill of Rights as an ordinary statute appears to make no difference as to who has the final say on rights.

The rights strategy is not confined to the legal profession. A Parliament similarly infused with rights talk is as likely as are the judges to make the errors of the rights strategy. For example, a legislature which refers to vague standards, such as fair, unconscionable, just and equitable simply allows, indeed forces the judiciary to impose their own values. The legislature can as easily play the rights game too, by writing legislation which sounds attractive but leaves the decisions in other less accountable hands. However, “if the legislature enacts rules with precise meanings, it means that it is forced to declare what will be the result of its policies in their application to particular classes of case”.<sup>9</sup> In other words, the use of rules or principles, which give direction to the courts, keeps the policy decisions in the hands of the legislature and out of the courts.

Keeping policy in the more responsible forum is only half the issue. Whether Parliaments legislate standards or rules, the fact is that “Parliaments attempt to legislate for every conceivable detail”.<sup>10</sup> This, as much as rights litigation, is a cause of an increase in litigation. For example, the Commonwealth passed 221 Acts in 1973, and 204 in 1991. While the 221 Acts passed in 1973 covered 1,624 pages of the statute book, the 1991 Acts took up 4,880. In 1998 there were 106 Acts passed and the number of pages was 4,150.<sup>11</sup> A

consequence of the growth of legislation is a growth in the amount of litigation. For example, in 1977, 322 cases were filed in the General Division of the Federal Court. By 1997-98 the number had risen to 2,665.<sup>12</sup> In 1977, 48 civil special leave applications were filed in the High Court. By 1997-98 this figure had risen to 245. Special leave applications in criminal cases rose from 66 in 1992 to 113 in 1997-98.<sup>13</sup>

Changing the forum does not foreclose the difficulties of the rights agenda. Whether the legislature or the legal profession holds the honours for an increase in litigation is also immaterial. Clearly the law-making climate that seeks to satisfy all comers is an environment in which rights flourish. A Bill of Rights may fan the flames, but the fire is already lit, and all law-makers, not just the judges, have to be watchful.

### **What is wrong with rights?**

The essential critique of the Bill of Rights rests not so much on democratic control, but on the weaknesses of rights as an instrument to satisfy an electorate's needs. Rights rely on the law to determine contested concepts. Rights are treated as if they are not time and place specific, as if they are ahistorical. The attempt to give rights precedence in public life assumes universality and a moral certainty, which is not sustainable. Finally, though not least important, is the practical record of the device, which appears to be disappointing.

### **An ahistorical strategy**

In the absence of other constitutional devices and conventions, political institutions and culture, an Australian Bill of Rights may have been useful. As things stand, it does not recognise the enormously rich and stable array of instruments, devices and cultures that have grown over two hundred years of European settlement and the historical legacy of the common law.

A rights approach does not answer the question, who are to be the recipients of rights: individuals, including or excluding foetuses, corporations, animals, or the environment? For example, the US Bill of Rights may have been state of the art at its inception, but it was fully two centuries before women could vote at Federal elections! Clearly, the meaning of a right is time and place specific. Furthermore, the right having been won is unlikely to be undone, unless it offends a considerable proportion of the community, at which time the courts will be arraigned against the democracy. There is a sense in which some things must never be undone; that is, locked away from future generations. The difficulty is that such sentiment offends the right of future generations to decide their own future, which includes making their own mistakes.

A Bill of Rights mechanism may be justified in the absence of the institutions and processes which are taken for granted in Australia. For example, the Hong Kong Bill of Rights exists where there is no fully representative democratic system in place, or likely to develop with the resumption of rule by the People's Republic of China. The Bill may act as a surrogate<sup>14</sup> for democracy in these circumstances, though it is doubtful it will carry much weight under a non-democratic entity. The rights strategy depends ultimately on mechanisms of consent, which are at the heart of democratic practice. Consent depends on a view current among a large majority at a given time and place. Accepting rules from other times and other places may not suit.

### **Asks too much of the law**

Does a rights/litigation culture imply the failure of other institutions? Rights will not provide "relief from the heavy burden of political choice and institutional responsibility"<sup>15</sup> that our political democracy has been designed to facilitate. Rights and their use of the legal

forum does not of itself provide solutions to political or contested issues:

“The ideology of litigation ... has something spurious to offer every political viewpoint. For radicals it offers an unending pantomime of class struggle and social upheaval, exposing the ultimate antagonisms between workers and bosses, consumers and producers, husbands and wives in a perfect orgy of consciousness-raising and grievance. For democrats it promises to impose the social norms of common-man juries and bring private concentration of private wealth and power to heel. For conservatives it claims to mold anti-social defendants into law-abiding citizens through the forms of a cherished tradition of legal order. For boosters of economic prosperity it vows to correct inefficiencies in markets and bring ultra-advanced business techniques to the legal profession itself. For libertarians it purports to defend individual rights against the coercive impositions of the outside world”.<sup>16</sup>

Our politics has already become highly “judicialised”, either by an increasing number of decisions being taken in the courts or by the use of legal method in the political arena. Law is coming to dominate public life, as well as political life, so the question needs to be asked of the dangers that lie in placing a heavy reliance on this mechanism to resolve individual and societal problems. The delivery of rights by the law runs the risk of having the law displace all other institutions, which mould the way we live together. As Jenkins argues, “the legal apparatus is being asked to do too much with too little support: because other institutions such as the family, the church, and the school, are not functioning as once they did to develop character and define conduct”.<sup>17</sup>

To the question, what is the role of law in the enterprise of justice, Jenkins cautions:

“The conviction that men should enjoy certain goods and attain certain ends does not mean that through its institutions society either owes them to or can bestow them upon its members. The knowledge that organised efforts are required to achieve certain values does not entail that this effort devolves upon or is within the reach of law”.<sup>18</sup>

The requirement of law to decide substantive political and moral questions displaces more fundamental aspects of the law. Rights cannot make safe an unsafe conviction, cannot unprejudice prejudiced juries or necessarily promote ethical behaviour among the legal profession. These elements, which are the strength of the legal method, have been sidelined. The emphasis on outcomes rather than process is more likely to diminish ethical behaviour. A win is equated to justice.

### **Relies on a moral certainty**

Giving prominence to rights is to assume that any right is so fundamental as to be incontestable. Clearly, the right to life is contested, the right to vote is limited, the right to free speech is limited, the right to welfare is an insurance contract and may not be a right limited by obligation. Rights as they seek to achieve justice suffer from the difficulty that “justice stands as an empty and formless receptacle that must receive its shape and substance from elsewhere”.<sup>19</sup> Human rights are nothing more than social goods, and as such cannot escape some crucial questions.<sup>20</sup>

What particular group of rights is to be recognised: procedural or substantive, individual or collective? The rights of due process are generally treated differently from substantive rights. “There are no circumstances in which a man may be denied impartial justice ... most substantive rights, on the other hand, are defeasible in the public interest”.<sup>21</sup> Others argue that substantive or material rights should be recognised in order to allow the citizen to participate in society:

“This goal may require, either imposing on the State an obligation to guarantee, or

conferring on individuals a right to ... a minimum level of income, ... measures which ensure that people's health needs are met, ... the provision of adequate housing, and ... the availability of a broad range of cultural, recreational and leisure facilities".<sup>22</sup>

These objectives however rely heavily on a view of citizenship based on the dominant value of equality of opportunity as it applies to shared resources. This is a highly contested base! How is the scope and nature of each right to be determined? The *Australian Capital Television Case*,<sup>23</sup> where the High Court of Australia implied a right of freedom of communication in the Australian Constitution, has its political science critics.<sup>24</sup> Its legal critics are just as severe:

"Judicially created 'human rights' protected and benefited large media corporations. The latter, not humans, were the aggrieved litigants. Commonwealth legislation ... enacted to provide individual electors time to think and reflect free from media interference, was held unconstitutional ... Large, powerful and wealthy corporations were given constitutional rights and protections. Smaller, poorer and weaker individuals, who had gained legislative protection, were rendered constitutionally vulnerable".<sup>25</sup>

No more so than Sir Stephen Sedley who, a keen advocate of "a rights instrument ... to address ... the imbalances and appropriations of power which threaten the values ... of democracy",<sup>26</sup> was scathing in his criticism of the decision. He stated:

"Because democracy demands a free flow of ideas, the court holds that to accord a hearing to ideas in proportion to the wealth of those who hold them is not only a democratic course but the only democratic course: and in doing so it assumes a symmetry which simply does not exist between freedom of speech and freedom of information".<sup>27</sup>

How is a clash of competing rights to be adjudicated? The US Supreme Court in *Roe v. Wade* (1973) was forced to find an implied *right to privacy* and balance the right to life protected by the US 14<sup>th</sup> Amendment in an abortion case. Its decision was essentially a mathematical compromise. In the first trimester the state could not interfere in the decision to abort. In the second trimester the state could regulate the abortion procedure. In the third trimester the state could forbid abortions. This is an admirable piece of work in many respects but has no greater claim to moral certainty than "balance".

### **Great victories**

Does the record of achievement of Bills of Rights justify the considerable risks inherent in their application? Sir John Laws, commenting on the incorporation of the *European Convention on Human Rights* into British law, noted its historical context and its aspiration, "namely the protection of people against lawless and violent abuses of power by an overwhelming State".<sup>28</sup> He rated the magnitude of the task as follows:

"While the Gestapo and the death-camps are the Convention's backdrop, its stage is now often a battleground against much lesser devils, such as corporal punishment in schools".

Another writer, similarly in support of a Bill of Rights also noted the limitations of its application:

"The abiding impression of the first seven years of Bill of Rights jurisprudence [in New Zealand] is the utter domination of criminal cases".<sup>29</sup>

The same was held to be true of Canada. A less sympathetic view of the Canadian Charter was that it had "extended well beyond influencing criminal law and procedure. Quite bluntly, the judges are far more powerful, active and influential in making social policy decisions than ever they were before 1982".<sup>30</sup> Further, the New Zealand *Bill of Rights Act* has so many grounds of discrimination, nearly fifty in all, that it caused one wit to remark,

“discrimination for the connoisseur”.<sup>31</sup>

What has been won by a Bill of Rights that has not been won by other means? The aspirations of Aboriginal people in Australia have had to be satisfied to this point without a Bill of Rights, in fact with a minimum of judicial intervention, with of course the notable exception of the High Court decision in *Mabo*. The achievements of Aboriginal people in their “recovery”<sup>32</sup> phase, particularly post-*Mabo/Wik* is notable. Aboriginal people have enhanced political structures; Land Councils and ATSIC, a differentiated economic base; Native Title and the Indigenous Land Corporation, a recognised cultural base; heritage legislation, a legal base; common law rights, anti-discrimination statutes, and a welfare base; innovative and considerable funding, for example, CDEP. Scrutiny of the enormous number of instruments and programs in place indicates a job largely done. With the continued support of the wider community, the recovery is now in the hands of the indigenous community.

These considerable achievements however do not appear to count in the face of the next phase of demands, which centre on Reconciliation. The Council for Aboriginal Reconciliation draft Document for Reconciliation<sup>33</sup> includes a national strategy to promote the recognition of Aboriginal and Torres Strait Islander rights. It holds that these rights “will be based on the principles that all Australians should share equal rights and responsibilities as citizens”. However, it continues:

“The strategy will recognise the unique status of Aboriginal and Torres Strait Islander peoples as the original custodians of Australia, their continuing cultures and heritage, and their rights under the common law”.

These aspirations are multi-dimensional, and presumably need to be read in the context of the considerable achievements of differentiation noted above. There are of course two problems: the community has to accept the entire package, that is all of those matters which are also listed in the strategies to advance reconciliation, namely a national strategy for economic independence, and to address disadvantage. These are clearly political aspirations. The entire community will make judgments as to whether Aboriginal people are indeed “a people”; whether they can be equal and special, not just equal and different; and indeed how long any of the measures for achieving a desired status should remain. To press them into a legal context is asking too much of a rights instrument. These claims are contestable, time and place specific, resource intensive, in other words clearly not rights that non-political forums can address.

### **A rights culture**

The rights culture has many sources. It arises from the explicit promotion of rights as a political tool, from its utility as a basis for laying claim to the common property of the welfare state, and the development of certain concepts of the common law. Rights may have three quite different goals: to promote the individual interest against authority or organisation with power,<sup>34</sup> the desire to have justice tailored to every eventuality, and as part of a broader political strategy – a political strategy which sees the “I am my brother’s keeper” of the welfare state, changed to “everyone else is my keeper”. The ideas of justice held in common are being displaced by the promise of a personal gain.

### **Citizenship**

A source of theoretical justification for the rights strategy is the citizenship theory of the welfare state. The core of that theory is community membership:

“It is the *source of the claims* we have against each other. From our membership in our

community flow the welfare rights we can assert and the *duties we owe* to contribute to the support of our fellows”.<sup>35</sup>

This means that it is appropriate to treat all claims on society as if they were compensation claims. “If some individuals benefit from a *social process* which pushes others below the benchmark, *compensation* is owed”.<sup>36</sup> In effect, all citizens have rights to receive what they need to respect their status as full members of society, irrespective of the reasons why they lack resources and opportunities.

The basis of such a claim on society’s resources is at considerable variance with other common models of the welfare state. Earlier models were the “Christian duty” of state-provided charity of the Poor Laws in England, and the “economy of altruism” of social insurance in Bismark’s Germany. More latterly has been the “enabling state”, the USA version of equal opportunity. More radical has been the “citizenship” of Marshall and Beveridge, with social security for everyone, and redistributive socialism, or the egalitarian “reduction of relative poverty” state.<sup>37</sup> Each of these models represented a dominant rationale, namely equality, whether egalitarian, meritocratic or liberal, need, altruism, or insurance.

The further development of the Marshall/Beveridge citizenship model, relying more explicitly on rights, argues that those with resources have a strict obligation to make them available to those in need. Need is defined as those resources which guarantee status as a full member of society. As the citizen does not have a choice to join society, consent is not sought. It follows that “I have some claim to be compensated for the fact that the society in which I live is not one in which I can be independent”.<sup>38</sup> The further claim that “allowing a citizen to be cut off from the community is more serious than a marginal limitation on personal disposable income” helps to explain the high expectation of recompense that exists in some quarters.

While duties exist alongside rights, for example there is a duty to maintain one’s health and to seek gainful employment, the potential outcome of the citizenship theory is that “society becomes solely the bearer of duties, with no right to impose conditions on or to make demands of its members. Individuals become solely the holders of rights, with no duty to conform or contribute”.<sup>39</sup> The basis of democracy, consent, is firmly shown the door.

### **Expectation of total justice**

The desire for rights is driven by the citizen’s expectation of what Friedman<sup>40</sup> calls “total justice”. It has three elements. Expectations of fair treatment, “everywhere and in every circumstances”. Expectations of recompense, “that someone will pay for any or all calamities that happen to a person”. And expectations of due process, that “no organisation or institution of any size should be able to impair somebody’s vital interests without granting certain procedural rights”. Fair treatment, recompense and procedural rights are at the root of the drive for human rights. The drive for total justice is the objective, and the rights strategy is its vehicle. An alternative strategy needs to address the origins of these elements of total justice.

The expectation of total justice is well primed by various “bad habits” derived from the common law. Decisions in torts and in contract, and in schemes such as victim of crime compensation, contribute to the desire for total and individualised justice. A recent study of trends in the Australian legal system spoke of “an emerging litigious mindset ... and a tendency to regard the legal system as a ‘first port of call’ when championing rights and accountabilities”.<sup>41</sup>

In the opinion of (now) Chief Justice Gleeson,<sup>42</sup> there is a trend in law, both judge-made and statutory, towards a preference for individualised, discretionary solutions as against the principled application of general laws. This is largely a function of societal expectation, which looks to the law to provide redress for an increasing number, and an expanding scope of grievances, in a manner tailored to the justice of the particular case.

In criminal law, originally anyone who caused death, intentionally or accidentally, was guilty of murder. In time the intention of the accused became the focus of concern; for example, were there grounds on which the accused were less culpable for their actions? The concepts of diminished responsibility and of provocation became lines of defence against murder. The central concept is one of temporary loss of self-control. It assumes a sudden loss of self-control. The problem now is that it can be very difficult to draw the line between a response to a prolonged course of conduct which is a loss of self-control, and a response that involves a deliberate and premeditated desire for revenge, or for putting an end to a source of pain.

In the law of evidence, as a general rule, facts in dispute at a trial are to be proved by the sworn testimony of witnesses capable of giving direct evidence of such facts, and whose evidence may be tested in cross-examination. Assertions of fact made out of court were generally inadmissible, unless they were sufficiently reliable or necessity dictated. More recently, the hearsay rule might be applied more flexibly, and individual trial judges might be confronted with the task of making a discretionary decision, on a case-by-case basis, as to the reception or rejection of hearsay evidence. Certainty will be sacrificed to considerations of merit.

In the law of contract, people can seek relief from an “unjust” (unconscionable, harsh or oppressive) contract, based on the circumstances at the time of the making of the contract. These circumstances may include poverty or need of any kind, sickness, age, gender, infirmity, drunkenness, illiteracy or lack of education, or lack of assistance or explanation. The consequence is that claims that contracts are unjust are becoming almost routine. The trouble with using unconscionability as a panacea for adjusting any contract is that litigants may need reminding that people should honour their contracts, even when this involves hardship. Gleeson concluded:

“We can no longer say that, in all but exceptional cases, the rights and liabilities of parties to a written contract can be discovered by reading the contract”.<sup>43</sup>

In the law of negligence, the concept of reasonableness is of key importance, and the duty owed by one person to another is greatly dependent on the facts of the case. In the area of occupiers liability, for example, definition of various categories of relationship between occupier and entrant on land, with different standards of care, has given way to a general standard. The standard is dependent for its application upon the facts and circumstances of the individual case which, therefore, in the event of dispute, require individual consideration. It was the opinion of Lord Denning that “we have extended the law of negligence to an altogether excessive degree”.<sup>44</sup>

In the related area of personal injury, and more radically, Atiyah asks, why should a right to sue someone who wrongfully does you an injury exist?<sup>45</sup> He noted that right ideology assumes that everyone must be answerable at law for his or her own actions, which is compensatory justice. Left ideology assumes the injured victim should be assisted, that the perpetrator, usually large corporations or public bodies, be punished, which is distributive justice.



The current system is not a system of personal responsibility, because those who are responsible are hardly ever called to account or required to pay the damages. It is actually a system of insurance, but those who benefit do not pay the premiums. It is a system of distributive justice. The reason for the increase in personal injury litigation is the availability of liability insurance. It was thought fair that the costs of the risks of injury should not be borne solely by those at risk, but that others should be made to share or bear the burden. Yet, tort actions are becoming more common and payouts more spectacular.

Traditional corporate (and public sector) liability has it that actions of a guilty employee are attributed to the employer. Beyond motor vehicle accidents, the guilty party rarely pays an insurance premium. The employer or insurer, who is not to blame, pays the damages; the wrongdoer, who is to blame, does not pay. It is taken for granted that an employer is vicariously liable without any fault on his/her part for the negligence of employees. The whole idea rests on the principle of "long pockets"!

The Longford Royal Commission, reporting on the causes of the explosion at the Esso gas plant in Gippsland on September 25, 1998, concluded that neither the operators nor supervisors were to blame, because they were ignorant of the dangers present at the time. The company was blamed for failing to ensure its staff was informed. The company failed to identify all hazards and specify procedures for rectifying them.<sup>46</sup> Why does this result not surprise? Without wishing to doubt the Commissioner's findings, is it conceivable that an entity other than a company or government or other such organisation will ever not be held liable for whatever event befalls people associated with it?

The analogy with the citizenship theory of the welfare state is strong, to say the least. Atiyah was right to question the need for the pretence of causation; the presence of insurable risk, and the presumption that the individual is part of the larger organisation whether the society or a company, is sufficient to create a claim. And the action is not based on compensation but on redistribution. The same may be observed of the rights argument. The moral basis of rights is doubtful, but a cause of action is sought against the state, which by means of citizenship must make good any claim.

One further example illustrates the point. Victims of crime have successfully invoked this "victim" status, and have built on a public sympathy for crimes' victims and a public antipathy to criminals. This has enabled this particular class of claimant to sue for criminal damages (personal injury), and where insufficient funds are available to seek statutory compensation. In this example, the notions of compensation and redistribution become entirely mixed. It raises the question, to what extent do we socialise our misfortune? Should the state act as final insurer in essentially private actions, and if in some cases why not in others?

The theoretical rationale for crime compensation is not strong. Injuries, where they prevent someone from working are covered by Social Security. This does leave out the non-workforce, with respect to compensation, though Medicare covers medical costs. Which leaves the question: why should the state provide compensation, that is, over and above income replacement and medical expenses?

Does the state have a duty to protect its citizens? This certainly involves the maintenance of law and order, but compensating for injuries is a much greater step. Governments do not accept that they are liable for the actions of criminals. The risk of injury is so remote that the losses cannot be insured, although tax could be raised to cover the insurance premiums of all citizens. This does not answer the question why this source of injury alone should be

singled out. Is the system really a “top-up” for a certain class of victim? That is, those who have a common law action available but no “deep pockets” to pay compensation.

These are examples of a preference for the subjectivisation of issues and disdain for predictability and formalism. However, there are important constraints of principle upon the law’s capacity to provide a form of justice that responds to the peculiarities of every individual case. Some of these constraints are bound up with the concept of justice itself.

It is expected of judges that they will apply neutral and general principles to the resolution of individual disputes. They have no mandate to act as *ad hoc* legislators who, by decree, determine an appropriate outcome on a case-by-case basis.

“No judge has, and no judge aspires to political legitimacy. It is wrong to assume that, running throughout the law, there is some general principle of fairness which will always yield an appropriate result if only the judge can manage to get close enough to the facts of the individual case”.<sup>47</sup>

Justice Gleeson may not be correct that no judge has aspired to political legitimacy, but his point about driving the law beyond its capacity to deliver justice is well made. The common law may well be adding its bad habits to the already high expectation of justice, an expectation which feeds the rights strategy.

## Conclusion

The Bill of Rights argument is a surrogate for a broader rights and citizenship debate. The entrenchment or otherwise of rights is not determinant; the nature of the rights themselves is the issue, not the architecture. Procedural rights are universal, but substantive rights, especially those with resource implications, are not; these require political consent. In both private actions, and in the welfare state, obligation and contribution will have to be re-introduced as an antidote to the rights strategy, this time around free of the divisions of race and gender, and hopefully in a way not to re-ignite class struggle. The idea that everyone else is my keeper will have to be challenged directly. Law-makers, both judicial and legislative, will have to invoke rules rather than values. There is no theory of just legislation, only the agreement to processes of evaluation and negotiation, consensus and rebuttal. An intellectual process to be sure, but not one for all seasons or places or all time. Liberals and socialists, or more accurately meritocrats and redistributionists, seem to be swapping sides. The socialists are happy to advance the cause of individual (and group) justice if there is a reward to be had, and if the device is effective in the cause of redistribution. And the liberals are wary of the free rein of individuals to pursue through the courts their view of justice. They worry that claims for compensation are in fact claims in disguise for redistribution, and represent a free bite at the collective cherry.

The rights strategy is an immature stage in the development of democracy, and is a corruption of the objects of participation. Its method to achieve the just society will fail.

## Endnotes:

1. J Laws, *The Limitations on Human Rights*, in *Public Law*, Summer, 1998, p.255.
2. Laws, *op. cit.*, p.260.
3. *Leeth v. Commonwealth* (1992) 174 CLR 455 at 470.
4. *Racial Discrimination Act 1975* (Cwlth), *Sex Discrimination Act 1984* (Cwlth), *Disability Discrimination Act 1992* (Cwlth).
5. *The International Convention on the Elimination of All Forms of Racial Discrimination*, the *International Covenant on Civil and Political Rights*, various *International Labour Organisation Conventions* and so on.

6. F Brennan, *Legislating Liberty: A Bill of Rights for Australia*, University of Queensland Press, 1998. G Williams, *The Federal Parliament and the Protection of Human Rights*, Research Paper 20, Parliament of Australia, Parliamentary Library, 1999.
7. Brennan, *op. cit.*, p.175.
8. J Allan, *The Rise of Judicial Activism in New Zealand*, in *Agenda*, 1997, 4(4), p.468.
9. M McHugh, *The Growth of Legislation and Litigation*, in *The Australian Law Journal*, 1995, 69, p.43.
10. McHugh, *op. cit.*, p.38.
11. <http://www.aph.gov.au/house/pubs/wots/wots98a.pdf>
12. Federal Court of Australia, *Annual Report 1997-98*, p.97.
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