

COMPARATIVE LAW ESSAY

**FILLING THE GAPS:
THE ROLE OF COMMUNITY VALUES IN THE
DEVELOPMENT OF THE COMMON LAW IN NOVEL
AREAS IN AUSTRALIA**

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Introduction

The judicial incorporation of community values in the development of Australian common law is an inevitable and desirable process.¹ In order to maintain respect for the courts and the judiciary there must be a correlation between judicial decisions and community values.² One way to achieve such a correlation and to resolve conflicts between competing values is to appeal to a particular set of values the community regards as fundamental.³ Such fundamental community values ought to be reflected in a legislative or constitutional statement, which would serve as a framework for the normative development of the common law.⁴

Helpful insight can be gained from the experience of Germany and the United Kingdom where the development of private law is, at least to some degree, informed by a legislative statement of values and rights. This provides the judiciary with the democratic authority to develop private law in accordance with the interests of the community.

While the judicial selection and prioritisation of values and rights will always involve subjective considerations, a clear legislative or constitutional statement of values provides a framework from which the democratically expressed interests of the community can be protected.

¹ For example see Braithwaite, J, 'Symposium on Community Values in Law: Community Values and Australian Jurisprudence' (1995) 17 *Sydney Law Review* 350; Wood, D, 'Community Values and Judicial Decisions' (2001) 11 *Journal of Judicial Administration* 43; Mason, A, 'Legislative and Judicial Law-Making: Can we locate an identifiable boundary?' (2003) 24 *Adelaide Law Review* 15; McHugh 'The Law-Making Function of the Judicial Process' (1988) *Australian Law Journal* 15; and Doyle, J, 'Judicial Lawmaking – Is Honesty the Best Policy?' (1995) 17 *Adelaide Law Review* 161.

² Wood, D, 'Community Values and Judicial Decisions' (2001) 11 *Journal of Judicial Administration* 43 at 45.

Community Values and Legal Discourse

The general acceptance of the role of community values in the development of the common law in novel areas is demonstrative of a retreat from legalism and a declarative approach to judicial ‘law making’.⁵ By refusing to acknowledge the role of normative considerations in the development of the common law, strict legalism allows decision makers to hide personal values which may not accord with social norms valued by the community.⁶ It is the responsibility of the judiciary to keep the common law in line with contemporary values of society. Without such an approach the common law would lose its legitimacy and serviceability.⁷

The term ‘community values’ must be distinguished from community *attitudes*. Values, for example, the right to education,⁸ are relatively permanent beliefs of the Australian community on which there is a high degree of consensus.⁹ Attitudes, for example free primary education for all, are far more transient, comprising a set of beliefs about a specific object or situation.¹⁰ The incorporation of values rather than attitudes avoids a simplistic majoritarian approach to judicial law-making and preserves

³ Above n 2 at 49.

⁴ Above n 2 at 49.

⁵ For further discussion of this changing view of judges as law-makers see Mason, A, ‘Legislative and Judicial Law-Making: Can we locate an identifiable boundary?’ (2003) 24 *Adelaide Law Review* 15; Doyle, J, ‘Judicial Lawmaking – Is Honesty the Best Policy?’ (1995) 17 *Adelaide Law Review* 161; and Reid ‘The Judge as Lawmaker’ (1972) *The Journal of Public Teachers of Law* 22; McHugh ‘The Law-Making Function of the Judicial Process’ (1988) *Australian Law Journal* 15.

⁶ Braithwaite, J, ‘Symposium on Community Values in Law: Community Values and Australian Jurisprudence’ (1995) 17 *Sydney Law Review* 350 at 351, see also Mason, A, ‘Legislative and Judicial Law-Making: Can we locate an identifiable boundary?’ (2003) 24 *Adelaide Law Review* 15.

⁷ Braithwaite, J, ‘Symposium on Community Values in Law: Community Values and Australian Jurisprudence’ (1995) 17 *Sydney Law Review* 350 at 351.

⁸ For a comprehensive list of values receiving a high degree of community consensus (over 95%) in a study conducted in 1982 reported in Braithwaite, V, ‘The Structure of Social Values: Validation of Rokeach’s Two Value Model’ (1982) 21 *Brit J Soc Psych* 203.

⁹ Above n 7 at 352.

¹⁰ Above n 7 at 352.

both the independence of the judiciary and the fundamental interests of the community.¹¹

Importantly, the judicial incorporation of community values does not erode the application of the rule of law. The rule of law is itself a community value upon which there is a high level of consensus.¹² In this way, the term is broad enough to incorporate both legal and non-legal policy considerations.

Professor Luecke¹³ and Lord Millet¹⁴ have both emphasised the importance of the distinction between legal and non-legal policy, favouring the utilisation of legal policy before public policy when developing the common law in novel areas. Such an approach ensures a degree of consistency and certainty and enables policy concerns to be weighed and evaluated within an established legal framework. However, both categories of ‘policy’ are necessarily informed by personal and community values.¹⁵ For example, the arguments advanced in *Cattanach v Melchior*¹⁶ regarding whether or not damages should be awarded for child rearing costs incurred as a result of a negligent sterilisation procedure are inherently normative in nature.¹⁷ They draw on both legal values, such as the right to compensation for damage incurred, and non-legal values, such as the inherent goodness of the birth of a healthy child. They concern what the legal rights and obligations of individuals *ought* to be. Thus, it is possible to object to the outcome of *Cattanach* on normative grounds, but it is unrealistic and unhelpful to

¹¹ Above n 7 at 364, for example, a strict legalistic approach rejects the use of non-legal factors on the grounds of vagueness and criticises the use of specific community attitudes, not grounded in empirical evidence. Legalism suggests that the judiciary will lose their independence if they apply community attitudes to legal decision making.

¹² Above n 7 at 351.

¹³ Seminar Materials, Luecke ‘*Cattanach v Melchior*: Law and Policy in the High Court’.

¹⁴ In *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 108.

¹⁵ See Doyle, J, ‘Judicial Lawmaking – Is Honesty the Best Policy?’ (1995) 17 *Adelaide Law Review* 161.

¹⁶ (2003) 215 CLR 1.

¹⁷ Nicol, D, ‘Notes: Another Failed Sterilisation’ (2004) 120 *Law Quarterly Review* 189.

deny the role of community values (whether legal or non-legal in character) in judicial reasoning.

The reciprocal nature of the relationship between community values and the development of the common law highlight the importance of establishing a democratic dialogue between the courts and the community. The experience of Germany and the United Kingdom supports the suggestion that a legislative or constitutional statement of community values can effectively facilitate such dialogue.

Community Values and the Development of Australian Common Law

Australian judges have long been familiar with the process and consequences of incorporating community values in the development of the common law,¹⁸ however, the current method of incorporation has been developed in the absence of any guiding principles:

[T]here is no coherent method in Australian law for determining reliable social facts and ... this results in the adoption of conflicting and potentially inaccurate assumptions in High Court cases.¹⁹

Often there are disparities between the use of community values by different judges and frequently no reference is made to their source.²⁰ This can result in the highly subjective, contentious and contestable use of personal and community values in judge

¹⁸ For example of the Courts consideration of policy or community values in the development of the common law see *Wilkinson v Osborne* (1915) 21 CLR 89; *Church Property Trustees, Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394; *Smith v Jenkins* (1970) 119 CLR 397; *Perre v Apand* (1999) 198 CLR 180; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 and *Cattanach v Melchior* (2003) 215 CLR 1.

¹⁹ Burns, K, 'The way the world is: Social facts in High Court negligence cases' (2004) 12 *Tort Law Journal* 215 at 216

²⁰ For example see *Amaca Pty Ltd v New South Wales* (2003). 199 ALR 569; *Shorey v Pty Ltd* (2003) 197 ALR 410; *Cattanach v Melchior* (2003) 215 CLR 1 and *Perre v Apand* (1999) 198 CLR 180

made law.²¹ Some values emerge triumphant and are invested with legal status, whilst others appear to be side-lined or ignored.²²

The High Court's decision in *Cattanach* provides an example of the unregulated role of community values in the development of the common law in Australia.²³ In *Cattanach* the High Court was faced with a 'new' area of law and an inadequate body of existing legal principle to resolve the dispute. All members of the Court incorporated personal or community values in their reasoning, however they were divided in their method of incorporation and the appropriateness of whether to explicitly acknowledge this approach.²⁴

The minority denied the plaintiff's claim. Their judgments illustrate the central role that normative considerations play in the development of the common law in novel areas. For example, Gleeson CJ adopted the view that the Melchior's claim over-emphasised the financial aspects of the 'socially fundamental' parent-child relationship.²⁵

[a] child is not a commodity that can be sold or otherwise dispatched of in order to mitigate hardship to a parent ...²⁶

As a matter of 'public policy', Hayne J rejected the parent's claim as an attempt to prove that the birth of their child represented a net burden.²⁷ Heydon J also rejected the plaintiff's claim on normative grounds:²⁸

²¹ For example see above n 19

²² Above n 19 at 231 -234

²³ (2003) 215 CLR 1

²⁴ Semour, J, 'Cattanach v Melchior: Legal principles and public policy' (2003) 11 *Tort Law Journal* 208 at 215.

²⁵ Golder, B, 'McFarlane to Melchior and beyond: love sex, money and commodification in the Anglo-Australian law of torts' (2004) 12(2) *Torts Law Journal* 128 at 141 see also *Cattanach v Melchior* (2003) 215 CLR 1 at [38].

²⁶ *Cattanach v Melchior* (2003) 215 CLR 1 at [35].

It is wrong to attempt to place a value on human life or a value on the expense of human life because human life is invaluable - incapable of effective or useful valuation. It is thus the policy of the law that the birth of a child is not to be discounted or devalued ... The child is itself valuable, not because it confers blessings or economic advantages or other advantages, but because it is life.

The inherent benefit derived from the parent-child relationship, according to the minority, outweighed competing community values such as women's right to reproductive choice and the notion that persons have the right to compensation for loss incurred as a result of a wrongful act of another. All three minority judges concluded that the benefits necessarily flow from the parent-child relationship and that as a matter of public policy, the Melchior's were not entitled to recover damages for costs of maintaining the child. Golder suggests:²⁹

It was inconceivable to the male Justice of the High Court that parenthood might possibly represent a negative condition (even to those who had consciously and rationally chosen to avoid it through sterilisation).

The majority acknowledged community values as forming a foundation on which the law of torts is developed.³⁰ It was observed that community values inform the policy of the law, forming context in which each aspect of liability in tort is assessed.³¹ McHugh and Gummow JJ, in an attempt to articulate a method of incorporating community values into the development of the common law, formulated the question before the Court as whether: (a) the underlying values of respecting human life, stability of the family unit and welfare of children are essential aspect of the welfare of the community and (b) if they are, is there a general recognition in the community that

²⁷ Golder, B, 'McFarlane to Melchior and beyond: love sex, money and commodification in the Anglo-Australian law of torts' (2004) 12(2) *Torts Law Journal* 128 at 141.

²⁸ (2003) 215 CLR 1 [353].

²⁹ Above n 27 at 146.

³⁰ (2003) 215 CLR 1 at [65].

³¹ (2003) 215 CLR 1 at [65].

those values demand that there must not be award for damages for costs incurred in maintaining the child.³²

In *Cattanach*, the underlying values invoked by the appellants were not so definite as to be applied without reference the mischief arising from the negligence act.³³ In *Cattanach* that mischief, the pregnancy, was the very act the Melchiors sought to guard against. The existence of the parent child relationship did not preclude the finding of liability. It was observed that changes in Australian society means that it cannot be said unequivocally that the birth of a healthy child is regarded by all as an inherently good thing.³⁴ This was echoed in Kirby J's judgment, where His Honour referred to the modern practice of family planning, the widespread use of contraception and sterilisation techniques to avoid pregnancy, and the increasing acceptance of alternative family forms.³⁵ As Kirby and Callinan JJ observed, almost all arguments on both sides involved emotional and moral values and perceptions of what public policy is or should be. Both judges advocated a transparent approach to applying personal and community value considerations in the development of the law.³⁶

Cattanach raises the question as to whether it is desirable or legitimate for seven Anglo-Saxon, middle aged, economically privileged members men to determine the content of the community's values. Moreover, *Cattanach* illustrates the lack of a consistent framework for the application of community values in novel areas. A legislative or constitutional statement of rights and values would generate a more

³² (2003) 215 CLR 1 at [76].

³³ (2003) 215 CLR 1 at [77] – [79].

³⁴ (2003) 215 CLR 1 at [83].

³⁵ (2003) 215 CLR 1 at [148] – [151].

³⁶ (2003) 215 CLR 1 at [135] – [137] per Kirby J; at [291] – [292] per Callinan J.

consistent framework for evaluating competing community interests and would ensure the democratic legitimacy of the values applied.

Community Values in the development of private law in Germany and the UK

Just as gaps emerge in the common law, civil legal systems experience situations where courts are required to develop the law in novel areas. Civilian courts will seek to resolve novel issues while remaining within the general framework of the relevant code, ensuring that the conflicting interests are evaluated in accordance with the policies and value judgments underlying the code itself.³⁷ Of great historical, legal and cultural importance to the German legal system is the *Bürgerliches Gesetzbuch* and the protection of basic rights contained therein. These rights underlie the entire legal order, inform the development of public and private law and provide a democratically endorsed framework from which community values can be ascertained and employed.

A prime example of the incorporation of fundamental values in German private law is the *Luth Case*.³⁸ The case concerned Veit Harlan, a film director, notorious during Nazi period for directing anti-Jewish films.³⁹ In 1950 a Hamburg press official, Erich Luth was outraged by Mr Harlan's re-appearance on the public scene with a new, (uncontroversial) film. Concerned that Mr Harlan's past would hinder efforts to rebuild links between German Christians and Jews, Mr Luth called for a boycott of Mr

³⁷ For further discussion see Markesinis, B S, *Always on the Same Path - Essays on Foreign Law and Comparative Methodology Vol II*, (Oxford and Portland : Hart Publishing, 2001).

³⁸ Constitutional Court: BverfGE 7, 198, 204 (1958)

³⁹ Markesinis, B S, Chapt 7 'Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany' pp 131-173 in *Always on the Same Path - Essays on Foreign Law and Comparative Methodology Vol II*, (Oxford and Portland : Hart Publishing, 2001) at 134.

Harlan's film.⁴⁰ Mr Harlan sought an injunction against Mr Luth which was granted by the Court of first instance.

The Constitutional Court was asked to consider whether the human rights provisions of the Basic Law, in particular the right to freedom of expression, were applicable to a dispute between individuals and if so, to what extent.⁴¹ Reluctant to find that the human rights provisions of the Basic Law had a *direct* effect on relations between private individuals, the Court held that those rights *influenced* the development of private law norms.⁴² The fundamental values expressed in the Basic Law, such as free speech, constituted an objective order of values permeating the whole legal system.⁴³ In the context of the *Luth* case, Mr Harlan's economic rights had to give way to Mr Luth's fundamental right to free expression.⁴⁴

Building upon the principles established in the *Luth* case German law has established a system of objective, democratically endorsed values.⁴⁵ This value system has permeated all spheres of law, including private law. In the context of the right to free expression, the private law in general must be viewed in light of the significance of this basic right. Moreover, the fundamental nature of this right gives rise to a 'dual transaction' allowing the private law to limit the basic right, provided the private law is interpreted in light of the significance of the basic right as a value in the liberal democratic legal order.⁴⁶ From this background, German courts have developed usable and consistent criteria for resolving conflicts between competing rights and values,

⁴⁰ Above n 39 at 134.

⁴¹ Markesinis, B S, Chapter 8: The Applicability of Human Rights as between Individuals under German Constitutional Law pp 175-218 in *Always on the Same Path - Essays on Foreign Law and Comparative Methodology Vol II*, (Oxford and Portland : Hart Publishing, 2001).

⁴² Above n 39 at 135.

⁴³ Above n 39 at 135.

⁴⁴ Above n 39.

⁴⁵ Appendix A/7 Federal Constitutional Court of Germany – The Luth Case 15 January 1958.

providing a degree of legal certainty and democratic legitimacy in the development of private law.⁴⁷

A legislative or constitutionally statement of rights or values could assist in providing a legitimate framework for the incorporation of community values into the development of Australian common law. Such an instrument may overcome the claims that judicial incorporation of normative considerations is undemocratic. It may also provide a starting point from which the community and legislators can anticipate the direction of judicial legal development.

An example of such an approach is the United Kingdom's *Human Rights Act 1998* (UK) ('HRA'). The HRA:⁴⁸

- applies exclusively to the acts of *public authorities*,⁴⁹
- requires the courts to read legislation in a way that is "compatible" with the *European Convention on Human Rights* ['ECHR'] "so far as it is possible to do so".⁵⁰
- seeks to hold governments to account for compliance with the protected rights and freedoms at the time proposed legislation is passing through the Parliament.⁵¹
- provides a means of government accountability to Parliament and the public for significant constitutional decisions.⁵²
- prescribes a procedure whereby a court may make a "declaration of incompatibility" between primary legislation and a Convention right, leaving it to government and Parliament to amend the statute if there are "compelling reasons" for so doing.⁵³

⁴⁶ Above n 41.

⁴⁷ Above n 39 at 147.

⁴⁸ Department for Constitutional Affairs, *Human Rights Act: Frequently Asked Questions* [www.dca.gov.uk/hract/hracfaq.htm] (23 April 05).

⁴⁹ *Human Rights Act 1998* (UK) s6.

⁵⁰ *Human Rights Act 1998* (UK) s3.

⁵¹ Above n 48

⁵² Above n 48

⁵³ *Human Rights Act 1998* (UK) s4.

Markesinis notes that the *HRA* does not explicitly contemplate the direct horizontal effect of the legislation in private matters between individuals.⁵⁴ However, some horizontal effect is clearly inevitable if the courts are to act compatibly with the Convention.⁵⁵ For example in *Venables and Thompson v News Group Newspaper*⁵⁶ it was held that:

...Convention rights are not directly enforceable against the defendants, see section 7(1) and section 8 of the Human Rights Act. That is not, however, the end of the matter, since the court is a public authority, see section 6(3), and must itself act in a way compatible with the Convention, see section 6(1) and have regard to European jurisprudence, see section 2. ... The duty on the court, in my view, is to act compatibly with Convention rights in adjudicating upon existing common law causes of action, and that includes a positive as well as a negative obligation.⁵⁷

Importantly, the *HRA* establishes a hierarchy of norms or fundamental community values against which legislation can be tested and the common law developed.⁵⁸ In *Venables* Butler-Sloss P noted that Parliament has placed great emphasis upon the importance of the rights protected by the *HRA*, such as free speech and the right to privacy.⁵⁹ It was held that the *HRA* and the *ECHR* acted to “reinforce and give greater weight to the principles already established in our case law”.⁶⁰ Although the Court ultimately decided the case on the application of the principles of the tort of breach of confidence, these principles were interpreted and applied in light of the values enshrined in the relevant Articles of the *ECHR*.⁶¹

⁵⁴ Above n 39.

⁵⁵ Above n 39. See also Starmer, K, *European Human Rights Law* (London : Legal Action Group, 1999) 24-27.

⁵⁶ [2001] 1 All ER 908.

⁵⁷ [2001] 1 All ER 908 at 917.

⁵⁸ Above n 39. Examples of application of HRA include – *Bellinger v Bellinger* [2003] 2 AC 467; *Goodwin v United Kingdom* (2002) 35 EHRR 18; *In re S* [2002] 2 AC 291.

⁵⁹ [2001] 1 All ER 908 at 920.

⁶⁰ [2001] 1 All ER 908 at 920.

⁶¹ [2001] 1 All ER 908 at 932 to 933.

Australian Courts are not unfamiliar with the concept of the horizontal application of rights and values to private common law.⁶² For example, in *Lange*⁶³ the Court examined the sections of the *Constitution* establishing the doctrine of representative government, which in turn gave rise to the implied freedom of political communication.⁶⁴ The High Court articulated a defence of qualified privilege on the grounds that the alleged defamatory material published constituted discussion of political and government matters.⁶⁵ The implied freedom constituted a development of the common law in light of the values endorsed by the text and structure of the constitution.⁶⁶

Taylor argues that *Lange* illustrates the indirect influence of the *Constitution* on the development of the common law.⁶⁷ This is similar to the German Constitutional Court's approach in the *Luth* case. Taylor argues that the High Court's approach in *Lange* reflects the underlying common law tradition that judicial development of the law takes place utilising existing common law precedents rather than by constructing new rules.⁶⁸ Whilst this approach provides a level of consistency and certainty in the law, it does not adequately reflect the social norms valued by the community. Moreover, it elevates certain values to the status of legal principle, relegating others to

⁶² For an comprehensive overview of the incorporation of 'rights' in the common law see Bailey, P, 'Righting' the Constitution without a Bill of Rights' (1995) 23 *Federal Law Review* 1. Examples include *Bropho v Western Australia* (1990) 171 CLR 1; *Mabo v Queensland* [No 2] (1992) 175 CLR 1; *Polyukhovic v The Commonwealth* (1991) 176 CLR 1; *Dietrich v The Queen* (1992) 177 CLR 23.

⁶³ (1997) 189 CLR 520.

⁶⁴ (1997) 189 CLR 520 at 559-560.

⁶⁵ (1997) 189 CLR 520 at 574.

⁶⁶ Meagher, D, 'What is 'Political Communication'? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) 28 *Melbourne University Law Review* 438 at 445. See also Taylor, G, 'Why the Common Law Should be Only Indirectly Affected by Constitutional Guarantees: A Comment On Stone' (2002) *Melbourne University Law Review* 32.

⁶⁷ See Taylor, G, 'Why the Common Law Should be Only Indirectly Affected by Constitutional Guarantees: A Comment On Stone' (2002) *Melbourne University Law Review* 32.

⁶⁸ Above n 67.

the non legal domain.⁶⁹ As Burns notes,⁷⁰ it is of concern that this process occurs in the absence of clear guidelines or legislative framework. The current expansion of implied constitutional rights also has the potential to result in an unbalanced approach to certain individual freedoms. For example, without legislative intervention, Australian courts are unlikely to recognise and protect the right to of personal privacy to the same degree as the implied constitutional right to free speech despite the fact that both can be described as fundamental community values underpinned by a high level of community consensus.⁷¹

The ACT has recently enacted the *Human Rights Act 2004* (ACT), largely mirroring the UK legislation described above,⁷² however its influence on the development of the common law and its treatment by the judiciary has yet to be fully realised.⁷³ Although it has been described as a ‘modest start to the legislative protection of rights’ and its application is geographically and constitutionally limited, the Act signifies a positive step in the direction of a legislative statement of community values in Australia.⁷⁴

⁶⁹ Above n 19 at 354.

⁷⁰ Above n 19.

⁷¹ Above n 67 at 35-36.

⁷² *Human Rights Act 2004* (ACT) for an overview of the Act and an evaluation see Hudson, A, ‘The Australian Capital Territory Leads the Way with its Bill of Rights (2004) 78(12) *Law Institute Journal* 36; Evans, C, ‘Responsibility for Rights: The ACT Human Rights Act (2004) 32 *Federal Law Review* 291; Evans, M W, ‘Human Rights: What's been Left out of Australia's First Bill of Rights? (2004) 29(4) *Alternative Law Journal* 195; and Debeljak, J, ‘The Human Rights Act 2004 (ACT): A Significant, yet Incomplete, Step toward the Domestic Protection and Promotion of Human Rights (2004) 15(3) *Public Law Review* 169.

⁷³ The Act has been noted in the following judgments, however there does not appear to be any extensive judicial comment on the horizontal application of the Act or its impact on the common law *Fletcher v Harris* [2005] ACTSC 27; *Buzzacott v The Queen* [2005] ACTCA 7, *The Queen v Peter Martiniello* [2005] ACTSC 9, *The Queen v Peter Martiniello* [2005] ACTSC 9, *Firestone v The Australian National University* [2004] ACTSC 76

⁷⁴ See Evans, E, ‘Responsibility for Rights: The ACT Human Rights Act (2004) 32 *Federal Law Review* 291.

Developing a democratic dialogue when filling the gaps - A Bill of Rights and Values for Australia?

The incorporation of community values in the development of the common law is not only inevitable but also necessary to maintain public confidence in the administration of justice. The existence of normative considerations in the common law is unquestionable. It is the existence of a set of guidelines or framework for their incorporation which is absent.⁷⁵

A legislative or constitutional statement of rights⁷⁶ and values⁷⁷ is advocated as a normative basis from which to ascertain and assess community values and as a method of facilitating democratic dialogue between the courts and the community.⁷⁸ Such a framework would provide for a more transparent, consistent and democratically legitimate approach to judicial development of the law in novel areas and would ensure public confidence in the independence of the judiciary. As Lord Devlin observed:⁷⁹

...[T]he law-maker is not required to make any judgment about what is good and what is bad. The morals which he enforces are those ideas about rights and wrong which are already accepted by the society for which he is legislating and which are necessary to preserve its integrity. ... His mandate is to preserve the essentials of his society, not to reconstruct them according to his own ideas.

The German and United Kingdom experience demonstrates that a legislative framework of values and rights allows for horizontal application, even where the legislation is primarily aimed at the relationship between individual and the State. It is

⁷⁵ See above n 27; above n 58; and above n 16.

⁷⁶ To date Australia has rejected the implementation of a Bill of Rights, whether in constitutional or (federal) legislative form. In the 1960s, Sir Robert Menzies suggested that the structure of representative government enshrined in the Constitution, responsible government, made bills of rights unnecessary. This remains the prevalent view. Attempts to implement a legislative bill of rights failed in 1973, and again in 1983 and 1985.

⁷⁷ There are a variety of options for the construction of a legislative statement of community values or a non-entrenched legislative statement, each with their own advantages and disadvantages. For example Braithwaite, above n 6.

⁷⁸ Above n 6 at 368.

⁷⁹ Devlin, P, *The Enforcement of Morals* (London : Oxford University Press 1965) at 91-92.

apparent that the existence of a legislative or even constitutional statement of values or rights does not result in static or rigid judicial law making, but rather invests courts with the normative tools to keep the common law in touch with modern life.

A legislative statement of rights or values would provide Australian courts with a fresh source of legitimacy and authority from which to develop the common law in light of values adopted by the people of Australia.⁸⁰ Moreover, it would provide the foundation for a culture of respect for rights that has the potential to permeate all sectors of society. This is of fundamental importance when it is recognised that judicial development of the common law is both reflective and constructive of the values of the community. As Burns warns:⁸¹

[W]e need to acknowledge that social facts used by judges may not just reflect society and social values (if indeed they do) but rather they may contribute to the construction of social norms. Perhaps, it is here that the most damage may be done, when the social facts referred to by judges are incorrect, incomplete, out of date or tell the story of some members of society, but shut out the reality of the lives of others.

An Australian Bill of Rights and Values is a respectable and desirable way to fill the gaps in the common law.

⁸⁰ This is a view shared by the Honourable Justice Kirby, see Kirby, "A Bill of Rights for Australia - What role should the Courts play", *Constitutional Centenary Foundation*, New South Wales Chapter, 31 October 1995

⁸¹ Above n 19 at 238.

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